



REPUBLIC OF KENYA

The draft Natural Resources Development and Management Policy, 2012

**ASSOCIATION OF PROFESSIONAL SOCIETIES IN EAST AFRICA  
(APSEA)**

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**FOREWARD**

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DRAFT

## POLICY CLARION CALL

### - **Securing, Developing, Managing and Sustainably Utilizing Natural Resources to save and Replenish Planet Earth**

At the pre-ambular outset, the Policy is formulated and predicated upon a solid pillar of a 'Clarion Call', a call to re-trace our steps, a call to safeguard and protect the natural resource base and replenish planet earth, restore its *original* success story, and rich potential; and that call is articulated herein-below:

In the beginning, when the universe was created, mankind was given the *green-light to exercise dominion* over planet earth, wherein lay all components and attributes of all that nature bequeathed the human race with. From land, above in the air and into the under-ground of the soil, the *original value* of this creation extended to plant, animal, water, trees as well as all living and non-living resources in the marine regime. All around these components was the AIR which all the resources freely breathed, in order to continue to generate and re-generate.

In the beginning, no *end* was prescribed by the creator upon mankind's dominion over these resources, on condition strictly that these resources were *protected, conserved and managed* prudently. It was, therefore, upon mankind to design a *strategic plan* on how to exercise this dominion. Without a doubt, it can be safely stated that either there was no such *strategic plan* or, if ever one was designed, mankind must have done a very poor job of it.

It must have escaped mankind's attention, and altogether conscience, perhaps, that while the resources remained *finite*, generation after generation were *over-exercising* their capacity to rely on the *benefits* that accrued from the use, utilization and harvesting of the resources; for, whereas the resources did not, or could not, *increase* both in quality as well

as in quantity, those who came forth into mother earth had to rely on the resources which, at the time, were in *abundance*.

However, with the passage of time generational incremental impact became too *burdensome* upon the land, the soil, the sub-soil, the space and air above and, ultimately, the under-ground soil and waters. The resultant effect was that the resources started to shrink and, by the turn of the last century, and since then, the human race has continued to find itself in harsh and bitter competition with one another, on the one hand, and with *nature*, on the other.

The loud paradigm and clarion call which the Policy seeks to advance is upon mankind to hearken to the first whisper that was ever uttered by the creator, which *instructed* the human race to exercise prudent dominion over *the rest of the creation*, and to live *in harmony* and to manage the resources peacefully and approach the rest of other competing interests *peaceably*.

The Policy seeks to *instruct* the current generation to exercise great caution in the manner in which the *remaining natural resources* are protected, conserved, managed, exploited and utilized.

The Policy outlines the attributes of this *instruction* through several prescriptive measures calling upon Kenya as a Republic, as a nation among other nations and governments, through established agencies and administrative organs, to, *inter alia*:

- i. *Defend* and *protect* the existing natural resources;
- ii. *Develop* and *harness* the attributes that under-pine all the natural resource components;
- iii. *Build* and *manage* a strong and extensive resource base whence cometh the re-generating species of the resources through renewable and modern technologies through science and innovation;

- iv. *Sustainably use, exploit, harvest and utilize the natural resources for the sake, and enjoyment, of both present as well as future generations; and*
- v. *Ensure that since the natural resources belong to the people of Kenya, entitlements and rights which attach to the conservation, protection, management, use and utilization are appropriately and equitably apportioned to, between, within and among local communities; this, without prejudice to any share thereof, to which the state through the governments, both national and county, may be apportioned with.*

From the deep blue seas and oceans, across the harsh desert, arid and semi-arid terrains, through the undulating hill-tops and mountainous escarpments, and yonder the valleys and lush green plantations, the voice conveyed by the Policy is to the human race, particularly the local communities that scatter right across the land, to take every measure and every step to safeguard the sanctity of their entitlements and rights in respect of ALL natural resources that the creator of the universe, through past generations, bequeathed upon them.

The foregoing, the Policy posits, is realizable, particularly with the advent of the letter and spirit of the Constitution of Kenya 2010, upon which the formulation of the same is predicated, as a firm pivot.

## **CHAPTER 1**

### **1. FORMULATING THE POLICY**

The Policy was formulated through a broad-based consultative process, with the involvement of the people of Kenya, whose power is sovereign in policy and legislative matters, through several well-publicised and duly advertised stake-holder meetings, sessions, seminars, retreats and general participatory mechanisms, as well as peer review caucusing, as required by law.

