



Abridged Version of the Written Submissions on

The Petroleum (Exploration, Development and Production) Bill, 2017 (page 1- 10)

And

The Energy Bill, 2017 (page 11- 17)

## Petroleum (Exploration, Development & Production) Bill, 2017

Kindly note that the words in italics and underlined in the Proposal columns are the proposed additions, while the italicised words that are struck through are the proposed deletions.

Clause	Proposal	Justification
<p>9 (3)</p> <p>In its effort to promote upstream petroleum operations and investments, the national government shall facilitate access to land for exploration activities in accordance with the Constitution and any other written law</p>	<p><b>Addition</b></p> <p><i>In its effort to promote upstream petroleum operations and investments, the national government <u>through the Ministry in charge of land, the National Land Commission and the Council of Governors</u> shall facilitate access to land for exploration activities in accordance with the Constitution and any other written law.</i></p>	<p>The inclusion of the:</p> <p><u>Cabinet Secretary in Charge of Land</u>; the CS is mandated to provide policy direction on management of land<sup>1</sup></p> <p>The <u>National Land Commission</u>; the NLC is given a constitutional mandate (Article 67) in matters relating to land. Additionally, the NLC has the technical capability and legal mandate to provide advice on conversion of land as well as to supervise activities in ecologically sensitive areas<sup>2</sup>. with and</p> <p>The <u>Council of Governors (CoG)</u>; the CoG will be helpful regarding ensuring a smooth transition and smooth working environment for various companies and contractors as well as assist in ensuring adequate public participation and public information on planned activities.</p>
<p>12(5) Establishment of the National Upstream Advisory Committee.</p>	<p><b>Addition</b></p> <p><i>“The Advisory Committee shall, in co-opting members to sit in the Committee, ensure that the</i></p>	<p>To conform with Constitutional provisions</p>

<sup>1</sup> Land Act, 2012 Section 6

<sup>2</sup> Land Act, 2012 Section 9 & 12

Clause	Proposal	Justification
Page 1012 “The Advisory Committee shall, in co-opting members to sit in the Committee, ensure that the persons co-opted have the necessary knowledge and experience in the matters under consideration by the Committee	<i>persons co-opted have the necessary knowledge and experience in the matters under consideration by the Committee <u>and meet the requirements set in Chapter 6 of the Constitution.</u>”</i>	
15: Functions of the Upstream Petroleum Regulatory Authority	<p><b>Addition</b></p> <p><i><u>(x) provide such information concerning upstream petroleum operations in Kenya to the general public on request and its website ;</u></i></p> <p><i><u>(y) develop guidelines on how public consultations will be done with local communities when developing infrastructure and operations for the upstream petroleum sector</u></i></p>	<p>It is vital that the Authority provide direction on how the Kenyan public will have access to information.</p> <p>Proactive disclosure is envisioned in Article 35 (3) of the Constitution and Section 5 of the Access to Information Act, 2016.</p> <p>Aside from the legal requirement, in order to build trust with the Kenyan public and avoid sensational false stories, it would be best for the Authority to provide information.</p>
16 (2) The Director Public Prosecutions may, on the request of the Authority, -appoint any officer of the Authority or an advocate of the High Court to be a public prosecutor for the purposes of prosecuting offences under this Act.	<p><b>Deletion</b></p> <p><i><del>The Director of Public Prosecutions may, on the request of the Authority shall, -appoint any officer of the Authority or an advocate of the High Court to be a public prosecutor for the purposes of prosecuting offences under this Act.</del></i></p>	<p>To ensure compliance and accountability with the law, the office of the DPP ought to have a specialised officer who monitors and deals with the Authority and other actors in the upstream sector.</p>
35 How the Authority Shall Exercise its Powers and Functions	<p><b>Addition</b></p> <p><i><u>(g) Ensure compliance with environmental laws and upholding of human rights by the contractors towards their employees and the local communities. This shall be done in conjunction with the National Environment Management</u></i></p>	<p>The Authority should also be tasked with ensuring that environmental laws and human rights are upheld. In the oil and gas industries of most developing countries, environmental harm and human rights abuses occur because there is little communication between the regulating government agencies.</p>

