



The Kenya Alliance of Resident Associations



MEMORANDUM

ON

**NATIONAL SUSTAINABLE
WASTE MANAGEMENT
BILL, 2019**

SUBMITTED TO

**THE MINISTRY OF ENVIRONMENT AND
NATURAL RESOURCES**

SUBMITTED BY

**KENYA ALLIANCE OF RESIDENT ASSOCIATIONS
(KARA) AND KENYA ASSOCIATION OF
MANUFACTURERS (KAM)**

1. TITLE OF THE BILL

THAT the Title of the Bill be amended by inserting the word “solid” after the word “sustainable” so that the title of the policy reads “The Sustainable Solid Waste Management Bill”.

Justification

The Bill is dealing with solid waste and not the whole waste spectrum that includes liquid waste.

2. CLAUSE 2

THAT Clause 2 of the Bill be amended by deleting the definition of the term “private sector entity” and substituting therefore the following –

“private sector entity” means a business entity or for profit entity

Justification

Private sector implies entities that are for profit and does not include public benefit organizations. For example, reference to private sector entity in clause 17 relates to for profit entities.

3. CLAUSE 3

THAT Clause 3 of the Bill be deleted

Justification

A preamble is not applicable to drafting of Statutes. It’s applicable to constitutions and international instruments. In addition, there is no policy justification for providing for the reference to the Statutes. Each of the statute as well as the Constitution have their respect legal mandate to govern their respective matters. Reference to them in the Bill does not make implications on the Bill.

4. CLAUSE 6

THAT Clause 6 (2), (3), (4), (5), (6), (7) and (8) of the Bill be deleted and anywhere in the Bill where the term Waste Management Council is referred and substitute therefor a new clause 7, and renumbering the Bill accordingly, as follows –

Inter-governmental
Coordinating
Committee on Solid
Waste Management

7. (1) There is established the Inter-governmental Coordinating Committee on Solid Waste Management which shall consist of –
- (a) the Principal Secretary for the time being responsible for matters related to solid waste management, who shall be the chairperson;
 - (b) the national director responsible for solid waste management in the ministry responsible for environment, who shall be the secretary;

- (c) the officer who is in charge of matters related to solid waste in the National Environment Management Authority;
- (d) one person representing the Water Resources Authority;
- (e) the national director responsible for physical planning;
- (f) one county executive committee member responsible for matters related to solid waste management nominated by the Council of governors
- (g) two county directors responsible for matters related to solid waste management nominated by the council of governors;
- (h) one person representing manufacturing industries appointed from persons nominated by Kenya Private Sector Alliance and Kenya Association of Manufacturers;
- (i) one person representing manufacturing industries involved in recycling or waste material transformation appointed from persons nominated by Kenya Private Sector Alliance and Kenya Association of Manufacturers; and
- (j) one person representing resident associations nominated by the Kenya Alliance of Resident Associations

(2) A person described under subsection (1) (h), (i) and (j) shall be appointed by the Cabinet Secretary.

(3) The Committee shall be responsible for –

- (a) advising national and county governments on effective implementation, monitoring and evaluation of national and county solid waste management policies, laws, strategies and plans;
- (b) providing a platform for inter-governmental consultation, collaboration, cooperation and coordination on solid waste management;
- (c) advising national and county governments on appropriate national and county solid waste management policies, laws, strategies and plans that may be adopted;
- (d) advising the national and county governments on appropriate financing mechanisms and strategies for solid waste management.

(4) The Committee shall meet at least four times in each year.

(5) The Cabinet Secretary shall prescribe the procedure for

governing the Committee.

(6) The term of office for a person described under subsection (1) (h), (i) and (j) shall be three years, which may be renewed for one further term of three years.

Justification

In accordance with Art. 189 of the Constitution, functions to be implemented in concurrent jurisdiction should be implemented through coordination, collaboration and consultation between national and county governments. In addition, what is needed more for such as structure is coordination of implementation of policies and laws and not oversight. The Council as proposed does not conform with Art. 189.

Functions assigned to the Council under Clause 6 (7) (a), (b), (c), (d) and (e) are functions already being carried out or should be carried out by NEMA as well as the department responsible for environment in the ministry. The existing gap, which should be mitigated by a new structure is in relation to intergovernmental relations.

