

# Executive summary

## Context of the Programme

Conservation and sustainable management of forests is a critical concern for the Government of Kenya, in particular because it has direct bearing on the protection of water towers and climate change mitigation and adaptation. This concern is reflected in major policy instruments, including the Constitution of Kenya 2010 and Kenya Vision 2030, the country's development blueprint. The Constitution mandates the State to achieve and maintain a tree cover of at least ten percent of Kenya's land area, while water towers protection is a flagship project under Vision 2030. In addition, the Water Towers Agency was established to spearhead the protection of water towers, and a Climate Change Directorate to spearhead climate change mitigation and adaptation.

Yet, forest conservation has historically been beset by a host of challenges. Conflicting policy imperatives have seen government-instituted conversion of forest land to settlement and other uses. Historical claims over forest land by indigenous forest communities such as the Ogiek in the Mau on Mount Elgon, and the Sengwer Cherangani Hills have resulted in litigation between the government and these communities, in local and regional courts, and have periodically engendered conflict and insecurity amid claims of human rights violations associated with violent evictions from forests. Managing competing demands on forest resources has proven challenging in a context of increasing population growth. Illegal logging, unregulated charcoal production and encroachment into forest land by neighbouring farming communities all undermine forest conservation efforts.

These challenges have been exacerbated by climate change, which in recent years has manifested itself in increased extremes of weather such as droughts and floods. When these events occur, concerns about forest conservation gain momentum, including in political circles, often leading to knee-jack responses that have failed to achieve much by way of long-term impact. The recent establishment of a Task Force on Protection of Forests and Water Towers is one such example, and adds to a long list of official inquiries that have been instituted over the years to address forest conservation.

The Constitution of Kenya 2010, and the new governance context it introduced, offers opportunities to address the challenges of forest conservation, especially through innovative approaches to forest conservation that reconcile conservation with livelihoods needs of communities and human rights. The Constitution privileges participatory, devolved approaches to governance, environmental conservation and natural resource management in addition to recognizing community forests, ancestral lands and lands traditionally occupied by hunter-

gatherer communities as community land. It devolves implementation of forestry policy to county governments. These principles are also integrated in the Forest Conservation and Management Act, 2016.

The partnership between the Kenya Government and the EU through the WaTER Programme offers an opportunity to reconcile conservation and human rights and livelihoods of indigenous people living within the water towers and those of people in the lower catchment. Devolved forest management has potential to be more efficient, effective and sustainable than the current approaches.

## The Programme

The Water Tower Protection and Climate Change Adaptation (WaTER) Programme started in September 2014 with the signing of the Financing Agreement between the Government of Kenya (GoK) and the European Union (EU). Three grant contracts were signed (components 4 and 2, then 1) while Component 3 contracts (with 11 counties) are being prepared at the time of this Mid-Term Review (MTR). The four components of the Programme are:

1. **Component 1, Systems and capacity** – Technical assistance (TA) contract signed with the AESA consortium nearly three years after the Financing Agreement, in July 2017.
2. **Component 2, Management frameworks to improve Eco System Services** - signed in January 2016 with KFS, KWS and CCD, suspended in January 2018.
3. **Component 3, Landscape engagement** – contracts for 11 counties, not yet signed.
4. **Component 4, Science to inform community action and policy decisions** - signed in in September 2015 with KEFRI, suspended in January 2018.

## Key purpose and focal issues of the review

The global objective of the mid-term review is to provide the Government of Kenya and the European Union with an independent and reliable assessment about the overall performance of the WaTER Programme. The evaluation will determine to what extent the key WaTER components achieve the intended overall objective, and make appropriate recommendations. A specific emphasis will be placed on strengthening the human rights aspects of the WaTER Programme.