Clause	Proposal	Justification
	<u>Authority and the Kenya National Commission on Human Rights</u>	Ensuring protection of the environment and people will ensure a more prosperous sector and avoid civil strife that is mostly associated with Oil and Gas <sup>3</sup> .
45(1) Negotiation, award and execution of petroleum agreements. “Subject to section 50 the Cabinet Secretary shall negotiate, award and execute a petroleum agreement, on behalf of the national government, in the form prescribed in the Second Schedule to this Act.” Page 1030	<b>Addition</b>  <i>“Subject to <del>section 50</del> <u>section 58</u> the Cabinet Secretary shall negotiate, award and execute a petroleum agreement, on behalf of the national government, in the form prescribed in the Second Schedule to this Act.”</i>	The correct provision should be referred to section 50 speaks to the grant of a non-exclusive permit while section 58 speaks to ratification by parliament. The Cabinet Secretary’s decisions should be overseen by parliament as Article 71 gives parliament the mandate to ratify agreements relating to natural resources.
48 Operator	<b>Addition</b>  <i><u>(3) The public shall be informed of the changes to the operator by way of a gazette notice, a newspaper of nationwide circulation and a radio of local coverage in the area in which the operations are</u></i>	Informing the local community of a change in operator will assist in managing expectations and help them understand how to engage with the new operator.
50 Grant of a Non-exclusive permit	<b>Addition</b>  <i><u>(4) The Authority may issue an applicant with a non-exclusive exploration permit, and the Authority may impose such conditions as it may deem fit on the permit including the requirement for an environment sensitivity analysis in conjunction with the National Environmental Management Agency Authority.</u></i>	A sensitivity analysis should be presented to NEMA to ensure that the operators’ activities will not negatively affect the environment.  In this case, a sensitivity analysis is preferred to a Project Report or Environmental Impact Assessment Report as it is cheaper to do and will help strike the right balance between creating a good

<sup>3</sup> Abigail Anongos, *Pitfalls & Pipelines* (Tebtebba Foundation 2012) page 19 accessed at [https://www.iwgia.org/images/publications//0596 Pitfalls and Pipelines - Indigenous Peoples and Extractive Industries.pdf](https://www.iwgia.org/images/publications//0596_Pitfalls_and_Pipelines_-_Indigenous_Peoples_and_Extractive_Industries.pdf)

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		business environment for investors and protecting the environment for Kenyans.
51 (9)	<p><b>Additions/ Modifications</b></p> <p><i>(9) The Authority shall, in carrying out public participation under subsection (8)—</i></p> <p><i>(a) conduct the public participation through such means as may be necessary to ensure that the citizens within the respective county and the relevant stakeholders --</i></p> <p><i>(i) are informed of any decision to be undertaken under this Act which affects them;</i></p> <p><i>(ii) have sufficient notice <u>of at least 30 working days</u> of any decisions to be made or permits to be issued which may affect them; and</i></p> <p><i>(iii) have an opportunity to obtain information with respect to any permit issued or decision made under subparagraph (i) or to submit their concerns or any information that they may have with respect to the issue under consideration- the public shall have <u>at least 30 working days to submit their comments and receive notice of this via a Gazette notice;</u></i></p> <p><i>(b) conduct the public participation through such fora as may be necessary for effective public participation under paragraph (b) including the structures for citizen participation established by a county, government pursuant to section 91 of the County Governments Act;</i></p> <p><i>(c) publish any notices required for the purpose of informing the public through such forums including <u>at least one newspaper and one radio station</u> of local circulation within the local community which is to be affected by the issue under consideration. <u>Further, a notice shall be published in the Kenya</u></i></p>	<p>We propose that the period for public participation should be stated, this will ensure that communities, the private sector and the government know their responsibilities and when they are expected to give their views.</p> <p>The suggestions are modelled on the Access to Information Act</p>

