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23<sup>rd</sup> December, 2022

**The Clerk of Senate,  
Parliamentary Service Commission,  
P.O Box 41842-00100,  
Nairobi, Kenya.**

**Dear Sir,**

**RE: MEMORANDUM ON THE NATURAL RESOURCES (BENEFIT SHARING), BILL 2022 BY KENYA WILDLIFE CONSERVANCIES ASSOCIATION (KWCA)**

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Pursuant to the invitation for memoranda for Kenya Gazette Supplement No. 177 (Senate Bills No. 6), the Natural Resources (Benefit Sharing) Bill 2022, the Kenya Wildlife Conservancies Association (KWCA) in consultation with and on behalf of 175 wildlife conservancies (conserving over 7 million hectares of land) spread across 29 counties in Kenya,

**HEREBY SUBMITS AS FOLLOWS:**

- I. The Natural Resources (Benefit Sharing) Bill 2022, is progressive towards realizing the aspirations of the Constitution of Kenya, Part 2 of Chapter 5.
- II. The Natural Resources (Benefit Sharing) Bill 2022 seeks to establish a system of benefit sharing in natural resource exploitation. **HOWEVER**, the Bill has the unintended consequence of negatively affecting, disincentivize and eventually annihilate the conservation and management of wildlife in community and private lands, which would diminish three decades of conservation effort and investment by communities, landowners and conservation partners.
- III. The Bill, which was first introduced in 2014 with the non-renewable natural resources including minerals and petroleum being among the integral resources intended to be subject of benefit sharing, is still under the Bill of 2022, drafted within the concepts of depleting and non-renewable resources whose exploitation and benefit sharing models

are differently governed and managed, compared to renewable resources such as wildlife.

- IV.** The Bill will downplay the recent advances in wildlife policy and legislative reforms and the growing interest by Kenyan communities and landowners to coexist with wildlife through voluntary stewardship based on deriving benefits through the sustainable management of natural resources; further risking a downward spiral on wildlife populations, localised extinctions and threatening the country's wildlife and tourism industry, a major foreign exchange earner and GDP contributor. Currently, communities and landowners are incurring the cost of wildlife conservation, a government function, fore-going other competitive land-uses that disintegrate land connectivity, dis-regard climate change causatives and impacts.

## **KWCA'S SUBMISSION IS BASED ON THE FOLLOWING GROUNDS:**

### **I. Inequitable Sharing of Benefits**

The Bill, under section 8, proposes a revenue sharing ratio that is inequitable and disadvantages the local communities who bear the direct burden of living with wildlife, defying the principles of equitable benefit sharing as required by Constitution, under Article 69(1)(a). The sharing ratio is as follows:

- **Sovereign Wealth Fund (National Government): 20%**
- **National Government: 48%**
- **County Government: 19.2%**
- **Local Communities: 12.8%**

Local communities that have contributed immensely to addressing threats to wildlife will receive a meagre **12.8%** of revenue which will be channeled to community projects. Kenya has experienced long term wildlife population declines, estimated at **68%** in the past 4 decades, especially of the charismatic species that attract tourists— lions, elephants, rhinos, giraffes, impalas mainly, through loss of habitats and migratory corridors, to other land uses. Wildlife conservancies, are securing the vastly diminishing wildlife habitats and corridors and creating livelihood and economic options for communities and landowners who take up wildlife as a land use.

Recent report indicates that wildlife conservancies are home to more than 22 percent of Kenya's ungulate wildlife biomass, and have some of the highest densities of wildlife in the country<sup>1</sup>. A minimal and inequitable allocation of benefits to local communities where wildlife occurs, and to which government financial allocation is insignificant, will inevitably make them shift to other more beneficial land uses that exclude wildlife, resulting in further closure of wildlife dispersal areas and injuring Kenya's position as a global leader in environment conservation.

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<sup>1</sup> World Bank Group and GEF, "When Good Conservation Becomes Good Economics".

## **2. Failure to consider costs associated with exploitation of the natural resources**

In computing the revenue ratio, the **Bill under section 8**, fails to consider the high costs of managing the natural resources incurred by communities and landowners, especially for the biological resources e.g. wildlife and forests.

