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NATIONAL ASSEMBLY

TWELVETH PARLIAMENT – SECOND SESSION

THE DEPARTMENTAL COMMITTEE ON AGRICULTURE AND LIVESTOCK

.....
REPORT ON THE IRRIGATION BILL, 2017

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

APRIL, 2018

ABBREVIATIONS

NIB:	National Irrigation Board
CoK:	Constitution of Kenya
IWUA	Irrigation Water Users Association
SEA	Strategic Environmental Association
NIDA	National Irrigation Development Authority
CIDU	County Irrigation Development Unit

The Committee notes that the bill also in clause 34 repeals cap 347 and provides for transition of assets, liabilities, rights and powers of the board created under cap 347 to the proposed Authority

The enactment of the bill may not necessitate incurring of additional cost on the exchequer with regards to establishment of office infrastructure and human resource for the Authority since the Authority will inherit the existing infrastructure of National Irrigation Board.

On behalf of the Departmental Committee on Agriculture and Livestock and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Irrigation Bill, 2017.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank the stakeholders and the Ministry of Agriculture and Irrigation for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

HON. ADEN HAJI ALI, MP

MANDATE OF THE COMMITTEE

The Committee on Agriculture and Livestock is one of the Departmental Committees of the National Assembly established under Standing Order 216 and mandated to:-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) Study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.
- (c) study and review all legislation referred to it;
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*); and
- (g) Reports and makes recommendations to the House as often as possible, including recommendation of proposed legislation.

the bill, to regulation, development, management, financing, and the provision of support services of and in the entire irrigation sub-sector in Kenya.

Upon the enactment of this bill, no irrigation development may be carried out in Kenya other than as provided for under this bill and the provisions of this bill shall prevail in the case of any inconsistency between this Act and any other legislation in matters relating to irrigation.

The Bill under clause 6 also provides that the Cabinet Secretary in consultation with the county governments shall regulate and promote the development and proper management of irrigation throughout Kenya.

The Bill (in clause 9) establishes a Board that will have a chairperson appointed by the President subject to subsection(5), the Principal Secretary in the State Department of Irrigation or his representative, the principal Secretary responsible for finance or his representative, the Principal Secretary responsible for Agriculture or his representative and six other members appointed by Cabinet Secretary and approved by the President taking into account the various stakeholder interests in irrigation development and management.

The Committee notes that the bill also in clause 34 repeals cap 347 and provides for transition of assets, liabilities, rights and powers of the board created under cap 347 to the proposed Authority.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on Friday 16th February, 2018 pursuant to Article 118 of the Constitution. The Committee received and consolidated submissions from Ministry of Agriculture and Irrigation, the National Irrigation Board (NIB), the Council of Governors and the Nature Kenya, Mwea Irrigation Water Users and Mwea Irrigation Scheme whose views and comments are captured and contained in the body of the report.

2.0. ANALYSIS OF THE CLAUSES OF THE IRRIGATION BILL, 2017

Clauses	Provision Clauses	Remarks
1	Provides for a short title and commencement of the Act	The title of the Act is referenced as "Irrigation Bill, 2017.
2	Provides for interpretation of terms and phrases used in the Bill	The terms and phrases in the Bill are clearly defined.
3	Outlines the scope of the bill as regulation, development, management, financing and the provision of support services in the entire irrigation Sub-sector.	The scope of the bill is well-defined.
4	Provides for how to mitigate inconsistency between the proposed irrigation act and any other law.	Allows the act to prevail if any conflicts arise with other legislation on irrigation.
5	Provides for guidelines while discharging functions under this Act	Principles and values set out in Articles 10, 43, 60 and 232 of the Constitution to guide the administering and discharging of functions under this Act.
6	Establishes the regulation of irrigation.	Role of the Cabinet Secretary are well outlined.
7	Provides for establishment of the National Irrigation Development Authority	Shall be a body corporate with perpetual succession and a common seal.
8	Provides for functions of the Authority	The functions of the National Irrigation Development Authority are well defined.
9	Provides for the establishment of Board of the Authority	Consists of the Chairperson, Principal Secretary and six other members.
10	Outlines the mandate of the Board	The conduct of business of the Board in accordance with the schedule.
11	Provides for the powers necessary for the proper performance of the functions of the Authority under this Act	Power of the Board is well defined without prejudice.
12	Provides for qualifications for one to be appointed as a Chief Executive Officer	Qualifications for one to be appointed as a Chief Executive are well defined.
13	Provisions regarding transitional arrangements in line with section 34	Terms and conditions are as provided in approved establishment.