The specific objectives of the review are:

- a. Assess the situation to date of the Water Programme against the five DAC evaluation criteria to determine the relevance and fulfilment of objectives, developmental efficiency, effectiveness, impact and sustainability of efforts;
- b. To assess the implication of the ruling by the African Court on Human and People's Rights on the implementation process of the WaTER programme and make recommendations to reorient/adapt the Water programme (including the components to support KFS and KEFRI), including analysis of unintended negative human rights impact and recommendations on mitigation measures, if required, if required;
- c. To assess specific parts of the programme and make recommendations regarding
  - The ongoing preparation of Environmental Action Plans by counties and the FPIC process
  - eventually reorient some activities and associated budgets.
  - efficient use of the TA component to raise impact.
  - the coordination system of the programme

- d. Identify key success factors, lessons learnt, and areas to strengthen in order to improve on the various WaTER components and propose practical recommendations for follow-up actions.
- e. Assess the impact of the delays on the implementation of the programme.
- f. The experts have to participate in the Fact Finding Mission to the Embobut Forest if the National Authorities have given clearance for the Mission.
- g. To perform an in depth analysis of the conflicts related to the indigenous Sengwer Community in the Embobut Forest and to develop a conflict resolution strategy.

The Embobut Sengwer conflict analysis (g) is being carried out by a parallel study; subject of a separate report.

## Main findings and conclusions

### **1. The Programme formulation failed to take into account and integrate important developments and experiences that could have better informed the design of interventions**

It is our conclusion that all stages of the preparations of the programme were affected by this. Had the Programme formulation been more thorough, it could have pre-empted some of the conflicts and controversies that have subsequently beset the Programme's implementation. But also, had the programme formulation been more thorough, it would have been more in line with highly relevant developments, including:

- a. devolution: the emergence of counties and related new policies and legislation, including stipulations in the Constitution, and legislation on land governance and county level Environmental Action Planning;
- b. relevant reports and court rulings including Waki and Truth, Justice and Reconciliation Commission (TJRC) reports, and the African Commission on Human and People's Rights (ACHPR) ruling (even though the ACHPR ruling was delivered after the signing of the Financing Agreement, the case was then pending before the Court and the issues that were being canvassed therein were in the public domain and should have been covered in the context analysis);
- c. lessons learned from similar projects that had faced similar challenges (World Bank NRMP, MFA Finland and IUCN project).

Furthermore, the stakeholder analysis had important gaps. For instance, it mostly failed to identify communities other than those who are members of Community Forest Associations (CFAs) or Water Resource Users Associations (WRUAs). These organisations have their value<sup>1</sup>, yet – especially in the case of CFA – they include a good number of more exclusive (fee-based) associations that do not represent entire communities, and their role is at times questioned. For example, where forest land (tenure) claims remain unresolved, and CFA work and obtain user rights in fenced-off rehabilitation areas, a forest dweller community can see it as encroachment). With a focus on CFA only, some communities may feel excluded from the Programme.

The risk analysis was incomplete and lacked proposals for adequate mitigation measures. For instance, while some Programme documents recognised the presence of forest dwellers and their resistance to Programme activities within protected areas, forest dwellers were not listed among the stakeholders, and no adequate consultations were conducted to understand their grievances and integrate mechanisms for responding to the same in the Programme.

### **2. The steering mechanism excluded major stakeholders, the TA Team came on board late and the coordination mechanism was not budgeted for**

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<sup>1</sup> From a value chain perspective, CFA mostly provide forestry-related labour services, for forests managed by KFS, in return for some user rights.

The steering mechanism was lacking adequate representation from counties, civil society and other relevant Ministries e.g. the National Land Commission (NLC). As a result, important opportunities were missed to make the steering mechanism more focussed on strategic issues and challenges. This also denied the Programme access to expertise and networks that would be useful in supporting capacity building within counties and communities on such diverse issues as stakeholder analysis, conflict mediation, human rights and land tenure.

Adding to this was the delayed commissioning of the Technical Advisory Team (TAT). The team only started working in earnest towards the end of 2017 and thus could do little to support coordination and assure coherence in the Programme. The delay in bringing the TAT on board also affected preparations for what is effectively the most important component in the Programme (and with more than 50% of its budget), namely, the support for 11 counties in their role to protect the water towers' ecosystems. And lastly, the TA itself seemed limited by a narrow context analysis of the Programme.