### **2. GOAL OF THE POLICY**

The overall goal of the policy is to give full effect to the provisions of Article 72 of the Constitution of Kenya 2010.

The attendant components hereof are three-fold, namely:

- i. to implement, operationalize and streamline the provisions of PART (II) of CHAPTER FIVE (5) of the Constitution of Kenya 2010, particularly with respect to the provisions on ‘*Natural Resources*’ (with special emphasis on Article 69 thereof) ;
- ii. to provide a one-stop reference point as well as an over-arching mechanism for the management, conservation, protection, use and utilization of natural resources for the overall good of the people of Kenya ; and
- iii. to operationalize the provisions of Article 71 in its entirety, with particular emphasis on Article 71 (2).

### **3. VISION OF THE POLICY**

The Vision of the Policy is three-fold, namely : first to ensure that the sum total equation of deriving, accessing and equitably apportioning natural resource entitlements and rights positions Kenya in a better geo-strategic context in consonance with the under-pinning pillars of Vision 2030, as presently formulated ; secondly, to offer the opportunity through which the livelihoods of individuals and communities receive not only recognition, but also enrichment, enhancement and empowerment ; thirdly, to enforce internationally-established principles and values, particularly the principle of inter-generational equity as well as the principle of sustainable development, by dint of which both present and future generations will stake their respective claims and entitlement to the use and exploitation of natural resources.

### **4. MISSION OF THE POLICY**

The Mission of the Policy is to develop, nurture and elevate the natural resources sector in a viable, vibrant and competitive manner for the local, regional as well as international market through established and duly recognized sustainable utilization, conservation, protection and management practices.

### **5. SCOPE OF THE POLICY**

The policy makes provision for an overarching framework for the prudent and sustainable conservation, protection and management of Kenya's natural resource base, with incidental provision on fair access and the just and equitable distribution of entitlements and rights accruing there-from, and its alignment and synchronization as well as harmonization, in an overall sense, with sector-specific policy statements of intent.

## **CHAPTER 2**

### **6. OVER-ARCHING PRINCIPLES AND VALUES**

The Policy is guided by, and constructed upon, several Principles and Values, key among which include the following:

**i. Access to, derivation from natural resources, and equitable apportionment of accruing entitlements and rights**

The principle values the right of communities, the State, National as well as County Governments, together with other users of natural resources to access, derive and equitably apportion all entitlements and rights attached to, and accruing from, the utilization, exploitation, use, conservation, development and management of natural resources.

**ii. Sustainable Development**

This principle recognizes natural resources as rich assets for local communities, county and national governments as well as the State- holding the resources in trust for the people- the protection, promotion and maintenance whereof remains a key pre-requisite towards sustainable development for the benefit of both present and future generations, nationally, regionally and globally

**iii. The Right to Development:**

The right to development shall be enjoyed and fully exercised taking into consideration the economic, social, health, cultural, environmental and related needs

**iv. Eco-system Approach:**

An integrated ecosystem approach to conserving the natural resource base will be adopted and enhanced to ensure that all ecosystems are managed in an integrated manner while also providing a range of benefits to the people of Kenya.

**v. Total Economic Value :**

The benefits that ecosystems generate will be integrated into the national accounting system, programmes and projects in the overall scope and agenda for economic development.

**vi. Sustainable Use and Equity :**

Natural resources will be utilized in a manner that does not compromise the quality and value of the resource, or decrease the carrying capacity of supporting ecosystems.

Further, the management of the environment and natural resources will seek to secure the best interests of present and future generations.

**vii. Inter- and Intra-generational Equity:**

The management of the environment and natural resources will be based on long term views where present generations make choices that benefit them without compromising the ability of future generations to meet their own needs

**viii. Public Participation:**

The people of Kenya shall be entitled to their views and contributions by participating in the process of policy and legislative making, at every step of the way, and their opinions and resolutions must be taken into due consideration before any decision or action or plan is implemented.

**ix. Devolution of Resources:**

The management of natural resources will be through decentralization and devolution of authority and responsibilities at the lowest level possible, as by law established.

**x. The Precautionary Principle:**

Where there are credible threats of serious or irreversible damage to key natural resources, lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

**xi. International Cooperation and Collaboration:**

Multilateral environmental agreements (MEAs) and related instruments will be domesticated and implemented for better management of shared resources, in line with the Constitution, as well as all other established enabling legal and regulatory mechanisms.

