

21<sup>st</sup> August, 2023

**THE CLERK OF THE NATIONAL ASSEMBLY,  
P.O. BOX 41842-00100,  
NAIROBI, KENYA.**

**RE: MEMORANDUM ON THE CLIMATE CHANGE (AMENDMENT) BILL, No.42  
of 2023 BY KENYA WILDLIFE CONSERVANCIES ASSOCIATION (KWCA)**

Pursuant to the invitation dated 16<sup>th</sup> August 2023 to submit memoranda on the Climate Change (Amendment) Bill 2023, KWCA in consultation with and on behalf of 184-member community and private wildlife conservancies spread across 30 counties in Kenya submits this memorandum.

The Bill is designed towards enhancing climate change resilience and low carbon development for the sustainable development of Kenya. Aligned to this, wildlife conservancies in Kenya, which conserve over 9 million hectares of the country's land mass, have been recognized as locally led initiatives that serve as climate adaptation and mitigation tools, through participation in carbon credits programs, among others.

**KWCA HEREBY SUBMITS AS FOLLOWS:**

1. The Bill has a dual purpose; amending provisions on Climate Change and introducing regulation of the carbon market. While Part IVA on Regulation of Carbon Market is a significant milestone in activating Kenya's carbon market;

**ISSUE:** The multiple governance structures in the Bill (Designated National Authority, Climate Directorate and the Cabinet Secretary) all with various powers and mandates in the regulation of carbon market, have the potential to overlap in discharge of their powers and duties, which is a dis-incentive for the carbon credit business.

**RECOMMENDATION:** *Minimal bureaucratic procedures and processes for carbon projects under a one-stop shop institution* with powers, duties and capacity for carbon credit market administration, permitting, monitoring, carbon registry management, community agreement and benefit sharing administration, and compliance and enforcement. This will enable ease of developing the carbon market and incentivizing investments.

2. Despite carbon credits not creating the conventional property rights that can be strictly or directly be defined, it is nevertheless important to provide description on the nature and bundle of rights and entitlements, especially to inform equitable benefit sharing regime.

**ISSUE:** *The ownership and entitlement of carbon credit rights has not been addressed by the Bill.*

**RECOMMENDATION:** a *description of carbon rights be provided in the Bill* to include intangible assets and or ownership of beneficial interest created by legislation or contractual arrangements, arising from carbon sequestered and carbon stored in forests, soil, grasslands or other approved means.

3. The Bill is designed as a general legislative framework on regulation of carbon market.

**ISSUE:** The Bill is however silent on some substantive provisions on registration, market compliance and monitoring and enforcement of the carbon credit market. As much as the finer and administrative details on permitting will be provided in subsidiary regulations, key principles as to the nature of agreements for carbon credit business, permitting and licensing and the responsible government entity, need to be included in the primary legislation, as these are core in the regulation of the business.

**RECOMMENDATION:** *Comprehensive provisions on carbon credit trading agreements, principles for permitting and licensing of carbon credit trade be included in the Bill and the responsible authority be provided.*

4. Community development and benefit sharing agreements:

**ISSUE:** *The Bill narrowly views and assumes communities as beneficiaries of carbon credit projects*, thus only providing for social benefits as only benefit accruing to communities. Vast of carbon credit projects through rangelands and grasslands management and soil carbon have the biggest potential within community lands. In the a-foregoing, *communities are co-project or main developers* who may enter into project development agreements with the carbon credit buyers directly, in the name of the community. This elevates communities beyond only accessing social benefits to sales revenue.

**RECOMMENDATION:** The Bill to provide provision on income generation by where carbon credit trade projects are developed on community lands. A specific recommendation is provided below under 23E 5.

5. The Scope of the Bill, including its principles, is *largely silent on non-carbon markets*, whereas a new object of the Act (Sec 3(ga)) is to provide guidance in development and implementation of carbon markets and non-markets. The Bill presents an opportunity to promote and incentivize non-market approaches to enhance carbon reservoirs and sinks and enable co-benefits such as biodiversity conservation, in instances of limited potential for high-quality carbon offsets; and further application of taxes to discourage emissions. This is in consideration that Kenya is focused on advancing its offset capacity.
6. In order for Kenya to develop and maintain high integrity and value carbon credit market, *there is need for provision of offences and related penalties.*

**ISSUE:** The Bill does not provide for any offences or penalties related to the carbon credit trade, limiting transparency and accountability and exposing the country a high volatile market operation. This is a substantive area that requires address in the Act and not in subsidiary regulations.