Clause	Proposal	Justification
	<u>Gazette as well as one newspaper of nationwide circulation.</u>	
53 Transfer of Interest in Petroleum Agreement	<b>Addition</b>  <u>(13) Once a transfer of interest in a petroleum agreement has been concluded the Cabinet Secretary shall ensure publication of the details of the transfer including the new entrant in a notice in the Kenya Gazette and two newspapers of nationwide circulation</u>	This addition is intended to ensure that the public is notified of the changes. Providing information helps build the confidence of the public and results in greater cooperation especially from the affected communities and the public in general.
55 Notification Prior to Abandonment	<b>Addition</b>  <u>(4) Once the permission of the Authority has been obtained. The Contractor shall cause to be published a notice in a newspaper of local circulation, an announcement in the local radio station and a notice in the Kenya Gazette of the abandonment.</u>	It is important that the public is notified in order to manage expectations and not feel that either the government or contractor has ulterior motives.
Clause 58 (1) & 2  (1) The Cabinet Secretary shall, within thirty days of the approval of a field development plan submitted in accordance with the terms 'of a production sharing contract entered into under this Act, submit the production Sharing contract together with the field development plan to Parliament for ratification in accordance with-Article 71 of the Constitution.	<b>Addition and Deletion/ Clarification</b>  <u>(1) The Cabinet Secretary shall, within thirty days of the approval of a field development plan submitted in accordance with the terms 'of a production sharing contract entered into under this Act, submit the production sharing contract together with the field development plan to Parliament for ratification of the production sharing contract in accordance with-Article 71 of the Constitution.</u>	The Production Sharing Contract (PSC) is the document that allows investors to explore, produce and develop infrastructure for the downstream oil and gas sector <sup>4</sup> . In essence, it is the document that signifies the beginning of the relationship between the government and the oil and gas company.  The field development plan, however, is a technical document that sets out the mode of operation of the oil or gas company.

<sup>4</sup> Allen & Overy, 'Guide To Extractive Industries Documents – Oil & Gas' (World Bank Institute Governance for Extractive Industries Programme 2013) <http://www.eisourcebook.org/cms/Jan%202014/Guide%20to%20Petroleum%20Documents.pdf> page 3

Clause	Proposal	Justification
<p>(2) Parliament shall, within sixty days after receipt of the production sharing contract and the field development plan under sub-section (1)—</p> <p>(a) ratify the production sharing contract and the field development plan; or</p> <p>(b) refuse to ratify the production sharing contract and the - field development plan and refer the documents back to the Cabinet Secretary for reconsideration stating the reasons for the refusal.</p>	<p><i>(2) Parliament shall, within sixty days after receipt of the production sharing contract and the field development plan under sub-section (1)—</i></p> <p><i>(a) ratify the production sharing contract <del>and the field development plan</del>; or</i></p> <p><i>(b) refuse to ratify the production sharing contract <del>and the - field development plan</del> and refer the documents back to the Cabinet Secretary for reconsideration stating the reasons for the refusal.</i></p>	<p>Thus we submit that Article 71 refers to the grant of a right or concession for exploitation of Oil and Gas. Article 71 (1) (a )states</p> <p><i>(1) A transaction is subject to ratification by Parliament if it—</i></p> <p><i>(a) involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and</i></p> <p>In light of the above, we contend that Article 71 relates to the production sharing contract and not the field development plan. Thus clause 85 (1) &amp; (2) should be reworded as indicated in order to ensure that the PSC is ratified independent of field development plan.</p>
<p>Clause 58 (3)</p> <p>Parliament shall, in carrying out its obligation under sub-section (2), undertake public participation.</p>	<p><b>Addition/ Clarification</b></p> <p><i>(3) Parliament shall, in carrying out its obligation under sub-section (2), undertake public participation by providing 30 working days within which the public shall be invited to submit memoranda on the proposed Product Sharing Contract.</i></p>	<p>We propose a clarification to the section as it will ensure that parliament and the people of Kenya know what to expect and how public participation will be carried out.</p> <p>The 30 days is modelled on the provisions in the Access to Information Act on how long an official should take before responding to a request.</p>
<p>Clause 58 (5)</p> <p>If Parliament does not make a decision under sub-section (2) within ninety days, the production sharing contract and the field development plan shall be deemed to have been ratified.</p>	<p><b>Deletion</b></p> <p><i><del>(5)If Parliament does not make a decision under sub-section (2) within ninety days, the production sharing contract and the field development plan shall be deemed to have been ratified.</del></i></p>	<p>Article 71 gives parliament the mandate to ratify agreements relating to natural resources. This is based on the fact that Oils and Mineral Oils are classified as public land (Article 62 (f)). Public land vests and is held by the national government in trust for the people of Kenya (Article 62 (3)).</p>



