



The Institute for Social Accountability

## Memorandum on the Draft National Sustainable Waste Management Bill

**To: The Principal Secretary,  
Ministry of Environment and Forestry,  
NHIF Building, Ragati Road,  
13<sup>th</sup> Floor, Room 1319,  
P. O. Box 30126 – 00100,  
Nairobi.**

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### About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya. TISA submits this memorandum in response to the notice for submission of memoranda made by the Ministry of Environment and Forestry in January 2019.

### Review of the National Sustainable Waste Management Bill

We commend the Ministry of Environment and Forestry in its efforts to develop the National Sustainable Waste Management Bill whose objective is to establish an appropriate legal and institutional framework for the efficient and sustainable management of waste in Kenya and the provision of a clean and healthy environment for all Kenyans. Although the draft Bill provides an opportunity for adoption of an overarching law that clarifies the roles of national government and county governments in respect to solid waste management regulation, we note with concern that the draft Bill contains gaps as follows:

CONCERN	PROPOSAL
<b>PART I – PRELIMINARY</b>	
<b>Clause 5</b> of the draft Bill lists down the principles to govern waste management. However, the Bill does not include key constitutional <sup>1</sup> principles of public participation and decentralization.	This section should include public participation and decentralization among the general principles

<sup>1</sup> Constitution of Kenya, Article 10 (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. (2) The national values and principles of governance include: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) Good governance, integrity, transparency and accountability; and (d) sustainable development.

<p><b>Clause 5(a)</b> of the draft Bill includes the right to clean and healthy environment as a key principle guiding the implementation of the Act. However, the draft Bill does not elaborate on the legal implications of having this right articulated as a principle in law.</p>	<p>There is need to link waste management to human right norms to support the evolution of the “right to clean and healthy environment free from wastes”: The Ministry should seek guidance from the Kenya National Commission on Human Rights (KNCHR) on possibilities of evolving the aforementioned rights and domestic standards for realization of the same. KNCHR has a statutory mandate to provide such guidance, on its own motion or upon request from entities.<sup>2</sup></p>
<p><b>PART II – POLICY, COORDINATION AND OVERSIGHT OF WASTE MANAGEMENT</b></p>	
<p><b>Clause 6, 7 and 8</b> of the draft Bill proposes an institutional framework for implementation of the Act comprising of the Cabinet Secretary, the Waste Management Directorate, NEMA and the County government.</p> <p>However, the draft Bill is conflicted on devolving some solid waste management functions, especially licensing to county authorities. The draft Bill fails to elaborate on the regulatory powers of County governments in waste management and thus appears to reinforce the rather anomalous situation where NEMA will continue regulating wastes within counties. This may undermine full devolution of solid waste management functions to counties</p>	<p>There is need for proper and clear legislative guidance on the relationship between NEMA’s licensing powers and the counties’ regulatory responsibilities on waste.</p> <p>There is need to devolve NEMA’s licensing powers in respect to private waste operators from NEMA to county governments. On the other hand, NEMA should retain powers to license county government’s waste operations and facilities. However, an intergovernmental agreement may be required to pave way for such legal change</p>
<p>The draft Bill does not provide for space and involvement of stakeholders in the institutional framework and therefore is State-centric.</p>	<p>There is need for involvement of non state actors in the institutional framework</p>
<p>Some of the proposed responsibilities of NEMA in the Draft Bill overlap with those of the Ministry of Environment and Forestry and the Waste Management Directorate. These include the development of regulations, standards and guidelines on waste information; and generating and disseminating waste information for the public.</p>	<p>There is need to streamline the responsibilities of the Ministry of Environment and Forestry, the Waste Management Directorate and NEMA to avoid overlaps and duplication of functions.</p>
<p><b>PART IV – DUTIES RELATING TO WASTE MANAGEMENT</b></p>	
<p><b>Clause 11, 12, 13 and 14</b> of the draft Bill only provides for the duties of national government, county government, private sectors and citizens in relation to waste management.</p> <p>The draft Bill places more emphasis on duties of right-holders and duty bearers rather inordinately. Failure by legislations to highlight rights of citizens, particularly on solid waste management matters, may undermine the process of exacting accountability whenever breaches occur.</p>	<p>The draft Bill should ensure there is also a strong focus on rights in waste management laws. Therefore, the draft Bill should include rights for which the listed duties are correlated. This will ensure balanced accountability measures in the said frameworks.</p>