Clauses	Provision Clauses	Remarks
23	Allows the Board to ensure proper books of account of the income, expenditure, assets and liabilities of the authority are well kept in line with the provisions of the state corporations Act	The Board responsibility in terms of proper books of accounts is well defined.
24	Provides for mandates of the Board in relation to reports on the operations of the board each financial year, audit reports, statements with specifications from the Cabinet Secretary	The Board mandate in terms of publishing reports for each financial year is well defined.
25	Provides for resolution of disputes through water User's Association	Functions of Dispute Resolution Committee well outlined.
26	Provides for appeal in the regional Committee if not satisfied with the decision of the dispute resolution Committee	Well defined resolutions of disputes.
27	Provides for implementation of a Monitoring and Evaluation system for the development, governance, management and financing of irrigations at all levels	The procedure for implementation of Monitoring and Evaluation systems are well defined.
28	Provides for grounds on which the authority won't own up for liabilities caused by a staff or members of the Board	The grounds for good conduct of office are well defined.
29	Provides for legal measures on anyone who wilfully damages any irrigation infrastructure or equipment	The grounds for punishment are satisfactory.
30	Provides for punishment for offences on damaging water catchment areas	The procedure for imprisonment and fines are clearly defined.
31	Provides for punishment for offences pertaining fire on an Irrigation Scheme	The grounds for punishment are satisfactory.
32	Provides for punishment on offences of any illegal application of chemicals not permitted by this act	The procedure for imprisonment and fines are satisfactory.
33	Provides for exercising delegated powers	Its standard procedures in all Acts.

3.0 SUBMISSIONS FROM THE STAKEHOLDERS

The submissions from the stakeholders and the subsequent views of the State Department for Irrigation on some of the clauses of the bill are as presented here below:

3.1 STATE DEPARTMENT FOR IRRIGATION

On Tuesday 20th March, 2018 the Principal Secretary State Department for Irrigation, Prof. Fred Sigor appeared before the Committee and presented on the proposed amendments on the Bill as follows:-

Clause 2 (Interpretations)

Proposal: to include definition of "State Agency"

"State agency means a public corporation, commission, office or other body established under the Constitution or Act of Parliament;"

Justification

This is for the avoidance of doubt as to what a "State Agency" referred to in the Bill means. Amend definition of "License" as follows:

Proposal: Amend definition of "license" as follows:

"License" means a license issued by the Cabinet Secretary, Authority or county government under this Act;"

Justification

The current definition makes reference to license by "Director" and yet there is no reference to that office in the Bill: licensing is by Cabinet Secretary, Authority or county government as appropriate.

Clause 6 (1) Role of National Government

Proposal: Include new sub clauses:

- (h) in collaboration with county governments, gather information and maintain databases on irrigation development and management, including data on irrigation water supplies, demands, projects, irrigated areas, management performance, potential for expansion and human resources;
- (i) conduct periodic technical and management audits of irrigation schemes to identify problems with scheme infrastructure, governance, management and financing;

re-arrange the sub clauses as follows : (h) becomes (j), (i) becomes (k) and (j) becomes (l)

Clause 9. (1) The Board of Authority

Proposal: Include phrase”

(e) The Principal Secretary responsible for Water or his representative

Proposal: Delete word

the word “six” at the start of paragraph (e).

Proposal: Replace with word:

the word “five” at the start of the paragraph (e)

Paragraph (e) becomes paragraph (f) and reads “five other members, who shall appointed by the Cabinet Secretary, taking into account the various stakeholder interests in irrigation development and management as defined in subsection (2) below.”

Proposal: Delete phrase:

The phrase “and approved by the President” appearing immediately after the word “Secretary” on the second line.

Justification

Water is such a vital requirement for irrigation that this sector must be represented in the Board. In addition, the Mwangozo requirement is that the maximum number of Board Members is 9 and therefore the other Members are reduced from six to five.

It is not a requirement under Mwangozo that Board Members other than the Chairperson are approved or appointed by the President.

Clause 12 (2) Chief Executive Officer

Proposal: Delete phrase:

the phrase “an advanced” appearing in paragraph (c) immediately after the word including on the second line and replaced it with the word ”a”.

The whole section (d) and replace it with the following wording:

(d)“has at least ten years knowledge and experience in a relevant field, has served in a position of senior management for a period of at least five years, and meets the requirements of the fit and proper test”

Justification

Paragraphs (c) and (d) limit the pool of potential Chief Executive Officers. The guidance given in Mwangozo is preferred.

To conform to the letter and spirit of the constitution in as far as irrigation is accommodated in the distribution of functions under schedule 4. Also provide for hydraulic processes pertaining irrigation water.