8. CLAUSE 7

THAT Clause 7 (1) of the Bill be amended in paragraph (d) by inserting the words “in accordance with functional assignment between national and county government in respect to licensing of activities in waste management.” after the word “activities”

Justification

NEMA as a national government body should license or issue certification of aspects such as motor vehicles and facilities involved in waste management and not all activities involved in waste management

9. CLAUSE 8

THAT Clause 8 of the Bill be amended as follows –

(a) by deleting sub-clause (2) and substituting therefor the following–

Where a county government is adopting or enacting any policy of legislative measure in respect to solid waste management, the county government shall ensure that such policy or legislation conforms to the national policy, standards and norms related to solid waste management.

Justification

Pursuant to Art. 191 of the constitution on conflict of laws, the national law supersede a county law where for example there is need for uniformity, national norms and standards and policy. Therefore it is most important to require county governments to conform to national policy, standards and norms rather than the national law.

10. CLAUSE 10

THAT Clause 10 of the Bill be amended as follows–

- (a) In clause 10 (2) (a), by deleting the words “as determined by the county environment committee established under ...of the Environmental Management and Coordination Act”
- (b) by deleting paragraph (b)

Justification

Management and administration of public funds is the responsibility of the respective accounting officer in accordance with Public Finance Management Act. A committee cannot be the funds administrator. The committee is also not a board that has been incorporated for that purpose. The administration of the fund must comply with the Public Finance Management Act.

As noted above, the national legislation should not prescribe the acreage of land to be utilized or set apart by county government as such prescription does not consist the setting of national standard and norm.

11. CLAUSE 12

THAT Clause 12 of the Bill be amended as follows –

- (a) by deleting sub-clause (1) and substituting therefor the following –
 - 12 (1) A county government shall establish or promote or facilitate establishment of such solid waste transfer stations or material recovery facilities as may be appropriate
- (b) by deleting sub-clause (2) and substituting therefor the following–
 - 12 (2) A material recovery facility referred to under subsection (1) may be a single waste stream facility which receives waste that has been separated at source or mixed solid waste stream which receives waste that has not been separated at source, for purposes of carrying out appropriate material processing.

Justification

Establishment of waste sorting centers and material recovery facilities is an economic activity that may be carried out the public or private sector. Sub-clause (1) makes an assumption that only county government may establish such a facility. In addition, the clause makes assumption that only one facility may be established. Sub-clause (2) makes assumption that a material recovery facility must be a mixed waste stream facility. However, where certain level of sorting and separation takes place at source or transfer station, a county or private sector mat establish a clean or single stream material recovery facility. The national law should leave discretion to the counties to determine the nature of the facilities and processing system that they the service delivery models suitable to them.

12. CLAUSE 15

THAT Clause 15 be amended by deleting sub-clause (2) and substituting therefor the following–

(2) The national government may provide technical support and assistance to a county government in implementing requirements stipulated under subsection (1), which may include preparation of model laws, plans or related policy or management instruments.

Justification

Sub-clause (2) does not reflect the spirit of Art. 6 and 189 on distinctiveness of the 2 levels of government and their working in collaboration, inter-dependency, coordination and mutual consultation. The environment law should not deal with matters that fall under the Public Finance Management Act.

13. CLAUSE 16

THAT Clause 16 of the Bill be amended as follows–

- (a) In sub-clause (1) by deleting the words “and submit to the Authority” and deleting the words “to be reviewed after every three months”
- (b) By deleting sub-clause (4) and substituting therefor the following new clauses; and placing subsection (4) before subsection (3) so as to ensure appropriate section flow–
 - (4) The national government shall –
 - (a) provide technical assistance and capacity development to county governments in process of developing integrated solid waste management plan described under subsection (1);
 - (b) review the integrated solid waste management plans and where appropriate give recommendations to a county government so as to ensure that the plan conforms to national policy, norms, standards and national solid waste management plan.
 - (5) A county government shall take into consideration the views and recommendations of the national government and shall incorporate such views and recommendations when developing the integrated solid waste management plan.
 - (6) Where a county government does not incorporate the views and recommendations of the national government as required under subsection (5), the county government shall give reasons of such decision in writing to the national government.

Justification

The proposed amendments integrates the principles of Art. 6 and 189 of the Constitution on interdependency of national and county governments.