**RECOMMENDATION:** The *Bill to provide comprehensive section on offences and a detailed schedule on the penalties* which need to be commensurate to the value of the business, both in amounts of fines and term of sentence. The offences include but are not limited to:

- conduct of unauthorized carbon credit trade,
- relating to social and environmental impact assessments
- relating to maintenance of carbon records,
- manipulation of measurements to claim additional measurements
- selling to unauthorized entities
- false or misleading claims with respect to environmental or financial gains or benefits from carbon market investment
- financial crimes including money laundering, transfer mis-pricing

**FURTHER, KWCA MAKES THE FOLLOWING SPECIFIC RECOMMENDATIONS:**

<b>Part in the Amendment Bill</b>	<b>Title and Clause in the Amendment Bill</b>	<b>Current Provision in the Amendment Bill</b>	<b>Proposed Recommendations</b>	<b>Justification and Rationale</b>
Part IVA- Regulation of Carbon Markets	Principles governing trade in carbon markets- 23B	The trade in carbon market shall be guided by the following principles–	<p><b>Insert the following new principles 23 B –</b></p> <ul style="list-style-type: none"> <li>(a) Eligible mitigation projects for international transfer shall demonstrate shall be environmental integrity, transparency and promote sustainable development</li> <li>(b) Carbon credit market that is of high integrity and high quality</li> <li>(c) Leverage carbon credits to meet the Country’s national determined contribution mitigation commitments</li> <li>(d) Respect and safeguard of social and economic rights of local communities, while promoting access to equitable benefits</li> <li>(e) Mitigate against greenwashing</li> <li>(f) Promoting development of national and local</li> </ul>	The principles in the Bill are largely clearly structured as objective rather than guiding standards for Kenya's carbon market.

			<p>skills and capacities across the carbon market value chain</p> <p>(g) Advance the conservation of the Country’s biodiversity and environment agenda towards enhancing adaptation capacities</p>	
Part IVA- Regulation of Carbon Markets	Provision of Social and Environmental benefits- 23E	(1) Project anticipated environmental, economic or social benefits - the environmental benefits shall include— (b) incentives that promote offset projects;		Clarity on the nature of incentives to be provided to promote development of carbon sinks in the different sectors and to attract project development is recommended. Among incentives include tax incentives for development of carbon projects,
Part IVA- Regulation of Carbon Markets	Provision of Social and Environmental benefits- 23E	<p>(4) The National Government and the respective county government where the project is situated shall oversee and monitor the negotiation of the community development agreement with project proponents and the stakeholders.</p> <p>(8) The national government and the respective county</p>	<p><b>1. Insert under 23(4) the specific government Authority</b> that shall coordinate the preparation and monitor the negotiation of the community development and benefit sharing agreement in collaboration with the national and respective county government where the carbon credit trading project is situated.</p> <p>2. Delete 23 E(8)</p>	<ul style="list-style-type: none"> <li>• Under 23(4), the <i>benefit sharing administration is NOT placed within any specific national and county government entity, but generally on the two levels of government</i>. This creates a legal and administrative lacuna as to who is responsible for coordinate the preparation and monitoring of development and oversight on implementation of community development and benefit sharing agreements.</li> <li>• <i>23E(8) is unclear on which specific national and government entity is responsible to enforce community development and benefit sharing agreements</i>. Aligned to earlier recommendation, a specific Authority</li> </ul>