**xii. Good Governance- Transparency, Accountability and Integrity:**

Rule of law, effective institutions, transparency and accountability, respect for human rights and the meaningful participation of citizens will be integrated in environmental management. The leaders chosen to lead others and spearhead the process must be citizens of integrity.

**7. CONSTITUTIONAL PIVOT**

The constitution of Kenya, under Article 67, affords the National Land Commission (NLC) the mandate to, *inter alia*, generally superintend over the management of public land on behalf of the national and county governments. Among the several other functions set out in respect of the

NLC include ‘...research related to land and ***the use of natural resources***’ (Article 67 (2) (d)).

Under PART (I) of the Constitution, in respect of LAND, the provisions of Article 67, regarding the NLC, are properly anchored in Sessional Paper No. 3 of 2009, namely the National Land Policy (NLP). More than eighty (80) pieces of statute have been collapsed into just about four (4) Acts of Parliament, with the advent of the Constitution.

Under PART (II) of the Constitution, in respect of the ENVIRONMENT, the provisions are already clearly anchored in the National Environment Policy of 2012.

Both the NLP and the National Environment Policy are, essentially, over-arching in nature.

Under PART (II) of the Constitution, in respect of NATURAL RESOURCES, there exists no over-arching policy, and neither does any such piece of legislation exist, save for sector-specific statutes.

The case for an over-arching Policy and Legislative architecture cannot, therefore, be over-emphasized.

In terms of appropriate institutional superstructure, the Policy will be anchored under the framework of the National Land Commission for ease of operationalization and implementation, thereby eliminating the normally arduous tasks of creating or establishing an entirely new implementing agency.

### **CHAPTER 3**

#### **- Framework Architecture for Natural Resources in Kenya**

Planet earth, as has been stated in the pre-ambular note, arguably remains the finest endowment that the creator of the universe ever bequeathed mankind with.

Thereon lay, in the beginning, a clean, un-polluted and conflict-free regime of natural resources. These resources were clustered, *inter alia*, land-based as well as marine-based types, plant and animal as well as mineral and mineral oils.

Since her protectorate-status classification, Kenya started implementing policy and legislative provisions within the framework of *1897 inception clause*, whence cometh the various provisions only on the basis that they were not repugnant to morality and justice.

At independence, the country began to formulate its own sets of laws, which were gradually intended to repeal or, by and large, *refine* the colonial type provisions. Natural resources became a preserve of the central government, ranging from wildlife, forests, water, minerals, fisheries, among other clusters.

Traditional management mechanisms in the natural resources sector nearly collapsed, given that the centralized systems, administered by and under the central government control did not give due consideration to sustainable management techniques and approaches.

Ad hoc methods were resorted to by the central government through five-year National Development Plans, Presidential Decrees, Chiefs' authority pronouncements, which, though a little draconian, seemed to move the country through a relatively '*stable*' system of management.

The next phase was realized in 1999 with the enactment of an over-arching piece of legislation, the Environmental Management and Co-ordination Act (EMCA).

The enactment of this law, EMCA, it was argued, would *superintend* over the management, protection and conservation of natural resources. However, it is trite to say that the EMCA was formulated strictly as a framework law with regard to the *Management and Co-ordination*' (as the title clearly suggests) of *'the environment'*.

It is safe to argue, in the circumstances, therefore, the Constitution of Kenya 2010 did, upon promulgation on August 26 2010, open a new paradigm by presenting fresh impetus for a new approach to the way natural resources had hitherto been managed in the country.

The new constitutional order has, indeed, placed natural resources at a high pedestal as the main source of livelihood for the larger population of the Kenyan people. It has even gone further by making provision for the benefits accruing from exploitation of natural resources to be equitably shared within a new dispensation.

It is appropriate, and highly timely, therefore, that these provisions be translated into appropriate policy and legislative tools for the same to be afforded the requisite application and implementation mechanisms.

The Policy sets out to ensure that the proliferated and truncated types of policies and pieces of legislation that exist in the sector of natural resources are all harmonized and brought under the same paradigm within the framework of the Natural Resources Act, as and when enacted.