14. CLAUSE 17

THAT Clause 17 of the Bill be amended as follows–

- (a) In sub-clause (1) by deleting the words “and preparing quarterly monitoring reports” inserting the following words “which shall include among others proposed measures and strategies to improve production process and reduce quantities of solid waste generated in accordance with the relevant manufacturing standards and code of practice, and

(b) By deleting sub-clause (2) and substituting therefor the following–

(2) A private sector entity shall –

- (a) maintain records of operations related to implementation of the waste management plan described under subsection (1); and
- (b) submit an annual report to the Authority describing the extent to which the entity has implemented the waste management plan described under subsection (1).

(c) By deleting sub-clause (3) and substituting therefor the following –

(3) A private sector entity shall–

- (a) ensure that any solid waste generated in its business processes is segregated, handled, stored and transferred to a licensed waste collector or transporter in accordance with prescribed standards;
- (b) ensure that any hazardous waste is handled and disposed in accordance with the requirements stipulated under the Environmental Management and Coordination Act; and
- (c) clean up and restore any site to its natural state where the entity was carrying out activities that may have generated solid waste.

(Cap 387.)

(d) By deleting sub-clause (4) and (5) and substituting therefor the following; and inserting a new sub-clause (6) as follows–

(4) The Authority shall –

- (a) not issue a license or certificate applicable under the Environmental Management and Coordination Act to a private sector entity which fails to submit

(Cap 387.)

- the solid waste management plan and annual reports described under subsection (1); and
- (b) give recommendations and advise to a private sector entity on appropriate measures and strategies that the entity should adopt in relation to –
 - (i) compliance with this standards related to solid waste management applicable to production or commercial processes undertaken the entity;
 - (ii) effective and efficient mechanisms for implementing the solid waste management plan described under subsection (1) ; and
 - (iii) appropriate international best practices applicable the respective sector in which the entity operates.

(5) A private sector shall ensure that it incorporates the recommendations and advice received from the Authority as stipulated under subsection (4), and shall report to the Authority on the extent to which it has incorporated the recommendations and advice received from the Authority.

(6) A private sector entity which contravenes subsection (3), commits an offence and shall upon conviction be liable to a fine not exceeding one million shillings.

Justification

The provisions are of general nature and should not be used to lay foundation for the punitive fines. The Bill does not provide for description of what cleaner production principles are. In addition, the provision does not provide for requirements on environmental management under the Environmental Management and Coordination Act. For industry players, it is impractical to comply with 2 statutes regulating a similar matter. In addition, production processes are normally provided for under the Standards applicable to the various products and respective manufacturing code of practice. Matters related to production process for reduction of waste should be provided for under the respective standards.

Further, the general nature of clause 17 leaves room for abuse of power by the State during enforcement, since interpretation of cleaner production principles is left to the enforcer.

The clause provides for punitive fines based on entity's net income. This is contrary to the policy on setting up on penalties and offences. The nature of the offence has no relationship the entity's profits. Even tax laws do not apply this kind of offences yet the very nature of tax laws is applied on an entity's revenue and profitability.

15. CLAUSE 24

THAT Clause 24 (1) (a) of the Bill be amended by inserting the words “Provided that enforcement for compliance shall not be based on county functions of removal and disposal of waste” after the words “adopted thereunder”

Justification

The county government should be the competent authority for enforcing laws at county level in relation to the county functions assigned under the Constitution.

16. CLAUSE 29

THAT Clause 29 of the Bill be deleted and appropriate fines be provided for in relation to respective offences

Justification

A general penalty, which is not related to any specific offence should not be punitive as provided under the clause. Each offence is unique and should not be dealt with in this general manner. It is inappropriate and contrary to fairness and justice to prescribe a general penalty of minimum Ksh. 2 million which is punitive especially for individuals. Further, the Bill should not prescribe a minimum imprisonment term or fine for a court. It is the discretion of the court to determine the imprisonment term as well as penalty based on the magnitude of the case and prevailing circumstances.

17. CLAUSE 33

THAT Clause 33 (2) be deleted.

Justification

The provision is not a transitional matter. In addition, the national government has the mandate to prescribe the national standards and norms and not prescribing the form of a county legislation. The national government may, on its own motion provide guidelines and support to county governments during the process of developing county legislations. However, such need cannot be a matter of legislating in a Statute.

An alternative proposal has been proposed under amendment to clause 15 above.