In the case of wildlife, the operational costs of wildlife conservancies is estimated at Kshs 2.53 billion annually across the country. These costs are solely borne by the communities and landowners who manage the wildlife, which is a national function and to which, government financial allocation is remote. Other related costs include foregone land uses such as agriculture and losses from human wildlife conflict. Wildlife conservancies invest mainly in non-consumptive wildlife user rights provided under **Section 80 of the Wildlife Conservation and Management Act, 2013**. Wildlife tourism is the main revenue source for majority of conservancies, supporting the enormous operational costs. The model of benefit sharing, thereby ignores costs, and while looking into sharing the limited benefits accessed by the conservancies, ultimately denies them the much-needed revenue to manage wildlife resource and offset opportunity costs associated with hosting wildlife.

## **3. Narrow view of Benefits**

The Bill views benefit sharing only in respect to revenues or monies, as provided under the following sections, among others:

- ✓ Section 2: Definitions of the following terms; benefits, benefit sharing agreement and royalties;
- ✓ Section 5: Functions of Commission on Revenue Allocation, to among other functions: determine the royalties payable; oversee the administration of funds, and ensure the proper and timely payment of funds.

There is dis-regard of other significant benefits that are generated from exploitation of natural resources, especially the genetic resources, which have wide valuable technology and skills, and are also long-term in nature. Transfer of skills and knowledge to local communities, county and national government, could go a-long way in developing sustainable benefits.

## **4. Ambiguity and Generality**

The Bill creates substantial, legal and administrative challenges, propagated by ambiguity and generality as follows:

### **Substantive challenges:**

- a. The Bill, **under Section 3**, lumps together the different categories of natural resources to which the legislation shall apply to -biological, genetic resources and other natural resources, failing to appreciate the complexity of each of the resources in terms of exploitation, management, conservation, and utilization. The natural resources are varied in terms of their nature- extractives (non-renewables) versus non-extractives; their trade

value chains; and their exploitation models whereby the extractive ones tend to focus on maximization of benefits while non-extractive one focus on nurturing and sustainable utilization.

- b. The Bill **excludes mining** in section 3, **WHEREAS section 19**, makes reference to **amendment of the Mining Act**, in regards to the benefit sharing ration and structure.

**Administrative challenges:**

- c. The Bill does not demonstrate alignment with principles and processes of exploitation of the different natural resources, as **governed and regulated by different legislations-** Wildlife Act 2013, Forest Act 2016, Mining Act 2016, Water Act 2016, Fisheries Act 2016, Renewable Energy Regulations of the Energy Act of 2019 and Nagoya Protocol on Access to Genetic resources and Benefit Sharing. The access to the natural resources, licensing, permitting and applicable fees for exploitation are subsequently managed differently according to the resource, its conservation principles and trade value. They are managed by different government institutions, based on technical application of procedures and requirements. The Ministries responsible to develop policy or regulatory changes or developments are also different. All these scenarios are not addressed substantively in this Bill, presenting a possibility of **conflict of laws, inconsistencies and deepening vagueness and uncertainty** in access to benefits from natural resources in the country.
- d. The Bill **removes away the roles of Government agencies** (such as Kenya Wildlife Service, Kenya Forest Service, Water Resources Management Authority) **in collection of royalties and fees payable** for natural resources exploitation, **weakening their revenue base and regulatory role** in exploitation of the resources.
- e. The Bill is **unclear on administration and costs of administration of the four (4) FUNDS** (The Natural Resources Royalties Fund, The Sovereign Wealth Fund, The Futures Fund and the Natural Resources Fund), provided under Section 8(2), through which the revenue shall be collected and administered. The Sovereign Wealth Fund and Futures Fund, seem to serve the same purpose of achieving inter-generational equity, thus unnecessarily increasing administrative costs. **The funds increase the cost burden to the people of Kenya, and refutes the Bill's purpose** -equitable benefit sharing.
- f. The Bill under section 9, **assumes that all exploitation agreements are under the jurisdiction of the County Governments**. On the contrary, wildlife, energy (sunlight and wind) and water are within the jurisdiction of National Government- Schedule 4 of the Constitution. Further, wildlife user rights are regulated by the Kenya Wildlife Service, The Wildlife Research and Training Institute and National Commission for Science, Technology and Innovation (NACOSTI). As benefit sharing envisaged by the Bill between the affected entity and relevant County Government, cannot apply for wildlife resources.