The various pieces of legislation that exist in the arena of natural resources in Kenya include those that govern water, forests, wildlife, minerals, agriculture, petroleum, energy, fisheries, to name but a few. It is clear that a number of these laws are informed by the requisite policy framework provisions on whose architecture they are duly anchored.

The laws and policies currently governing the sector fall, respectively, under separate and independent institutions, each with a clearly *restrictively*

*narrow* mandate to enforce the provisions thereof independent of each other, within their own province of operation and application ; to a limited extent, however, these institutions do tend to exercise some degree of ‘collaboration’, particularly in areas of ‘*common convergence*’.

It can not be over-emphasized, of course, that nearly all components of the natural resource base are, by and large, *inter-connected*. The Policy therefore aims at ensuring that in the fullness of time, all these laws are synchronized with a view to creating a much more co-ordinated approach towards a proper and harmonized system of management and conservation of the natural resource base in Kenya.

The Policy further aims to place the ‘operationalization’ of these provisions under one roof, for ease of co-ordination as well as for the purposes of effective protection, management and conservation. Thus, it is envisaged that exploitation of natural resources, as well as derivation, access and sharing of benefits accruing there-from would be much more streamlined than is currently the case.

Under the provisions of PART (I) of Chapter Five (5) of the Constitution, slightly over eighty (80) pieces of statute in the land regime have since been collapsed into just about four. The one key significance of this measure is that the management of land-related issues has been brought under relatively tidier mechanisms.

Whereas laws *per se* may not be the panacea to issues ailing and/or confronting the sector, at least there is unanimity in the position that, for now, the general public would have an easier and flexible method of accessing and transacting in land and land-related resources with the ‘*collapsing*’ of the various truncated and proliferated laws. The Policy seeks to advocate for a near-similar approach with respect to the equally proliferated natural resource pieces of legislation.

## **CHAPTER 4**

The record will show that as at year 2009, based on the 2010 release of the Government of Kenya census (2009) report, the country's population stands at 38.6 million human beings, with an annual growth rate placed at 2.6%. The total land area that carries this population is placed at 582,647 square kilometers.

Land being a key factor of production, seven agro-ecological zones constitute the clusters which represent key eco-system constructs in the country. It is estimated, according to the report under reference, that 80% of the population relies largely on a 20% land surface area of high-medium potential agricultural attributes ; the remaining 20% of the population is supported by the remaining 80% of the land surface, which is, essentially, comprised of Arid and Semi-Arid Lands, so-called ASALs.

It is noteworthy that approximately 80-90% of a key natural resource component, namely the wildlife, as well as 50% of Kenya's livestock population, are located within the ASALs.

The glaring disparities and imbalances in the whole area of land and land-based resources is a matter of great national, community and individual concerns. No doubt, this is one key arena where conflict can be said to be 'fermenting', and the same must be addressed as a matter of priority.

The other main arena which has hitherto not received sufficient consideration is with regard to marine resources and the larger coastal zone, including the continental shelf, the deep sea-bed, as well as the 200-Nautical Mile Exclusive Economic Zone, over which Kenya has internationally-agreed jurisdiction. It can not be assumed that this particular area is not a conflict-potential zone!

Two key components in respect of '*conflict*' in the natural resources sphere have been clearly articulated in the Constitution, at Article 67 (2) (e), viz : '*to initiate investigations....into present or historical land injustices, and address appropriate redress*' ; and, (f) '*...to encourage the application of traditional dispute resolution mechanisms in **land conflicts***'.

The general import of the foregoing provisions is clear testimony that matters relating to the management and access to natural resources, particularly land, have not been properly handled in the past.

There is a clear imbalance in the manner in which land tenure as well as demarcation of resource rights and enjoyment of those rights has been dealt with over the years. The situation has, in recent times, resulted in *the haves* having had to continue to acquire more, while *the have-nots* have, perennially, remained a disgruntled lot.

Within the wider natural resources sphere, there is need to ensure that a clear framework, by way of a requisite legislative mechanism are established in order to address these issues before they take a 'harsh-reality' dimension.

The Policy, therefore, sets the right pace, and opens the platform for ensuring that issues relating to conflict are mitigated well in advance, in order to restore sanity in the overall management, conservation, protection and utilization of natural resources in Kenya.

The Policy creates the necessary opportunity for the enactment of the Natural Resources Act, as an over-arching legislative framework in this regard.