Clause	Proposal	Justification
		Thus providing for automatic ratification of petroleum agreements takes away the constitutional mandate of parliament to manage these resources and can easily be subject to abuse.
77 (3) Local Content Requirements	<p><b>Addition</b></p> <p><i>(i) consultancy services;</i>  <i>(j) construction services;</i>  <i>(k) hospitality services;</i>  <i>(l) transport services;</i>  <i>(m) security services;</i>  <i>(n) clearing and forwarding services; and</i>  <i>(o) inspection services.</i></p>	We propose the inclusion of the requirements in line with the proposals in the Energy Bill, 2017 and additionally the Kenya Extractive Industries Development Programme, 'Extractives Industry Local Content Early Gap Analysis Summary Report' of September 2015 explores the different categories of services that can be sourced locally. The table on page 31 sets out the information <sup>5</sup> .
85 Sharing of Petroleum Resource	<p><b>Addition of subclause</b></p> <p><i>(5) The County's and community's share of profits derived from the upstream petroleum operations shall be transferred to the County and community without undue delay and without deduction</i></p>	This conforms with Article 219 of the Kenyan Constitution
85 2 & 3	<p><b>Deletion</b></p> <p>(2)The county government's share shall be equivalent to twenty percent of the national government's share:  <del><i>Provided that the amount allocated in accordance with this subsection shall not exceed the amount allocated to the county government by Parliament in the financial year under consideration.</i></del></p>	<p>We contend that the caps included on the revenue allocated to the county and local communities should be deleted. This is because:</p> <p>i. The injection of investment into oil-rich counties will skew the poverty and development factors which are part of the revenue allocation formula<sup>6</sup>.</p>

<sup>5</sup>Accessed at [https://www.adamsmithinternational.com/documents/resource-uploads/Extractives\\_Local\\_Content\\_in\\_Kenya.pdf](https://www.adamsmithinternational.com/documents/resource-uploads/Extractives_Local_Content_in_Kenya.pdf)

<sup>6</sup> Commission of Revenue Allocation, 'Revenue Allocation Formula,' <http://www.crakenya.org/information/revenue-allocation-formula/>



Clause	Proposal	Justification
	<p>(3)The local community's share shall be equivalent to five percent of the Government's share and shall be payable to a trust fund managed by a board of trustees established by the county government in consultation with the local community:</p> <p><del><i>Provided that the amount allocated in accordance with this subsection shall not exceed one-quarter of: the amount allocated to the county government by Parliament in the financial year under consideration.</i></del></p>	<p>ii. The increased investment by the oil and gas industry skews the poverty and development factors. Consequently, oil rich counties receive a smaller share of revenue from the national government.</p> <p>We contend that the caps would result in more harm to oil-rich counties which have to deal with the social and economic impacts of the oil and gas industry on a daily basis.</p>
<p>95 Emergency Preparedness Measures</p>	<p><b>Addition</b></p> <p><u><i>The Contractor shall ensure that the Authority, the National Environment Management Agency, the Council of Governors and the relevant local communities are involved in the preparation of emergency preparedness measures. Further, the contractor shall communicate the responsibilities of each party when an emergency occurs.</i></u></p>	<p>The inclusion of the following institutions is proposed for the reasons stated below:</p> <p>National Environment Management Agency- is in charge of protection of the environment and can liaise with the relevant lead agencies if need be</p> <p>the Council of Governors- at the county level it is vital to coordinate with the County government as they have a better understanding of the context</p> <p>and the relevant local communities- it is vital that communities know what to do in case of emergencies this will go a long way in reducing casualties and ensuring that the community understands and complies with directions from relevant safety personnel</p>
<p>100 Access to Land</p>	<p><b>Addition</b></p> <p><i>A person who wishes to enter upon any land, other than that person's land to —</i></p>	<p>We propose that information should be disseminated through a radio of local coverage as this ensure wider coverage.</p>