4. Definition “Large Scale Irrigation Schemes”

Proposal: to delete definition of the “Large Scale Irrigation Schemes” and substitute with the following new definition “Large Scale Irrigation Schemes” means a scheme which acreage size covers over three thousand acres, and is developed and managed by the authority and is established for national strategic purposes or such schemes as implemented by the private sector

Justification

To secure the national strategic interests and provide avenues for strategic interventions on account of irrigation.

5. Definition “Licence”

Proposal: to delete definition of the “Licence” and substitute with the following new definition “Licence” means a licence issued by the Cabinet Secretary as otherwise upon delegation.

Justification

To centralize the issuance of licencing instruments with a window for delegation in order to ensure effective regulation

6. Definition “Storage”

Proposal: to delete definition of the “Storage” and substitute with the following new definition “Storage” means infrastructure and practices designed to capture and store water for use in irrigation.

Justification

To be constituent with the object of the act citing irrigation and not agriculture

7. Section 3 (1): Scope of application

Proposal: to delete Section 3(1) on the Scope of application and substitute with the following new section 3(1) on the Scope of application to appear as “The provision of the act shall apply as more specifically provided in the act, to regulation, development, management, financing, and the provision of support services and of the entire irrigation sub-sector in Kenya”

Justification

12. Section 6 (2) (j) Role of National government

Delete

Proposal: Delete Section 6 (2) (j) and Substitute with the new section 6 (2) (j) to appear as “6 (2) (j) Carry out other mandate as may be specified in this and any other Acts

Justification

To provide for any roles assigned to the Cabinet Secretary through legislation at both levels of government

13. Section 6 (4) Role of National government

Proposal: Delete Section 6 (4) and replace with a new section 6(4) to appear as “The Cabinet Secretary shall, in consultation with the county governments and other stakeholders, formulate and publish in the Kenya Gazette, a national irrigation services strategy, based on, among others, the national irrigation policy for the time being in force”

Justification

To synchronize with planning policy cycle of five years applicable to government development blue print

14. Section 6 (5) Role of National government

Proposal: delete section 6 (5) and replace with a new a new section 6(5) to appear as “The Cabinet Secretary shall ensure effective implementation of the national irrigation services strategy and to this end shall institute periodic review of the strategy.

Justification

To synchronize with planning policy cycle of five years applicable to government development blue print

15. PART III and Section 7 (1) Power and functions of the Authority

Proposal: Delete section 7(1) and replace with the new section 7(1) to appear as “the National Irrigation Authority”

Justification

To ensure coverage of all items in the object above without over emphasis on development alone.

16. Section 7 (3) Power and functions of the Authority

Proposal: Delete section 7(3)

(c) holds relevant academic and professional qualifications including a university degree in engineering or agriculture or any field related to irrigation; or

(d) in addition to relevant academic and professional qualifications, has at least fifteen years' experience in the management of a public or private institution, five of which should be at senior management level, or is a distinguished practitioner in a discipline relevant to irrigation.

Justification

This provides for a wider coverage of eligible professionals consistent with the board scope of elements within irrigation covering agriculture, irrigation, business among others

20. Section 14 (1): Role of county government.

Proposal: Delete Section 14 (1) and substitute with new section 14(1) to appear as “Each county government may within its area of jurisdiction establish a county irrigation development unit for the better carrying out irrigation function delegated by the cabinet secretary as prescribed in the regulations”

Justification

- This is to conform with the distribution of functions as provided for in the Fourth Schedule of the Constitution and provisions of article 6 (2)
- Irrigation is not agriculture hence it is not a devolved function since it is not included in Part 2 of the fourth Schedule of the constitution.
- Subsequent thereto, irrigation is a residual function of national government in accordance with article 186 (3) which provides for functions not assigned by the constitution or national legislation to a county being retained as functions of National Government.

21. Section 19 (1): Management of irrigation schemes.

Proposal: delete section 19 (1) and substitute with new section 19(1) to appear as “ The Cabinet Secretary shall, through the Authority, oversee management of existing and new national or public schemes, except those under county governments, and particularly storage dams, intake, main and secondary systems as necessary”

Justification

- This is to conform with the distribution of functions as provided for in the Fourth Schedule of the Constitution and provisions of article 6 (2)
- The Cabinet Secretary having appointed the Board to the Authority ceases to exercise direct management over the schemes
- Subsequent thereto, the Cabinet Secretary can only exercise oversight in the management of the schemes.

