

Approved for tabling in the House.

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE PETROLEUM DEVELOPMENT
LEVY (AMENDMENT) ORDER, 2021

(Legal Notice No. 77 of 2021)

SEPTEMBER, 2021

The Directorate of Audit, Appropriations & other Select Committees
The National Assembly,
Parliament Buildings,
NAIROBI.


| | |
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| THE NATIONAL ASSEMBLY PAPERS LAID | |
| DATE: 29 SEP 2021 | DAY: Wednesday |
| TABLED BY: | Vice-Chairperson Committee on Delegated Legislation |
| CLERK-AT THE TABLE: | Getnada Chebet |

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ABBREVIATIONS

| | |
|------------|-----------------------------|
| AGO | Automotive Gas Oil |
| LN | Legal Notice |
| RMA | Regulatory Making Authority |
| SO | Standing Order |

CHAIRPERSON'S FOREWORD

The Cabinet Secretary for Petroleum and Mining, in exercise of the powers conferred by Section 3(1) of the Petroleum Development Fund Act, 1991, published the Petroleum Development Levy (Amendment), Order, 2021 *vide Legal Notice Number 77 of 2021*.

The Order was published on the 13th May, 2021 and submitted to the Clerk of the National Assembly on the 10th August, 2021 and tabled on the 17th August, 2021, by the Leader of Majority Party and subsequently referred to the Committee on Delegated Legislation for consideration.

The amendment seeks to insert in the Schedule to the Petroleum Development Levy Order, 2020, "AGO (Diesel)" with its rate of Levy being Ksh. 5,400 per 1000 litres at 20° C. The Order seeks to amend LN No. 124 of 2020, which the Committee scrutinized, considered, and approved for operationalisation on the 17th of February 2021.

The regulatory objective and justification of the statutory instrument is to amend the Petroleum Development Levy Order, 2020 by inserting AGO (Diesel) and the respective rate of levy to the First Schedule of the Petroleum Development Levy Order, 2020.

The Ministry indicated in their submissions that they inadvertently omitted **to include AGO (Diesel) in LN No. 124 of 2020**. This was an error of omission on the record in a statutory instrument that ought to have been rectified through publishing a corrigendum and not an amendment Order since an amendment Order invites the Committee to subject it to all the statutory tests set out in the Statutory Instruments Act, 2013 and relevant laws.

The Committee, upon receipt of the Order, scrutinised the Order in accordance with the Constitution of Kenya, the Petroleum Development Fund Act, 1991, the Interpretation and General Provisions Act (*Cap 2*) and the Statutory Instruments Act (*No. 23 of 2013*) which regulate the making, scrutiny and publication of the Order and made various observations which informed the decision to annul in entirety, the submitted instrument.

Statutory Timelines – The Committee established that the submission of the said statutory instrument (Order) to the National Assembly on 10th August, 2021, which was 25th sittings days after publication and its subsequent laying before the Table in the House was done way out of the statutory timelines contrary to section 11(1) and (4) of the Statutory Instruments Act, 2013. Pursuant to section 11 (4) of the Statutory Instrument Act, the Order therefore ceased to have effect on the 17th of June, 2021, by operation of law.

Public participation - Articles 10 and 118 of the Constitution read with sections 5, 5A and the Schedule to the Statutory Instruments Act, 2013, requires a mandatory conduct of Public Participation by all regulation-making authorities before publication of a statutory instrument. The amendment Order is a Statutory Instrument on its own published under a different legal notice (*No. 77 of 2021*) and with the implications on the rates of levy chargeable on AGO (Diesel) hence the Ministry ought to have conducted public participation as required under the Constitution and the relevant laws, and not chosen to ride on public participation conducted for LN. No124 of 2020 which did not contain AGO (Diesel) in the schedule.

Having examined the Petroleum Development Levy (Amendment), Order, published *vide Legal Notice Number 77 of 2021* against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Statutory Instruments Act, 2013 (*No. 23 of 2013*), the Petroleum Development Fund Act, 1991, pursuant to which they are made, the Committee resolved to recommend to the House **to annul the amendment Order in entirety** for contravening section 11(1) and (4) of the Statutory Instruments Act, 2013, being out of the statutory timelines set out in section 11(1) and for lack of demonstration of public participation.

I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4) (b) it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Petroleum Development Levy (Amendment), Order, 2021 (LN No 77 of 2021.)**

HON. WILLIAM KASSAIT KAMKET, M.P.

1. PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny;
 - and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.

Kirinyaga Central Constituency

Jubilee Party

The Hon. Patrick Mariru, M.P.

Laikipia West Constituency

Jubilee Party

The Hon. Sammy Seroney, M.P.

Nominated

Wiper Democratic Movement – Kenya

The Hon. Robert Gichimu, M.P.

Gichugu Constituency

Jubilee Party

The Hon. Tindi Mwale, M.P.

Butere Constituency

Amani National Congress

The Hon. Edith Nyenze, M.P.

Kitui West Constituency

Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.

Isiolo South Constituency

Kenya Patriots Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Mr. Mohamed Jimale
Clerk Assistant II (Team Leader)

Ms. Ruth Mwihaki Gakuya
Clerk Assistant II

Mr. Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Fiona Musili
Research Assistant II

Ms. Noelle Chelangat
Media Relations Officer II

Mr. Anthony Wamae
Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Mr. Muriithi Theuri
Parliamentary Intern

2.0 CONSIDERATION OF THE PETROLEUM DEVELOPMENT LEVY (AMENDMENT), ORDER, 2021 (LN NO. 77 OF 2021)

2.1 Introduction

5. The Cabinet Secretary for Petroleum and Mining, in exercise of the powers conferred by Section 3(1) of the Petroleum Development Fund Act, 1991, published the Petroleum Development Levy (Amendment), Order, 2021 *vide Legal Notice Number 77 of 2021* on 13th May, 2021 and submitted the same to the Clerk of the National Assembly on 10th August, 2021 and was tabled on 17th August, 2021 by the Leader of Majority Party and subsequently referred to the Committee on Delegated Legislation for consideration.
6. The Order seeks to amend the Petroleum Development Order, 2020, (LN No. 124 of 2020) with the effect of inserting Automotive Gas Oil (AGO or Diesel) to legally incorporate it in the First Schedule of the Petroleum Development Levy Order, 2020. The justification was that the Order was published and approved in 2020, and it was discovered later that AGO (Diesel) had been erroneously omitted from the First Schedule to the Order. The Ministry now seeks to insert a new row to correct the omission.