**a. Kenya's Natural Resource Capital Data**

One of the many challenges that continue to confront Kenya is the absence of an up-to-date, reliable and accurate inventory to affirm the actual as well as perceived potential for the country in terms of the quantity and quality attached to the current natural resource base.

With the foregoing in view, the Policy seeks to propose the establishment of what is to be known as the Natural Resource Capital Centre (NRCC) through which such information may be easily accessible to the Public. Under the Constitution of Kenya 2010, the people have the right to access information that is held by the government or her administrative agencies. It

is imperative, therefore, that information relating to all components of the natural resource base be made available for use by both the State as well as- and more importantly- for reliability thereon by the investing public.

The country's framework for the purposes of national development lies in the pillars outlined in Vision 2030. It is therefore quite imperative that accurate data and statistics be prepared and posted on the state agency website for ease of accessibility by all primary and other stake-holders.

To illustrate the foregoing, Kenya's mineral production for the period 2005 to 2009 has been characterised in the tabulation below, as made available through official records of the government of the Republic of Kenya:

<b>Mineral</b>	<b>Unit</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Soda Ash	MT	360,161		374,210		286,578
		502,846	404,904			
Fluorspar	MT	97,608	132,030		85,115	130,100
		5,500				
Crushed Refined Soda	MT	640,291		662,939		842,043
		865,788	948,076			
Salt (Magadi)	MT	26,595	35,024	11,596	24,345	24,125
Carbon Dioxide	MT	8,723	9,359	11,028	22,030	15,711
Diatomite	MT	1221	1595	1841	1775	1696
Gold	KGS	616	432	3,023	340	1,055
Gemstones	KGS		5,420	5,044	8,927	20,933
		39,408				

[Source : MEMR- GOK]

These data do suggest, by and large, the dominance in the category of industrial minerals market, of a variety of products such as Soda ash, fluorspar, diatomite and limestone. Products such as gold as well as gemstones have also been captured in this tabulation as being of prominence in the production chain during the period under review, the same going on record as a major pre-occupation for investors in the small-scale mining.

**b. Natural Resource Valuation and Audit**

A major concern that arises, therefore, on the basis of the foregoing example is whether, even if only for the sake of argument, the people of Kenya are getting the value and net-worthiness of the rich resource base when the components thereof are harnessed, exploited, used, utilized, conserved, protected and managed by the state on their behalf; additionally, a further reason for worry is whether, on the basis of the foregoing example, the people of Kenya are receiving their legitimate entitlements and rights arising out of the process-product value chain.

The foregoing concern arises as a result of the manner in which transactions in the natural resources sector are handled. Accordingly, a number of questions arise, including the following :

- i. What is the total value of Kenya's entire natural resource base ?
- ii. What EXACT types of natural resources does Kenya have ?
- iii. Where are all these resources located and, where can this information be found deposited ?
- iv. What is the total value of investment does Kenya currently have in terms of the various natural resource components found and located within the country's territorial and geographical jurisdiction ?

- v. Who *values* and who *audits* all resources that are extracted from within the natural resource base of the country ?
- vi. Where, when and by whom are these natural resource components *processed* ?
- vii. Who EXACTLY *witnesses* the actual *from-process-to-product* analysis of the entire value chain ?

It is with the foregoing in view that the Policy proposes the establishment of the Office of Registrar of Natural Resources. To illustrate this point, whenever the country seeks to embark on fiscal and monetary planning for the purposes of financial and other resource allocation appropriately, a periodic population census is conducted around the whole country.

The essence of such an exercise is to establish the ACTUAL or ESTIMATED number of citizens for whom the state must plan and organize its affairs for the purposes of achieving its overall goals through relevant budgetary allocations and appropriation.

Information and data in relation to the living and the dead, for the purposes of identifying the estimated national population of the country is, as a matter of procedure, deposited with the Registrar of Births and Deaths. Similarly, in order to guide the state in terms of the equally important source of natural resource base data and statistics, it is imperative to deposit, within a one-stop mechanism, all relevant value and audit in this regard.

Accordingly, the Policy proposes the necessity to enlist the services of professionally qualified, trained and educated practitioners to be known as Natural Resource Valuers and Auditors. These are the professionals who will, routinely, undertake the exercises referred to herein-afore.

**c. Integrated Impact Assessment**

The Policy proposes that appropriate provisions of the attendant legislative instrument arising hereof, as well as any recommendations encapsulated herein, must contain detailed regulations with regard to matters appurtenant

to integrated impact assessment processes, particularly, inter alia, in environment, health, social, cultural and economic components.