22. Section 33 (2) (f): Management of irrigation schemes.

	of farmers, irrigation based stakeholders, irrigation water user associations and the Authority to oversee the utilization of the funds in 20 (3) above and any other funds due to the Authority	<ul style="list-style-type: none"> - casual labourers - Will serve as the communication link/channel between the authority and farmers which has been lacking since liberalization of rice farming in 1998 - To effectively operationalize participatory irrigation management approach advocated by the Authority - To comply with Art. 10 of the constitution of Kenya and in that context promote transparency, accountability and involvement of the people
Section 20 (4) (b)	Just as the functions of the Authority have been defined, let the committee define the specific functions of the scheme management committee	<ul style="list-style-type: none"> - This will avoid role-conflict with the Authority and the irrigation water users' association
Section 20 (5)	<p>Delete: The entire clause</p> <p>The current clause 20(4) becomes clause 20(5)</p>	<ul style="list-style-type: none"> - The pre-existing associations have their own by-laws and those that will be formed will write their own by-laws - It is important to maintain the independence of these associations so that they play their role effectively in the scheme management committees - For proper arrangement of clauses
Section 25(1)	<p>Delete: The word "property" immediately after the coma after the word "financing"</p>	<ul style="list-style-type: none"> - Disputes relating to property management, control and ownership, particularly land, are sensitive and emotive and require a broad-based

service fees”	receiving irrigation services; Replace with means the rates to be charged to any recipient of irrigation services;	article 6 (3) of the constitution of Kenya and in that context uphold the universality of irrigation services
Section 8 (2) Powers and Functions of the Authority.	Delete (j) provide land in national irrigation schemes for public purposes; Replace with (j) Provide, manage and administer land in national or public irrigation schemes, as well as schemes which traverse or straddle more than one county for public use.	<ul style="list-style-type: none"> • To conform to the interpretation of “Land” under CoK2010 this includes anybody of water on or under the surface. • Apply the Principles of Land Policy which include sustainable & productive management of land as well as transparent and cost effective administration of land
PART V	Delete IRRIGATION SERVICES Replace with IRRIGATION SERVICES AND RESEARCH	<ul style="list-style-type: none"> • This is to reposition irrigation research in its current context.
Section 15 Sub section title	Delete water for irrigation Replace with Irrigation Services and water for irrigation	<ul style="list-style-type: none"> • This is to comply with provisions of article 6 (3) of the constitution of Kenya
Section 15	Delete 15. (1) The Cabinet Secretary shall, subject to water and other resource constraints, and in consultation with county governments, and other stakeholders ensure the adequacy and quality of water for irrigation purposes throughout the country. (2) In pursuance of subsection (1), the Cabinet	<ul style="list-style-type: none"> • This is to comply with provisions of article 6 (3) of the constitution of Kenya

- irrigation infrastructure.
- (b) Operation and management of irrigation installations
 - (c) Irrigation research and production support
 - (d) Any other associated herewith

(2) The Cabinet Secretary shall, subject to water and other resource constraints, and in consultation with county governments, and other stakeholders ensure the adequacy and quality of water for irrigation purposes throughout the country.

(3) In pursuance of subsection (2), the Cabinet Secretary shall take measures to—

- (e) approve appropriate tariff structures and make arrangements with the Water Resources Authority in respect of requisition of irrigation water in bulk;
- (f) seek advice of the Water Resources Authority on the development of new irrigation water sources, including water harvesting, flood control and storage for irrigation;
- (g) approve appropriate arrangements on inter-catchment transfers of irrigation water in consultation with county governments and Water Resources Authority;
- (h) develop a mechanism on return on investment formula resulting from construction of irrigation schemes using public funds; and

	<p>Provided that the fees referred to in this subsection shall be agreed upon with the members of the association.</p> <p><u>Replace with</u></p> <p>The authority in consultations with irrigation water users association shall be set operation and maintenance fees the case of Public/National irrigation schemes based on the actual cost of operation and full maintenance of the scheme. Irrigation water users association shall collect from its members the operation and maintenance fees and remit to the authority.</p> <p>Provided that the fees referred to in this subsection shall be agreed upon with the members of the association</p>	<p>maintenance fees for the national irrigation schemes.</p>
<p>Section 20 (5) Formation of Irrigation Water Users' Associations.</p>	<p><u>Delete</u></p> <p>The Cabinet Secretary, in consultation with the county governments, may make rules for the establishment and governance of irrigation water users' associations under this section</p> <p><u>Replace with</u></p> <p>The Cabinet Secretary through the Authority, in consultation with the county governments, shall make rules for the establishment and governance of irrigation water users' associations under this section</p>	<ul style="list-style-type: none"> • To ensure that the rules for establishment and governance of irrigation water users' are made.
<p>Section 20 Formation of Irrigation Water Users' Associations.</p>	<p><u>Include</u></p> <p>(6) The Functions of the Irrigation Water Users' Association (IWUA) should be defined as;</p> <ol style="list-style-type: none"> Distribute irrigation water equitably to all its members Operate and maintain tertiary irrigation system on behalf of its' members Collect operation and maintenance from its' members and remit to the authority in the case of public or national irrigation system Apply for and hold the water abstraction permit for the irrigation scheme on behalf of its member and ensure that the permit is renewed annually. Collect the water use charges and remit to water 	<p>To provide for the scope of responsibilities to be covered by the Irrigation Water Users' Association (IWUA)</p>