Clause	Proposal	Justification
	<p>(a) undertake exploratory activities relating upstream petroleum operation; or</p> <p>(b) carry out a survey of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld:</p> <p>Provided that where the owner cannot be traced, the applicant shall give thirty days' notice, by public advertisement, in at least two newspapers of nationwide circulation, <u>a radio of local coverage and the Kenya Gazette</u> and through such other appropriate forum so as to ensure that the information is widely -publicized within the local community in which the land exists</p>	
107	<p><b>Addition between Subsection 2 and 3 of Clause 107</b></p> <p><u>The contractor when working in an ecologically sensitive area shall consult and obtain the permission of the Authority, the National Land Commission, the National Environment Management Authority (NEMA) and one of the following bodies depending on the nature of the area</u></p> <ul style="list-style-type: none"> <li>i. <u>Kenya Water Towers Agency (KWTA)</u></li> <li>ii. <u>Kenya Wildlife Service (KWS)</u></li> <li>iii. <u>Kenya Forest Service (KFS)</u></li> <li>iv. <u>Kenya Forest Research Institute (KEFRI)</u></li> </ul> <p><u>The contractors shall perform its work as swiftly as possible and leave the area with only the necessary equipment. The contractor shall at all time be accompanied by an official of the National Environment Management Authority (NEMA)</u></p>	As Kenya has multiple ecologically diverse regions, it is vital that the relevant protection agency is consulted in addition to NEMA and the NLC which have mandates to ensure protection and the sustainable use of ecologically sensitive areas.

Clause	Proposal	Justification
	<p><u>during the construction period. If the contractor needs to inspect the facility, they shall be escorted by an official of any of the bodies listed above</u></p>	
<p>118 Cabinet Secretary may make recommendations</p>	<p><b>Addition</b></p> <p><u>(nn) The Cabinet Secretary in consultation with the Authority and the Commission on Administrative Justice shall cause the following regulations and guidelines to be published:</u></p> <ul style="list-style-type: none"> <li>(a) <u>The manner in which information on upstream petroleum can be accessed</u></li> <li>(b) <u>The method of public consultations and participation</u></li> <li>(c) <u>A grievance redress process to the Authority</u></li> </ul>	<p>In order to contribute to the inclusion of the National Value of public participation envisioned in Article 10 and the Right to Access Information (Article 35).</p> <p>We propose that the Cabinet Secretary should make regulations regarding public participation.</p>

## Energy Bill, 2017

Kindly note that the words in italics and underlined in the Proposal columns are the proposed additions, while the italicised words that are struck through are the proposed deletions.