The coordination framework, being generally weak and without budget, was then not able to help the Programme to evolve; it went on to produce poorly formulated and somewhat disjointed parts, poor M&E (e.g. the indicator for eco-system services does not make sense), research that did not always serve the needs of its users, inadequate planning frameworks (e.g. HLPF), field work at times ineffective or duplicating, and workshops ending without action plans.

**3. The setting of the county grants within the scope of development of County EAPs provides an opportunity for counties and communities to strengthen participatory forest resource management**

The development of 'Community and/or Environmental Action Plans' as formulated for Component 3 would – with current county level planning provisions - mobilise programme resources to strengthen counties' Environmental Action Planning; this could make the impact of the programme more sustainable, and counties' engagement with communities offers a meaningful and structured way on participatory forest resource management through consultations informed by an adequate Free, Prior Information and Consent (FPIC) process, to find solutions for resource based conflicts in hotspot areas. In the implementation so far, however, county level Environmental Action Planning was not in the focus.

**4. WaTER has implemented useful information and awareness raising activities that can be built on further**

The positive outcomes in the area of information sharing and awareness raising that stand out and that could be further strengthened are:

1. some good reports are produced by KEFRI, describing biodiversity, indigenous forest dwellers' presence and their knowledge of the forest, and touching on land tenure and other issues that help explain some of the resource based conflicts;
2. there is potential for the efforts to improve information provision, *if* the adaptation of Innovative Approaches towards Rehabilitating the Mau Project (IARME) is to effectively serve information to Counties and communities, to support their planning for rehabilitation of Mt Elgon and Cherangani Hills water towers
3. efforts to raise climate change awareness in counties, schools and communities can be expected to have some positive impact.

With all the negative press, perhaps there is also an important, yet unintended positive outcome of the WaTER Programme: suspending most of the Programme has raised the profile of water towers, and today this contributes to highlighting the importance of addressing challenges of forest and resource based conflict. The Programme can contribute to a national debate on how forest

conservation should be done in Kenya, and make a case for introducing human rights and land tenure as dimensions of conservation.

**5. The Programme's impact on forest cover will depend on increased county ownership and integration of effective mechanisms for resolving local natural resource based conflicts**

Given the nature of the WaTER Programme and its interventions, it is too early to gauge impact and sustainability. It is evident however, that any significant positive impact of the Programme on the top indicator, namely forest cover, will largely depend on whether the Programme can be effective in helping counties to negotiate solutions for major degradation and conflict hotspots. The sustainability of such efforts shall ultimately depend on the extent to which they get integrated into County Environmental Action Plans (EAPs).

**6. While not causing the conflict, the Programme had unintended negative human rights impacts**

The Programme and its activities did not cause the conflict between KFS and the Sengwer but in failing to integrate within its interventions any efforts to address the conflict, it contributed, albeit inadvertently, to further marginalisation of some communities and therefore played into the hands of those advocating for Sengwer land rights. Where land grievances remain unaddressed, the Programme's technical support for forest block surveying and mapping, or even for fencing off degraded forest land or planting trees on wetlands, stand the risk of exacerbating existing conflicts.

**7. The ACHPR court ruling should inform the WaTER Programme**

The judgement of the African Commission on Human and Peoples' Rights (ACHPR) in the Ogiek case has direct implications for the WaTER Programme, as regards treatment of rights and interests of the Sengwer people. Although the cases are not identical, there are parallels between the claims of the Sengwer and those of the Ogiek as they were canvassed before the Court, and the response of the GoK and KFS to the claims by the Sengwer mirror their response to the Ogiek claims.

The African Court ruled in favour of the Ogiek and against the KFS and GoK on all the claims, confirming their claim of historical rights to land, as indigenous occupants of the forest, posing no risk to forest resources or water catchment. The court sided with the Ogiek claim that causes of degradation are encroachment by other groups, government excision of forest for settlement and ill-advised logging concessions. And it confirmed that eviction undermines rights established in Kenya's constitution and in international law.

The Court acknowledged that the Constitution of Kenya 2010 has changed the policy context for IPs in a significant way, but noted that there had been limited progress in enacting legislation to implement the Constitution. Although new laws have since been enacted, including the Community Land Act (2016) and the Forestry Conservation and Management Act (2016), implementation remains a challenge.