**d. Strategic Natural Resources**

The sum total emphasis that is being laid by the various pillars upon which Vision 2030 is predicated is that the country shall be propelled to a slightly-over middle-income and near-developed society. This is envisaged as a result of the specific efforts that are being employed by both public and private sector synergies and strategies towards a steady growth of the country's GDP, at a more-than 10% rate per annum.

No doubt, therefore, the role to be played by prudent development and management of the natural resource base of the country cannot be overstated. Deliberate efforts are intended to be made to ensure that the various resource components are made available, and freely open, to the wider investing community, public and private enterprises alike. Cautiously, however, the Policy seeks to stress the need to urge for similar deliberate efforts at ensuring that certain categories and classes of natural resources are classified as *strategic*, based, primarily, upon expert review, on the nature of their valuation and character, ranging from the likely danger that the same may be over-depleted, to their *national, regional and/or geo-strategic* attributes.

**8. ACCESS, DERIVATION AND APPORTIONMENT OF  
NATURAL RESOURCE ENTITLEMENTS AND RIGHTS**

*Benefits*, in a general policy sense, and without prejudice to the generality of a definition founded on science, empiricity or other within the meaning of any specific rubric, means *a derivative component of a primary right over, interest in or controlling attribute for an existing property, property right, resource, substance or matter, whether natural in nature, construct and/or other, or essentials ancillary or incidental to, or connected or associated therewith, and accruing there-from, by way of a deserved entitlement.*

From an international perspective, the 1992 Convention on Biological Resources (CBD), under Article (15) thereof, establishes a new international legal regime through which conservation of biological diversity, sustainable use of its components as well as the fair and equitable sharing of entitlements and rights arising as a result of their use are all duly anchored.

The Constitution of Kenya 2010, under Article 2 (5) and (6) makes provision for all treaties, conventions and agreements the country has ratified to form part of the laws of Kenya. Accordingly, these provisions as captured herein-afore have a place in Kenya's legislative framework.

The country must, accordingly, ensure appropriate national strategies and action plans are established with a view to implementing the letter and spirit envisaged within the subject framework.

From a national perspective, the principle upon which *access to, and sharing of*, benefits is, generally speaking, pivoted alongside the country's Poverty Reduction Strategy Paper (PRSP), which the government of the Republic of Kenya published in 2001.

One of the key philosophies of the PRSP advocates for *minimal* public sector participation in the overall management of the economic sector ; additionally, the Paper advocated for the decentralization of government functions with a view to improving service delivery, from the national to the very low level of the community, namely the village.

The **PRSP**, as formulated in 2001, was supported by four (4) key policy options, namely :

- (i) public participation, particularly affording the poor and marginalized a voice and a platform
- (ii) ownership of resources by the people of Kenya ;
- (iii) transparency, accountability ; and

(iv) *equitable distribution of national resources and development initiatives.*

The Constitution of Kenya 2010 sends a clear signal that the philosophical foundation surrounding, and upon which, the PSRP was formulated nearly a decade earlier, was well-informed and properly-intentioned. This is particularly reinforced by the provisions of Article 69 (1) (a) thereof, which clearly speak to the theme of '*equitable sharing of accruing benefits*'.

It is noteworthy that both the Constitutional provisions, as well as the philosophy behind the PRSP are quite clearly buttressed by the Ten (10) components that constitute a major construct of the [Millennium Goals (MDGs)] '*Millennium Project*', namely :

- (a) Poverty and Economic Development ;
- (b) Hunger ;
- (c) Education and Gender Equality ;
- (d) Children's and Maternal Health ;
- (e) HIV/AIDS, Malaria, TB and Access to Essential Medicines ;
- (f) Environmental Sustainability ;
- (g) Water and Sanitation ;
- (h) Improving the Lives of slum dwellers ;
- (i) Open, Rule-Based Trading Systems ; and
- (j) Science, Technology and Innovation.

The Policy, therefore, advocates for the setting up of a clear and responsible formulation upon which the theme of apportionment of entitlements and rights is to be predicated. Accordingly, any such formulation must, essentially, seek to ensure that *sharing* or *distribution* is based, *inter alia*, on the three key considerations as set out herein, namely, the objects of the PRSP, the Constitutional provisions under reference, as well as the MDG pillars. Overall, the people of Kenya MUST, of necessity, have due *access* to the subject benefits, at all times of the process of utilization, exploitation and use of natural resources in Kenya, as by law established.