Clause	Proposal	Justification
2 "local community" means a people living in a sub-county within which an energy resource under this Act is situated and are affected by the exploitation of that energy resource;	<b>Addition/ Streamlining</b>  <i><u>"Local Community" means a consciously distinct and organised group of users of land who are citizens of Kenya and share any of the following attributes—</u></i> <i><u>(a) common ancestry;</u></i> <i><u>(b) similar culture or unique mode of livelihood;</u></i> <i><u>(c) socio-economic or other similar common interest;</u></i> <i><u>(d) geographical space;</u></i> <i><u>(e) ecological space; or</u></i> <i><u>(f) ethnicity.</u></i> <i><u>This is restricted to a sub-count(y)/(ies) within which an energy resource under this Act is situated and are affected by the exploitation of that energy resource.</u></i>	In order to streamline the meaning of local community in the legal framework, it is vital that we stick to the definition in Section 2 of the Community Land Act, 2016 which is in accordance with Article 63 of the Constitution
72: All unexploited renewable energy resources under or in any land vests in the National Government subject to any rights which, by or under any written law, have been or are granted or recognised as being vested in any other person.	<b>Addition/ Clarification</b>  <i><u>"All unexploited renewable energy resources under or in any land vests in the National Government and is administered on behalf of the people of Kenya-subject to any rights which, by or under any written law, have been or are granted or recognised as being vested in any other person</u></i>	This clarification is important as natural resources are classified as land in Article 260. Article 62 (2) states that public land vests in the National Government and is administered on behalf of the people of Kenya thus it would be vital for the act to be clear on this issue.
76 All un-extracted geothermal resources under or in any land shall vest in the National Government.	<b>Addition/ Clarification</b>  We suggest that Clause 76 should state: <i><u>'All un-extracted geothermal resources under or in any land</u></i>	This clarification is important as natural resources are classified as land in Article 260. Article 62 (2) states that public land vests in the National Government and is administered on

Clause	Proposal	Justification
	<i>shall vest in the National Government and shall be administered on behalf of the people of Kenya."</i>	behalf of the people of Kenya thus it would be vital for the act to be clear on this issue.
79 Applying for a Geothermal Resource License	<p><b>Addition of subsections in between subclause 1 and subclause 2</b></p> <p><i><u>The Cabinet Secretary shall, on receipt of the application, publish notice of the pending application in a newspaper of nationwide circulation and the Kenya Gazette at the applicant's expense. The Cabinet Secretary shall allow for 30 working days to receive comments from the public with regards to the application</u></i></p> <p><i><u>Once the Cabinet Secretary Grants a License the decision shall be communicated to the general public by way of a notice in a newspaper of nationwide circulation and the Kenya Gazette</u></i></p>	In order to ensure the realisation of the national value and principle of public participation envisioned in Article 10 of the Constitution, it is vital that the Cabinet Secretary should publish a notice and also allow for 30 working days within which to receive comments.
80 (2) Where any by-product obtained in the production of geothermal resources may be reclaimed for further use or sale and is a mineral within the meaning of the law governing mining, the licensee shall exploit the same without requiring an additional licence notwithstanding the provisions of any other written law.	<p><b>Addition- Alignment with Mining Act</b></p> <p><i><u>Where any by-product obtained in the production of geothermal resources may be reclaimed for further use or sale and is a mineral within the meaning of the law governing mining, the licensee shall extract and sell the mineral but shall apply for a mining license or permit under the Mining Act, 2016 within 3 months of discovering and extracting the resource, this application and sale shall be done in accordance with the provisions of other written law.</u></i></p>	<p>This provision contravenes the Mining Act, 2016 and the Minerals and Mining Policy. In order to ensure adherence to the law, it is vital that proponents should apply for a mining license.</p> <p>However, it is vital to create a good business environment the licensee should have the first option to apply and get a mining license.</p>
91 Regulations for the Feed-in Tariff System	<p><b>Addition</b></p> <p><i><u>The Cabinet Secretary shall within one year and upon recommendation of the Commission, make</u></i></p>	It is vital that there is a definite timeline for regulations so as to ensure a good working environment for government officials, the private sector and communities.