Proposal : To amend by inserting ‘ through public participation’ to read as "The Cabinet Secretary may, may in consultation with National Land Commission, the Board, County government and through public participation, and by notice in Kenya Gazette, designate an area of land for which an irrigation water permit may be issued by the Water Resources Authority and irrigation license may be issued."

Justification

To allow public participation

3. Section 16 (6)

Proposal: to amend by inserting ‘**environmental requirements**’ to as “ The Cabinet Secretary shall in consultation with county governments, ensure that the design of national or public irrigation schemes and others, take into account the needs of various irrigation water users, including livestock, fish producers and environmental requirements."

4. Section 20 (1)

Proposal: Clearly define the mandate /synergy of Irrigation Water Users Associations and the Water Resource Associations defined in the Water act 2016 (Sect 29) to reduce role and governance conflict.

5. Section 20(5)

Proposal: The Cabinet Secretary, in consultation with county governments and relevant stakeholders, may make rules for the establishment and governance of irrigation of water user’s association under this section

3.6 COUNCIL OF GOVERNORS

On Friday, 23rd February, 2018 the Council of Governors submitted their written memoranda through the Clerk of the National Assembly and proposed the following amendments;

The Council of governors submitted as follows: -

Clause 8(2) c: Powers and functions of the Authority

Proposal: to amend clause 8(2) c to read as follows “ in consultation with the Cabinet Secretary, the Cabinet Secretary for the time being responsible for finance **and County Government**, raise funds for the development of infrastructure in national, public and smallholder schemes under appropriate mechanisms, including under agency contracts”

Justification

representative, the principal Secretary responsible for finance or his representative, the Principal Secretary responsible for Agriculture or his representative and five other members appointed by Cabinet Secretary, Principal Secretary for Water or his representative and approved by the President taking into account the various stakeholder interests in irrigation development and management.

6. The bill also in clause 34 repeals cap 347 and provides for transition of assets, liabilities, rights and powers of the board created under cap 347 to the proposed Authority.
7. The enactment of the bill may not necessitate incurring of additional cost on the exchequer with regards to establishment of office infrastructure and human resource for the Authority since the Authority will inherit the existing infrastructure of National Irrigation Board.

- (i) inserting the words “the county government” immediately after the word “finance” appearing in paragraph (c)
- (ii) deleting paragraph (e); and
- (iii) deleting paragraph (i).

(b) in sub clause (3) by —

- (i) deleting the word “shall” and substituting therefor the word “may”
- (ii) deleting the words “primarily through the Authority and with the permission of the Cabinet Secretary, such powers and functions are best performed directly by the authority” appearing immediately after the word “contracts”.

CLAUSE 9

THAT clause 9 of the Bill be amended —

(a) in sub clause (1) by—

- (i) inserting the following new paragraph immediately after paragraph (d)
“(da) the Principal Secretary responsible for water or his representative;” —
- (ii) deleting the word “President” appearing immediately after the words “appointed by the”;
and

(b) in sub clause (5) by deleting paragraph (c) and substituting therefor the following new paragraph—

“(c) holds relevant academic and professional qualification including a university degree or its equivalent in any field.”

CLAUSE 12

THAT clause 12 of the Bill be amended in sub clause (2) by—

(a) deleting paragraph (c) and substituting therefore the following new paragraph

“(c) holds a relevant academic and professional qualifications including a university degree in engineering or agriculture or any field related to irrigation; and” and

(b) by deleting paragraph (d) and substituting therefor the following new paragraph—

imprisonment.

CLAUSE 33

THAT Clause 33 of the Bill be amended in sub clause (2) by inserting the following new paragraph immediately after paragraph (f)—

“(fa) prescribe fees payable by irrigation water users based on costs of operation and maintenance of the scheme;”

CLAUSE 34

THAT Clause 34 be amended in sub clause (2) by inserting the following new paragraph immediately after paragraph (f)—

“(fa) The members of the National Irrigation Board established under the Irrigation Act Cap 347, shall continue in office as members of the Board until the expiry of their existing terms”.

ANNEXES

ANNEX 1: MINUTES