<sup>2</sup> Section 8 (e) of Kenyan National Commission on Human Rights Act, No 14 of 2011 (Revised Edition 2012)



<p>The draft Bill does not define the obligation of these entities as waste generators especially those that ordinarily operate beyond the remit of county government regulation, for example, sensitive national government infrastructures.</p> <p>Further, the duty-bearers with direct responsibility of waste regulation at both national and county levels, the laws appear to omit obligations related to technical aspects of waste management. These aspects include waste planning, monitoring and reporting. These functions are critical for effective and sustainable operation of waste management systems.</p>	<p>There is need for to elaborate the legal obligations on the technical aspects of waste management regulation. The legal framework on waste management at both levels should provide for legal obligations as well as broad guidelines on procedures and expected outcomes relating to technical aspects of waste management regulation. These technical aspects relate to solid waste planning, research, information management, monitoring and reporting.</p>
<b>PART V – PUBLIC PARTICIPATION AND ACCESS TO INFORMATION</b>	
<p><b>Clause 15</b> of the draft Bill provides for access to all government information on waste management. However, this may be undermined by lack of legal provisions that obligate duty-bearers to manage effectively waste management related information.</p>	<p>The draft Bill should embrace strong provisions on access to waste management information. Access to such information should be a matter of right. The laws should provide for simple procedures for obtaining such information</p>
<p><b>Clause 16</b> of the draft Bill promotes public participation by providing for guidelines on public consultations on waste issues. However, a review of the guidelines reveals that they merely entail notification procedures within the context of public decision-making processes, but do not prescribe standards and structures for participation and giving legal recognition to the emerging concept of co-regulation.</p> <p>The Environment Management Coordination Act 1999 establishes the County Environmental Committees as structures to facilitate participation in environment decision-making. However, these laws are weakly integrated in the absence of clear cross referencing and therefore implementers of waste management law may not necessarily utilize the structures, platforms and procedures provided for under the Environment Management Coordination Act 1999. The delays in operationalizing the County Environment Committee may deny stakeholders opportunity to influence decisions and planning related to solid waste management at the county-level.</p>	<p>There is need to align laws on public participation with waste management law. This will promote better integration and synergy, thus ameliorating weaknesses in the waste management law on this particular aspect. This can be achieved by cross-reference relevant provisions of the public participation laws (platforms, mechanisms and procedures) and how these could aid in entrenching participation in waste management system.</p> <p>There is need to fully operationalization structures of participation such as the County Environment Committee provided for under the Environment Management Coordination Act 1999.</p> <p>It must be also be ensured that there is special focus on participation of vulnerable and disadvantaged groups. All waste management laws should include provisions that promote affirmative action for vulnerable and disadvantaged groups such as associations found in informal settlements. To ensure participation of the poor and most vulnerable in the waste value chain, there is need to mainstream non-discrimination and equality through clear provisions. The SWM legal framework should embrace clear provisions, obligating duty bearers at both levels to prohibit discrimination and promote equality, while giving affirmative action measures for disadvantaged and the vulnerable</p>
<b>PART VI - FINANCIAL PROVISIONS</b>	
<p><b>Clause 17(1)</b> of the draft Bill proposes the establishment of a National Waste Management Fund to ensure financing of the functions of NEMA. However, the viability of the Fund is doubtful, given the</p>	<p>The proposed National Waste Fund under the draft Bill should be done away with, since most of the waste management functions have been devolved to counties and NEMA could mobilize resources to</p>