- g. The **capacity of Commission on Revenue Allocation to monitor** the implementation of all benefit sharing agreements entered into between a county government and an affected entity is questioned, considering the robust nature and scope of the agreements that are entered into for natural resources.
- h. The Bill **excludes benefit sharing to private landowners**, who in some of the natural resources such as wildlife, they have significantly contributed through management of their lands for wildlife conservation purposes. The Wildlife Act 2013, under Sections 71 provides that any person has the right to reasonable access to wildlife resources and is entitled to enjoy the benefits accruing.
- i. **A highly bureaucratic process for accessing benefits** from natural resource exploitation is provided by the Bill. Multiple government agencies and the two levels of government- National and County, are involved from the collecting of royalties and fees (KRA), developing benefit sharing agreements (County governments and Commission on Revenue Allocation-CRA), monitoring (CRA) and county benefit sharing committees.

#### **5. Unclear and Vague Terminologies**

Some of the terms used in the Bill are ambiguous and inconsistent with generally agreed definitions in the sector, within national and international legal frameworks and obligations where Kenya is party.

### **REASONS WHEREOF, KWCA RECOMMENDS THAT:**

#### **General Recommendations:**

1. The **Bill to distinguish benefit sharing structures and processes for biological and genetic resources from extractive resources**. Complexity of the two categories of resources, and the consistently emerging issues principles and global regulatory framework on the biological resources, including under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and Montreal Biodiversity Deal.
2. **Wildlife be excluded from the Bill**. Wildlife utilization occurring outside National Parks and National Reserves is structured to offset the costs of managing wildlife by communities and landowners. Benefit sharing of wildlife utilization in the aforementioned scenario is regulated by the Wildlife Act 2013, which requires that wildlife conservancies develop conservancy management plan that demonstrate benefit sharing (Section 44 and Schedule Five). Further, Section 76 of the Wildlife Act requires that the Cabinet Secretary for Wildlife develop guidelines on benefit sharing, in consultation with Commission for Revenue Allocation, and that minimum of five (5%) per cent of the benefits from national parks shall be allocated to local communities neighboring a park.

3. The **Bill to restructure and serve as an overarching legislation that provides guiding principles** on natural resource benefit sharing to the various legislations on different natural resources.
4. The Bill to **factor both monetary and non-monetary benefits** from natural resources utilization and exploitation, including material and technology transfer, and intangible cultural heritage and traditional knowledge.
5. The **Bill to align with the Community land Act 2016**, where a natural resource exploitation is occurring on community land. The Bill fails to recognize the governance and management structures of community land and its resources, which may overlap with the structures and process of benefit sharing provided by the Bill, including entering of benefit sharing agreements by County government on behalf of communities, where community land is registered.

### Specific Recommendations

No	Bill Section	Issue	KWCA Recommendation
I	Section 2- Interpretation	<ol style="list-style-type: none"> <li>a. “affected entity”- this term is too broad and does not reflect the intended meaning of artificial or natural persons who have permit or license to undertake natural resources exploitation.</li> <li>b. “royalties” has been defined to <i>includes fees or payments by whatever name, paid by an affected entity for the exploitation or exploration of a natural resource in Kenya</i>. This definition is vague and lacks precision as to what royalties are in the context of this Bill.</li> <li>c. the term “revenue” has not been defined, yet its used under section 8 and which seems to have been used interchangeably with royalties; but which the two terms convey very different meanings.</li> <li>d. The term “natural resources” has not been defined, yet it’s the core of benefit sharing. The Bill only lists the different natural resource applicable, under section 3.</li> </ol>	<ol style="list-style-type: none"> <li>a. Provide clear definitions for the following terms- “affected entity”, and “royalties”</li> <li>b. Provide definition for the following terms, “revenue” and “natural resources” .</li> </ol>