The judgement in the Ogiek case is now a relevant part of the context analysis, and should inform any reformulation of the Programme. The findings of the case should be taken into account in reviewing the claims of the Sengwer in so far as they are similar to what was asserted by the Ogiek in that case. At a minimum, the Programme should integrate more robust stakeholder mapping and analysis, assessment of land tenure implications for the Programme approach, and a human rights

assessment. The way the situation on the ground has evolved since December 2017 confirms the need to incorporate strategies for dealing with the concerns and challenges associated with resource based conflicts implicating indigenous communities. The suspension of components of the Programme provides an opportunity for addressing these shortcomings so that the Programme may make a positive contribution to the rights of indigenous peoples and forest conservation in Kenya.

## Recommendations

### *Overall recommendations*

**RO-1: The EU, in collaboration with the GoK and ensuring participation of all major stakeholders, should redesign the WaTER Programme to mainstream rights based approaches to forest conservation and align it to the new constitutional and governance dispensation in Kenya.**

The justification for this is that current Programme is not achieving original objectives. It is apparently not clearly contributing to increasing forest cover and water conservation. The design lacks a comprehensive context analysis that takes into account the full spectrum of stakeholders, as well as the changing context of forest conservation and management in Kenya in light of the policy and institutional transformations. This is exacerbated by weak strategic oversight and coordination. These weaknesses affect the entire Programme, including preparations for Component 3. The partial suspension of the Programme and recent developments around forest conservation (including the appointment of a Task Force on Protection of Forests and Water Towers) provide an opportunity for the Programme to reposition itself, to manage challenges that are affecting its implementation. However for this to materialise, real commitment is needed from the Government side to embrace a different approach to forest conservation inclusive of the forest communities.

Specific actions under this recommendation should include:

1. Hold a public event or workshop, to explain to key stakeholders (including donors) the efforts taken to address challenges and introduce the plan to redesign the Programme; this event could also be the first opportunity to share ideas on new forest conservation approaches and legislation;
2. Share the findings of the March 2018 human rights fact-finding mission to Embobut;
3. Conduct a comprehensive context and stakeholder analysis to inform risk assessment and integrate the outcome into reformulation of the Programme; the context analysis can be done more rapidly if it makes use of already existing documentation and -references (as for example in this report, Annex 5, and in the Embobut conflict analysis report; the documentation includes information from relevant NGOs), and provided that it creates a stage for more detailed context/stakeholder analysis at county level
4. Improve the M&E of the Programme
5. Continued support for better access to spatial information.

**RO-2: The Programme should be seen as an opportunity to contribute to the national debate on forest conservation and management in Kenya, in the light of the new constitutional, policy and legal dispensation**

The opportunity for a national debate on forest conservation and management has been provided by recent establishment by Government of a Task Force to advise on how to improve the protection of water towers. This is in addition to the Task Force on implementation of the ruling of the ACHPR on the Ogiek Case. These Task Forces and the general concern in the country about the impacts of climate change provide a unique opportunity for the Programme to influence policy developments that have a direct bearing on its activities. Now is the time when a national conversation is ongoing on the changing context for forest conservation and management, in the light of the provisions of the Constitution of Kenya 2010 on devolution, recognition of community land rights and ACHPR court ruling.

Specific actions under this recommendation should include:

1. The Steering Committee should be regularly updated by and contribute relevant information to the two Task Forces (with due regard to interests of indigenous communities)
2. In collaboration with the Environmental Donor Working Group and the Forests Issues Group (FIG), prepare consultations with government and other stakeholders on how to better implement the ongoing policy, legal and institutional reforms relevant to forest conservation, and how to provide support to KFS to review its approach to forest conservation and management in the light of the 2016 Forest Conservation and Management Act; the result of this should be followed up by the Programme Steering Committee.