		government where the project is situated shall enforce the community rights negotiated under a community development agreement negotiated under section 23E.		with technical capacity to undertake coordinate preparation and monitor implementation need to be assigned this responsibility, thereby recommendation to delete 23 E(8) and include provisions in the roles under reviewed 23 (4)
Part IVA- Regulation of Carbon Markets	Provision of Social and Environmental benefits- 23E	<p>(5) A community development agreement shall provide—</p> <p>(b) the annual social contribution of the aggregate earnings of the previous year to the community, to be managed and disbursed for the benefit of the community;</p>	<p><b>1. Substitute 23E5(b) with the following-</b></p> <p>(b) the annual social contribution of the aggregate earnings of the <i>credit issuance year</i> to the community, to be disbursed to the community and managed for identified community led development initiatives and facilitate activities that promote carbon sequestration and ecosystem health.</p> <p><b>2. Insert the following new paragraph</b> immediately after 23 E5(b) (ii)</p> <p>(b) (iii)- A minimum of sixty percent (60%) of gross revenue of a given credit issuance to be disbursed for community payment, where the project is developed on community land through a lease arrangement or other agreed manner.</p>	<ul style="list-style-type: none"> <li>• Further, under 23E 5(b), <i>benefit sharing should be determined based on credit issuance, and not previous years' revenue.</i> A previous year approach fails to take into consideration carbon credit vintage years, vesting systems, and other complexities of carbon markets. <i>A gross revenue share formula is recommended</i> to promote equity and transparency in the carbon market while mitigating against manipulation by project developers, through the net formula and other complexities of carbon markets.</li> <li>• <i>There is no guide as to a minimum on economic benefits accruing to a community where the carbon project is developed on community land</i> through lease model or otherwise. This leaves communities at a low bargaining business power with investors especially where the additionality function primarily lies with them. Only minimum guide to social benefits is provided, which is general even when projects are on public land.</li> </ul>

				<ul style="list-style-type: none"> <li>• KWCA’s recommendation <i>is a minimum monetary income of 60%</i> of gross revenue of the sales.</li> </ul>
Part IVA- Regulation of Carbon Markets	Provision of Social and Environmental benefits- 23E	(5) A community development agreement shall provide—	<p><b>Insert the following new paragraphs immediately after 23 E 5(ii)</b></p> <p>23 E 5- A community development agreement shall provide—</p> <ul style="list-style-type: none"> <li>• 5 (iii) rights and obligations of the private or public entity engaged in carbon credit trading business and local community</li> <li>• 5(iv) monetary benefits that may accrue from the project and the initial contribution of the private or public entity engaged in the carbon credit trading business</li> <li>• 5(v) terms on benefit sharing among the national government, respective county government, local community and other relevant stakeholders</li> <li>• 5(vi) rules and procedure of engagement and participation of the public and with the local community, process for obtaining free prior informed consent and approval by community</li> </ul>	<ul style="list-style-type: none"> <li>• The provisions on scope of community development agreement are inadequate especially on community safeguard, community engagement and transparency by carbon credit project developers.</li> <li>• KWCA recommends that a community development agreement model is developed to inform communities on the bare minimum terms of agreement.</li> </ul>

			<p><b>Insert the following new paragraph</b> immediately after 23 E 10-</p> <p>The Cabinet Secretary may develop model community agreements to guide communities on basic terms for negotiations in development of the agreements</p>	
Part IVA- Regulation of Carbon Markets	Dispute Resolution- 23H	<p>1) Any dispute arising under a land-based project shall be subjected to the dispute resolution mechanism set out in the Community Development Agreement in the first instance and be resolved within thirty days from the date the dispute is lodged.</p> <p>(2) Any dispute that is not land based and is not subjected to a community development agreement shall be resolved through Alternative Dispute Resolution in the first instance.</p>	<p><b>Substitute 23 H with the new paragraphs-</b></p> <p>1) Any dispute between parties to a carbon credit trading purchase agreement arising from land based and non-land based project shall be resolved through alternative dispute resolution mechanisms in the first instance.</p> <p>2) If any dispute remains unresolved, through alternative dispute resolution mechanisms either party shall have the right to refer the dispute to arbitration.</p> <p>3) Any person who is dissatisfied with the outcome of an arbitration process may refer the dispute to the Carbon Credit Trading Tribunal.</p>	<ol style="list-style-type: none"> <li>1. The Bill assumes that the only disputes that may arise in carbon credit trade are only those in relation to implementation of community development projects. There are other potential disputes within carbon development projects which require a comprehensive dispute resolution mechanism.</li> <li>2. All nature of disputes, both land based and non-land based require equally opportunity to be addressed through alternative dispute (ADR) mechanism, in the first instance.</li> <li>3. The scope of carbon disputes are technical and complex, mainly business structured. Address of the dispute by the National Environment Tribunal (NET) may limit comprehensive address since the NET is designed for environmental related disputes and not business disputes. <i>A special tribunal for carbon credit trading is required, equipped with specialized skills on the nature of the business.</i></li> </ol>



		(3) Where the dispute under subsections (1) and (2) is not resolved within thirty days of submission, the dispute shall be referred to the National Environmental Tribunal.		
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Yours Sincerely,



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