Clause	Proposal	Justification
	<i>regulations necessary for the administration and implementation of the feed-in-tariff system.</i>	
92 Regulations under IV on Renewable Energy	<b>Addition of a subclause</b>  <i><u>(s) prescribing the type of information available to the public under the Access to Information Act, 2016 and the procedure for ensuring public participation in the decision to grant a Geothermal Resource License.</u></i>	In order to manage expectations and ensure access to information, it is vital that there be regulations regarding access to information and ensuring public participation.
117 (1)  A person engaged in petroleum business shall comply with the applicable environmental, health and health and safety laws.	<b>Addition</b>  <i>A person engaged in petroleum business shall comply with the applicable environmental, health and health and safety laws. <u>In this regards the person shall make an environmental deposit bond as provided for in Section 28 of the Environmental Management and Co-ordination Act, 1999</u></i>	It is vital that an environmental deposit bond is made so as to ensure that the state will not have to bear the burden of cleaning up when a disaster occurs. The example of the oil pipeline spillage in Thange is a prime example of how environmental disasters can occur, and companies (even state cooperation) can take a lot of time to process claims, yet the State will have to ensure that citizens receive the health care needed and clean up where they can <sup>7</sup> .
117 (2)	<b>Addition</b>  <i>In the event of a fire, explosion, oil spill, injury or fatality occurring in the course of operating a petroleum logistics facility, transportation or sale of petroleum, either by accident or through negligence, the operator or person transporting or selling the petroleum shall forthwith clean up the polluted or damaged environment, at the operator's own expense, to the satisfaction of the licensing authority, the <u>national body in charge of environmental management and any other relevant authority.</u></i>	It is vital to include the national body in charge of environmental management NEMA, in order to ensure proper oversight and to coordinate with other state entities.

<sup>7</sup> Nation Newspaper, 'KPC pays Thange Oil spill victims Sh11m,' <https://www.nation.co.ke/counties/makueni/KPC-pays-Thange-Oil-spill-victims-Sh11m/1183294-4003294-oylwsf/index.html>

Clause	Proposal	Justification
121 Regulations for Downstream Petroleum	<p><b>Addition of a subclause</b></p> <p><u>prescribing the type of information available to the public under the Access to Information Act, 2016 and the procedure for ensuring public participation in the decision in the Downstream Petroleum Sector.</u></p>	It is vital to ensure that there is regulation that facilitates the interaction between the government, private company and contractor
126 Factors to be considered when reviewing an application	<p><b>Addition</b></p> <p>Clause 126 (1)(a): <u>the impact of the undertaking on the social, cultural or recreational life of the community including whether the affected community is a marginalised community</u></p> <p>Clause 126 (1)(f): <u>economic and financial benefits to the country or area of supply of the undertaking-including the microeconomic impact to the locality</u></p>	We propose that the status of the affected community and the microeconomic impact of projects should be taken into account. This will ensure that the project does not cause an unnecessary strain on the local community- and in the event that it does then the community also benefits proportionately.
133 Register of Licenses and Permits	<p><b>Addition</b></p> <p><u>The Commission shall maintain a register of license and permits of licenses on its website.</u></p>	In the spirit of Article 10 and Article 35 (3) and, we submit that the licenses and permits should be available on the Commission's website in the same way that mining licenses and permits are available on the Mining Cadaster which is accessed through the Ministry of Mining's website.
142 (2)	<p><b>Addition</b></p> <p><u>In the event of a fire, explosion, oil spill, injury or fatality occurring in the course of operating a petroleum logistics facility, transportation or sale of petroleum, either by accident or through negligence, the operator or person transporting or selling the petroleum shall forthwith clean up the polluted or damaged environment, at the operator's own expense, to the satisfaction of the licensing authority and the National body in charge of environmental management.</u></p>	It is vital that NEMA is involved owing to its regulatory function. Further, the precautionary principle should be applied as it will ensure that safer alternatives and decisions are made by private actors. Finally, the polluter pays principle is vital as it ensures that the government does not have to cover for the operator's wrongdoing neither does the local community suffer disproportionately.