The true measure in ensuring that benefits are properly shared out and/or duly and (*fairly, justly* and) ‘equitably distributed’ is in the change and improved status of the livelihoods of the people of Kenya, in whose trust the natural resources are held.

It must be emphasized that the formulation of parameters with regard to ‘benefit sharing’ must be based on the options of resource sustainability as well as social equity.

## **CHAPTER 5**

### **9. FACTORS HINDERING KENYA’S NATURAL RESOURCE DEVELOPMENT**

The Natural Resource Base in Kenya faces a number of challenges, which continue to hinder the development and appropriate management. These include the following, namely :

- (i) Absence of an inventorized data base ;
- (ii) Review of sub-sector and sector-specific policies and legislative instruments in haphazard fashion ;
- (iii) Absence of established formulae and set criteria on where, when and how to apportion entitlements and rights accruing out of utilization of natural resources and related components ;
- (iv) Absence of an over-arching policy instrument ;
- (v) Absence of an over-arching legislative instrument ;
- (vi) Un-coordinated efforts at management, protection and conservation measures ;

- (vii) Absence of synchronized execution strategies ;
- (viii) Existence of separate institutions effecting near-similar statements of policy intent in respect of the same natural resource components ;
- (ix) Absence of clear mechanisms with regard to resolution, management and mitigation of natural resources-related conflicts ; and
- (x) Incompleteness in the tidying up of constitutional provisions in the regime of natural resources.

## **10. STATEMENTS OF POLICY ACTION AND EXECUTION PLANS**

The State, in the execution of its mandate, resolves to undertake specific plans for executing the policy actions as spelt out in that regard, namely:

- i. To provide an enabling environment through which natural resource development and management is used for the purposes of creating real and tangible wealth and meaningful and gainful employment, by exploiting all natural resource components in a sustainable and prudent manner.**

### **Execution Plan :**

- To document, inventorize and secure natural resources as well as related components such as indigenous knowledge, by establishing an elaborate, reliable and coherent national database

**ii. To Establish an appropriate legislative instrument as a framework architecture in the management, coordination and regulation of natural resources in Kenya.**

**Execution Plan**

- to enact the Natural Resources Act
- to craft and develop a scientific formulation as well as set criteria for the equitable sharing of accruing benefits from natural resources that will take into account the needs of the national and county governments as well as all Kenyan communities for the benefit of both present as well as future generations.
- to develop and encourage the need for civic education, public awareness and public participation of communities on the need to harness, protect, develop, conserve, manage and sustainably utilize and exploit natural resources in Kenya.

**iii. To align and implement the policy in tandem with the aspirations captured in Vision 2030**

**Execution Plan**

- To develop the requisite infrastructure, build and enhance necessary expertise and offer result-based incentives for harnessing home-grown innovation for product discovery and development.
- to establish an initial revolving fund to support flagship projects and growth of Small and Medium Enterprises.
- to build a commercialization capacity by imparting of entrepreneurial skills, providing financial and fiscal incentives as well as investing in market development.

- to liaise with lead agencies on matters of regulation, including research and connected activities to promote the resource-process-product matrix
- iv. To establish an appropriate regulatory and institutional mechanism as well as capacity for administering a suitable regime for the sustainable exploitation of natural resources, and to ensure access to, derivation and equitable apportionment of, entitlements and rights accruing therefrom.**

**Execution Plan :**

- to establish the Natural Resources Regulatory Board through which to provide a basis for equitable apportionment of entitlements and rights accruing from the exploitation of natural resources in Kenya
- to anchor the policy within the framework of the National Land Commission, through the creation of the Directorate of Natural Resources

- v. To tap appropriate human capital for the purposes of embarking on research, development, innovation, information sharing, training as well as all aspects of technology transfer.**

**Execution Plan :**

- To establish the Natural Resources Training Institute
- allocate a percentage of revenue from natural resources to capacity development and research
- encourage and enhance appropriate technology transfer in the exploitation of natural resources as well as liaising with both local as well as foreign entities to invest in this regard.