2	<b>Section 3(d)</b>	Wildlife utilization is unique, as described in the general recommendations above, since its utilization outside State Protected Areas is to off-set costs which are not covered by Government, and sustain the resource.	Delete section 3(d)
3	<b>Section 5</b>	The responsibilities given to the Commission on Revenue Allocation are ultra vires in nature and to which the Commission has no technical capacity to effectively undertake. The Commission's role should be limited to advise the relevant government agencies, national and county governments on mechanism to achieve equitable benefit sharing.	Delete Section 5 (a), (d), (e), (f), (i), (g), (k), (n), (o), and (p)
4	<b>Section 7 (3)</b>	The role of natural resources government agencies in collection of revenue is withdrawn. This has the potential effect of weakening the financial base of the government agencies, and their regulatory responsibilities.	Replace the function of revenue collection by Kenya Revenue Authority with the relevant government agencies in collaboration with Kenya Revenue Authority.
5	<b>Section 8</b>	<p>a. The benefit sharing ratio is inequitable and not favorable to local communities (at 12.8%), who, for some natural resources such as wildlife, they serve as the resource custodians outside State protected Areas. National government on the other hand has a ratio of 68% and County government at 19.2%.</p> <p>b. The Bill fails to identify the entity at the local community level to enter into local community benefit sharing agreements, neither does it identify the content of the benefit sharing agreements. Benefits to local communities are administered by county government.</p>	<p>a. Revise the benefit sharing ratio to take account of costs of management of natural resources by communities and landowners.</p> <p>b. Benefits that accrue to communities within registered community land, be directly transferred to the community.</p> <p>c. Benefits that accrue to communities that are not within community land, shall be administered through structures approved by</p>

			the respective county assembly.
<b>6</b>	<b>Section 9</b>	<p>The Bill assumes that all exploitation agreements are under the jurisdiction of the County Governments; whereas majority of the natural resources under section 3, including wildlife, sunlight, and wind, are a national government function.</p> <p>In the case of wildlife, the benefit sharing agreement is between the community or landowner on one end, and with person granted the specific wildlife user right by relevant government agency, on the other end. Wildlife conservancies also have internally negotiated agreements for its membership. Benefit sharing agreement agreements entered by County governments for different natural resources will contradict the Constitution and resource managers-communities and landowners.</p>	Amend section to read that the parties to a benefit sharing agreement shall be determined by the respective legislation on a particular natural resource.
<b>7</b>	<b>Section 10 (4) &amp; 13(7)</b>	The Bill is silent on the administrative costs of the County Benefit Sharing Committee and the Local Community Benefit Sharing Forum. Lessons drawn from the County Wildlife Conservation and Compensation Committees established under the Wildlife Act 2013, include the need for clear source of funds to support functions of a committee.	Provide the source of funds to pay allowances for the members of the County Benefit Sharing Committees and Local Community Benefit Sharing Forum.
<b>8</b>	<b>Section 12</b>	<p>a. The process of developing benefit sharing agreement is highly bureaucratic, requiring approval by county assembly prior to execution.</p> <p>b. The requirement to deposit copy of the executed agreement with Senate, is redundant, since role of Senate in relation to benefit sharing is to develop legislation and not be custodian of benefit sharing agreements.</p>	Amend the Section to provide a less bureaucratic process for benefit sharing with no requirement for approval by County Assembly, unless it is for general community benefit; and no requirement to deposit agreement Senate.

9	<b>Section 13</b>	Local Community Benefit Sharing Forums lack independence; their election, meetings and allowances are facilitated by the county government, the forum allegiance shall then be to the County governments and not the local communities they represent.	Replace local community forums with relevant existing local community institutions
10	<b>Section 19</b>	The Bill amends section 183 of the Mining Act 2016 yet minerals are not among natural resources to which the Bill applies in section 3	Include mineral resources under section 3
11	<b>Memorandum and Objects</b>	The Objects provide that the cabinet Secretary for matters relating to natural resources shall make regulations for the purpose of bringing into effect the provisions contained in the Bill. The government structure has no Ministry for Natural Resources. Further, the objects contradict with the interpretation section that makes reference to cabinet secretary for finance.	Bill to provide for one cabinet secretary as responsible for the Bill administration.

Signed:



**Dickson Ole Kaelo**  
**Chief Executive Officer**  
**Kenya Wildlife Conservancies Association**

CC:

1. Hon. Peninah Malonza  
Cabinet Secretary,  
Ministry of Tourism, Wildlife and Heritage
2. Ms. Silvia Museiya,  
Permanent Secretary,  
State Department for Wildlife
3. Dr. Erustus Kanga

Ag Director General  
Kenya Wildlife Service