Clause	Proposal	Justification
	<u>Further, the precautionary principle and polluter pays principle shall be applied in the event of pollution regardless of whether or not it is accidental</u>	
144 Regulations for the use of Coal for Energy Production	<p><b>Addition</b></p> <p><i>(e) environmental, health and safety standards associated with the handling, transportation, storage and use of coal <u>in collaboration with the National Environmental Management Agency, the Ministry of Health and the Council of Governors</u></i></p> <p><i>(h) development and coordination of a National coal pollution response plan including measures to prevent coal pollution and a mechanism for compensation in the event of coal pollution <u>in conjunction with the National Environmental Management Agency and the Council of Governors</u></i></p> <p><i>(m) public participation and access to information regarding coal extraction and the usage of coal for energy production</i></p> <p><i>(n) Citizen participation in monitoring and enforcement</i></p>	As explained it is vital that the relevant governmental lead agencies are involved. Further, transparency must be promoted in order to ensure a peaceful climate.
199 Permission to Survey Land for Energy Infrastructure	<p><b>Addition</b></p> <p><i>(b) carry out a survey of the land for the purposes of paragraph (a );</i></p> <p><i>Shall seek the prior <u>and informed</u> consent of the owner of such land, which consent shall not be unreasonably withheld</i></p> <p><i>Provided that where the owner cannot be traced, the applicant shall given fifteen days’ notice, by public advertisement, in at least two newspapers of nationwide circulation, <u>an announcement in a radio station of local coverage for a period of two successive weeks and a notice in the Kenya Gazette</u></i></p>	This addition is aimed at promoting transparency in the sector

Clause	Proposal	Justification
201 (3)	<p><b>Addition and Substitution</b></p> <p><i>Where the owner of the land cannot be traced the applicant shall give thirty days' notice prior to the development of energy infrastructure on the land by way of public advertisement in at least two newspapers of nationwide circulation <u>an announcement in a radio station of local coverage for a period of two successive weeks and a notice in the Kenya Gazette:</u></i></p> <p><i>Provided that no development shall commence unless the amount of compensation payable, if any as determined by the <del>relevant government agency responsible for the management of that land</del> <u>National Land Commission in conjunction with a representative of the Governor of the relevant County,</u> has been deposited into a special compensation fund held by the said agency.</i></p>	<p>It is vital that information is disseminated through the radio and Kenya Gazette in addition to the newspapers.</p> <p>Further, the NLC and County Governments should be included in making the decision for compensation. This decision should also be based on the relevant land law<sup>8</sup>.</p>
204 (2)	<p><b>Addition and Substitution</b></p> <p><i>Where energy infrastructure is removed, the surface of the land shall forthwith be restored to its former condition as far as possible and in default thereof restoration <del>may</del> <u>shall</u> be carried out by the <del>owner of the land licensee,</del> and the costs thereof shall be recoverable from the licensee</i></p>	<p>The licensee should be responsible for removing energy infrastructure and restoration. This cost should not be passed on to the owner of the land who has already lost some of the value of the land.</p>
209	<p><b>Addition</b></p> <p><i>The Cabinet Secretary may, subject to the provisions of subsection (3) and having taken into consideration of the recommendations made by <u>the National Land</u></i></p>	<p>The NLC in the Land Act, 2012 Section 11 is tasked with the protection of ecologically sensitive areas thus will be vital in the declaration of energy resource areas.</p>

<sup>8</sup> As at 14<sup>th</sup> March 2018 the Land Value Index Laws (Amendment) Bill, 2018 had been published for public participation. Once this Bill is passed into an Act the law on Compulsory Acquisition will apply.

Clause	Proposal	Justification
	<p><i>Commission and other implementing agencies that an area is suitable for the conservation and management of energy resource or is suitable for the promotion of energy development projects, by order published in the Gazette, declare such area as an energy resource area.</i></p>	
<p>Miscellaneous Provisions Part X</p>	<p><b>Addition</b></p> <p><i>The Cabinet Secretary in consultation with the Commission and the Commission on Administrative Justice shall cause the following regulations and guidelines to be published:</i></p> <ul style="list-style-type: none"> <li><i>(a) The manner in which information can be accessed from the Commission</i></li> <li><i>(b) The method of public consultations</i></li> <li><i>(c) A grievance redress process to the Commission</i></li> </ul>	<p>We propose that the Cabinet Secretary should make regulations that allow for public participation (Article 10 of the Constitution) and access to information (Article 35)</p>