**vi. Mitigate existing and potential conflict in the management, conservation and utilisation of natural resources**

**Execution Plan :**

- To implement the National Land Use Guidelines in collaboration with the National Land Commission
- To make provision for Alternative Dispute Resolution as provided for under the Constitution
- To ensure access to justice through established dispute settlement mechanisms in the management and utilisation of natural resources
- To ensure access to environmental justice for all the people of Kenya through appropriate partnerships and collaboration with duly established state agencies and mechanisms.

**vii. To create an environmental and natural resource adjustment credit system for Kenya**

**Execution Plan :**

- Establish and, where already in place, implement appropriate fiscal, institutional, policy, legislative and regulatory reforms towards sustainable use of natural resources to limit or reduce future costs.
- To embrace and adopt all measures related to carbon trading through application of appropriate carbon credit systemization.

**11. DEVOLVED SYSTEM OF NATURAL RESOURCE GOVERNANCE**

The Constitution of Kenya 2010 lays down the law on which the governance structure as well as system of administration of the country are predicated. Arising there-from are legislative instruments which have been,

and continue to be enacted, within the framework of spelt out schedules. The fundamental principle that runs through the common thread underpinning these laws and related policies is *devolution*.

The Policy will be implemented on the basis of the provisions of the law governing the established system of devolution. Accordingly, it is envisaged that protection, management and and conservation of natural resources will be based on a devolved structure of administration and governance, as by law established.

**a. Dispute Resolution Council**

Recent history, experience and evidence has shown that by and large conflicts within, among and between communities in Kenya have revolved around access or right to, control over or use of resources. Some of the reasons, causes, explanations or excuses that have been advanced regarding the circumstances that continue to give rise to these never-ending conflicts range from scarcity of resources to competing interests as well as *uncertainty* as to *where exactly* the resources lie, in jurisdictional and territorial terms.

It is with the foregoing in view that the Policy makes the recommendation for the establishment of a Dispute Resolution Council (DRC) at the lowest possible level of governance structure. It is intended that the DRC becomes the focal point at the Ward, Village or Community level with clear terms of reference of arbitrating over and adjudicating upon conflicts arising out of disputed management, conservation, protection, use, utilization and exploitation of natural resources.

Of particular concern, in this regard, remains likely situations resulting in disagreements over specific apportionments of entitlements and rights as arising out of the matter of utilization of resources. The Policy seeks to

make the case for the DRC to superintend over this and other potential points of conflict by *quelling* the same even before they take root.

The Policy restates the established constitution paradigm that communities must at all times seek to address any kind of conflict through the use of Alternative Dispute Resolution Mechanisms, and it is envisaged that the DRC emerges as the best forum through which such mechanisms shall be effected.

The DRC, nonetheless, shall not deny the citizens their constitutional right to seek redress within the existing judicial architecture, starting with resort to the Environment and Land Court established under the Environment and Land Court Act (No. 19), 2011, proceeding up the ladder in the normal manner. However, the DRC shall remain the first port of call in the matter of resolving disputes and addressing all types of conflicts relating to natural resources in Kenya.

## **12. THE ROLE OF COMMUNITY NATURAL RESOURCE COMMITTEES IN ENHANCING PUBLIC PARTICIPATION**

All communities in the Republic of Kenya shall have an overriding interest in ensuring that the natural resource base is not abused, mis-used or over-exploited to their detriment.

In particular, the Communities in whose jurisdiction natural resources situate shall play a fundamental and active role in ensuring that the harnessing, exploitation and use of the resource therein shall not be to their detriment.

To this end, the Policy proposes that there be established County Natural Resource and Community Committees with the clear mandate and task of ensuring proper, transparent and objective protection, conservation,

management and use of the natural resources situate within their respective jurisdictions.

### **13. IMPLEMENTATION STRATEGY**

The policy includes an implementation plan for immediate action, the same having been duly recognized as urgent and critical. This plan may be adjusted from time to time to suit the particular circumstances but must be so adjusted only in accordance with established criteria in the realm of national objectives for broader economic and national development. The Plan establishes a self-executing Review of the Policy framework after every five (5) years, to bring the contents and philosophy thereof in congruence with emerging trends and issues appurtenant thereto. In the overall Implementation Plan Matrix, the National Land Commission will execute the functions of an Implementing Agency.

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10, 2012

THE DRAFT NATURAL RESOURCES DEVELOPMENT AND  
MANAGEMENT POLICY, 2012

DRAFT