#### *Recommendations for Component 1 - Technical Assistance (EU)*

**R-1: Review the working of the TAT with a view to better integrating TA into the entire Programme, and including in the Team competencies that are useful for ensuring conflict sensitivity and human rights imperatives in Programme implementation**

Specific actions under this recommendation should include:

1. Conduct a Technical Assistance (TA) needs assessment for the Programme and implementing partners (including identify gaps, opportunities and constraints), to establish specific needs for TAT to focus on
2. Review the composition of the TAT on the basis of the assessment, identify additional competencies required in the TAT and establish mechanisms for procuring and making use of the same
3. Clarify how the TAT shall support different result areas and establish a monitoring and learning system.

#### *Recommendations for Component 2 – Management Frameworks (KFS)*

**R-2: The WaTER Programme should support the devolution of forest management to the counties within the framework of the constitution, forestry legislation and other relevant legislation**

Specific actions under this recommendation should be implemented jointly with the 11 counties or the Council of Governors:

1. Support the 11 counties to review, finalize and operationalize the Transitional Implementation Plans (TIPs) signed between each of them and KFS
2. Support ongoing review and learning between the 11 counties and KFS on forest management within the context of devolution; this includes identification and development of pilot projects, documentation and sharing of promising practices and lessons learned on decentralised or devolved forest management at county and community level

3. Capture and disseminate good practices on devolution of forest management through the experiences of the 11 counties.

*Recommendations for Component 3 – Landscape engagement (11 counties)*

**R-3: Redesign Component 3 to be more strategically aligned to conservation objectives, as part of counties' Environmental Action Planning (EAP)**

Counties are to incorporate the WaTER Programme activities into their plans and budgets; aligned with their EAPs. By recognising new roles of counties in forest management, this component opens new opportunities for KFS and counties to collaborate on matters related to gazetted forests.

Specific actions under this recommendation should remain the task of the TAT and include:

1. Revision of the EAP framework, for it to cover counties' roles in forest management
2. Train and support counties on EAP
3. Provide grants to implement relevant parts of the EAP (funding proportions to counties should be rationalised, with specific criteria e.g. in proportion to the size of the natural forest area; also to be considered are other criteria e.g. population in the catchment)
4. Capacity building on rights-based forest governance and/or management, and for piloting of new approaches (any practice needs to be developed between Counties, KFS and communities, tailored to local contexts).

*Recommendations for Component 4 – Science to inform community-level action, policy (KEFRI)*

**R-4: Improve interactions between KEFRI, county governments, non-governmental research organisations and civil society in policy related action research**

To enable KEFRI to produce viable, innovative policy options, KEFRI and the Programme should engage other actors from research and civil society organisations with relevant experience and expertise, to inform a policy debate on forest conservation.

Specific actions under this recommendation include:

1. Strengthen KEFRI's role as an independent think tank on water towers and forest management, e.g. by linking up with other (national and international) research organisations and relevant civil society organisations (NGOs like the Katiba Institute, and/or Forest Action Network)
2. Create a forestry research platform to oversee research needs assessments in the 11 counties, dissemination of research needs, preparation of research ToR, and evaluation of research, to make it better respond to research needs of counties and of other relevant stakeholders.

*Recommendations for Programme Steering and Coordination*

**R-PSC: Restructure the Programme's institutional framework and clarify roles, interactions and feedback loops between steering mechanism, coordination framework and implementing partners**

It is necessary to clarify reporting lines, linkages and feedback loops between the different result areas to prevent that these operate as separate projects.



Specific actions under this recommendation should include:

1. Redesign the institutional structure for the Programme with an eye on representativeness and inclusiveness of major stakeholders:
  - a. At the county level, establish platforms for information sharing and continuous engagement with communities, to create awareness about the linkages between their livelihoods and their dependence on the water towers; at this level CBOs could engage, including NACOFA
  - b. At national level, the Programme Steering Committee (PSC) should include the National Lands Commission, and an NGO representation to give impetus and substance to dialogue on forest conservation approaches
  - c. The PSC could also include a conservation or forestry think tank or research organisation of international standing, to offer strategic advice.
2. Elaborate a coordination mechanism (PMU) across result areas, with a budget, to ensure effective inter-ministerial collaboration and coordination.