<p>devolution of most of the functions of NEMA to counties (hence shrinking mandate) and the existence of NETFUND, which potentially could finance research and awareness activities envisaged under the draft law.</p> <p>Additionally, Clause 10 (2)(a) of the draft Bill also proposes that County governments may establish a County Waste Fund for the sole purpose of investment of waste management programs as determined by the County Environment Committee.</p>	<p>discharge its functions from elsewhere. There should be established a Waste Fund at the county level only and not at the national level.</p>
<b>PART VII – MONITORING AND COMPLAINECE</b>	
<p><b>Clause 20 and 21</b> of the Bill provides for monitoring provisions to be enforced by NEMA, these appear repetitive of similar provisions under Environment Management and Coordination Act 1999.<sup>3</sup></p>	<p>The draft Bill should reference the relevant Environment Management and Coordination Act 1999 provisions on monitoring and inspection duties of NEMA which appear more elaborate.</p>
<b>PART VIII – OFFENCES AND PENALTIES</b>	
<p>Clause 25, 26 and 27 of the draft Bill propose the introduction of penalties of a fiscal nature for counties, public and private sector entities that breach their legal obligations.</p> <p>However, the draft Bill does not provide for access to administrative justice considering the elaborate framework of obligations created therein. This would force aggrieved persons to seek redress from the Environment and Land Court, which could prove expensive and inaccessible to the disadvantaged.</p> <p>To support enforcement, the laws provide for offences and penalties to elicit compliance through command-and -control approach. However, the draft Bill does not take into consideration the concept of co-regulation, by failing to recognize voluntary efforts by private sector and civil society organizations in regulating themselves in respect to solid waste management activities.</p>	<p>The draft Bill should include access to justice mechanisms: by providing for appropriate redress mechanisms which ensure affordable and non-technical access to justice for the aggrieved, particularly the disadvantaged groups. For instance, a mediation committee. Decisions made by waste management authorities could be made appealable at the National Environment Tribunal (NET) created under the Environment Management and Coordination Act 1999.</p> <p>There is need to provide legal recognition to co-regulation: The draft Bill should recognize the role of private sector umbrella bodies involved in co-regulation efforts and incentivize their work. However, these provisions should be operationalized and extended to community associations serving the vulnerable and disadvantaged groups</p>

## ADDITIONAL COMMENTS AND RECOMMENDATIONS

- ❖ **Intergovernmental Relations:** The draft Bill does not establish an intergovernmental relations structure in waste management, which otherwise would bring together both levels of government for joint planning, coordination and policy discussions. The draft Bill ought to have provided framework for improving intergovernmental relations on solid waste management issues.
- ❖ **Decentralization:** The draft Bill should have rendered guidance on decentralization of SWM below the county levels. The lack of clarity on designation of urban areas and how these units link with other units of decentralization within the county is an area of concern. This could have implication on service delivery due to potential for overlaps and duplication between urban areas and other

<sup>3</sup> Part IV *ibid*; compare and contrast with Part VII (environmental audit and monitoring) and Part X (inspection, analysis and records) of EMCA, which are rather elaborate on monitoring mandate of NEMA

decentralized units. One way of achieving this is by referencing Urban Areas and Cities Act and its structures (cities and municipal boards) as duty bearers at the sub-county levels. The Constitution gives a good basis for decentralization below the county levels. The enactment of the Urban Areas and Cities Act was done to facilitate decentralization of decision-making and service delivery to towns and urban areas. However, the draft Bill does not provide for this kind of decentralization and therefore can be presumed that the intention was to operate the law in a centralized manner.

- ❖ **Integrated Solid Waste Planning:** The draft Bill fails to provide guidance on key technical aspects of integrated waste management. One such area is waste planning. The law should prescribe in general terms, the process and anticipated outcomes of waste planning at both national and county levels. It should provide for mechanisms of integration of national and county waste plans as well as integration of waste plans with other key development plans (e.g. county and national environmental action plans, integrated development plans, budget etc.)

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