2.2 Purpose of the Statutory Instrument

7. The regulatory objective and justification of the Petroleum Development Levy (Amendment), Order, 2021 is to insert Automotive Gas Oil (AGO or Diesel) and the respective rate of levy in the First Schedule of the Order. According to the Ministry, the amendment was published following the detection of the inadvertent omission of AGO (Diesel) from the first Schedule of the Order.

2.3 Legislative Context

8. The Petroleum Development Levy Order, 2020 was published as Legal Notice No. 124 on 10th July, 2020. The Order was considered and approved by the National Assembly's Select Committee on Delegated Legislation at its sitting on 17th February 2021. However, upon approval of the Instrument by the Committee, the Ministry discovered that the AGO (Diesel) was omitted from the First Schedule.
9. According to the Ministry of Petroleum and Mining, the Petroleum Development Levy (Amendment), Order, 2021 rectifies the omission.

2.4 Scrutiny of the Instrument

10. The Committee considered the Amendment Order to check its conformity with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Petroleum Development Fund Act, 1991, the Statutory Instruments Act, 2013 (*No. 23 of 2013*), the Petroleum Development Fund Act, 1991 and the Petroleum Development Levy Order, 2021 pursuant to which they are made, which regulate the making, scrutiny and publication of the Regulations.

2.5 Summary of the Petroleum Development Levy (Amendment), Order, 2021

11. The Order seeks to amend the schedule to the Petroleum Development Levy Order, 2020, by inserting a new row immediately after the row containing tariff code 2710.19.29 of the description "other medium oils and preparations," as shown below:

| | | |
|------------|--------------|--------------------------------|
| 2710.19.31 | AGO (Diesel) | 5,400 per 1,000 Litres at 20°C |
|------------|--------------|--------------------------------|

| | | |
|------------|--------------|--------------------------------|
| 2710.19.31 | AGO (Diesel) | 5,400 per 1,000 Litres at 20°C |
|------------|--------------|--------------------------------|

3.0 COMMITTEE OBSERVATIONS AND FINDINGS

12. Following comprehensive scrutiny of the Amendment Order, the Committee made the following Observations:—

- 1) **THAT**, the Petroleum Development Levy (Amendment), Order, 2021 were published in the gazette on 13th May, 2021 and submitted to the National Assembly on 10th August, 2021, hence contravenes section 11(1) and (4) of the Statutory Instruments Act, 2013 which provides that –

“... every Cabinet Secretary responsible for a regulation making authority shall within seven sitting days after the publication of a statutory instrument is transmitted to the responsible Clerk for tabling before Parliament” and section 11 (4) of the Statutory Instruments Act, 2013 which provides that -

....that if a copy of a statutory instrument that is required to be laid before Parliament is not laid in accordance with this section, the statutory instrument shall cease to have effect immediately the last day for it to be so laid..

The Order was submitted to the Clerk of the National Assembly on 10th August, 2021 which, was the 25th sitting day. The Order therefore ceased to have effect on 27th May, 2021, by operation of law.

- 2) **THAT**, the Ministry indicated in their submission documents that they inadvertently omitted to include **AGO (Diesel)** in *L.N. No. 124 of 2020*. The error of omission on the record in a statutory instrument ought to have been rectified by way of a corrigendum and not an amendment Order since an amendment Order invites the Committee to subject it to all the statutory tests set out in the relevant laws.
- 3) **THAT**, Articles 10 and 118 of the Constitution and sections 5, 5A of Statutory Instrument Act requires a mandatory conduct of Public Participation by all regulation - making authorities before publication of a statutory instrument. The amendment Order is a Statutory Instrument on its own published under a different legal notice (*No.77 of 2021*) and with the implications on the rates of levy chargeable on AGO (Diesel) hence the Ministry ought to have conducted public participation as required under the Constitution and the relevant laws, and not chosen to ride on public participation conducted for LN. No124 of 2020 which did not contain AGO (Diesel) in the schedule.

| Table 1: The New Schedule after inserting a new row | | |
|--|---|-----------------------------------|
| <i>Tariff code</i> | <i>Description</i> | <i>Rate of levy (KSh.)</i> |
| 2709.00.00 | Petroleum oils obtained from bituminous minerals, crude | 5,400 per 1,000 litres at 20°C |
| 2710.12.30 | Aviation spirit | 5,400 per 1,000 litres at 20°C |
| 2710.12.20 | Premium motor spirit | 5,400 per 1,000 litres at 20°C |
| 2710.12.40 | Spirit type jet fuel | 5,400 per 1,000 litres at 20°C |
| 2710.12.50 | Special boiling point and white Spirit | 400 per 1,000 litres at 20°C |
| 2710.12.90 | Other light oils and Preparations | 400 per 1,000 litres at 20°C |
| 2710.19.21 | Kerosene type jet fuel | 400 per 1,000 litres at 20°C |
| 2710.19.22 | Illuminating kerosene (IK) | 400 per 1,000 litres at 20°C |
| 2710.19.29 | Other medium oils and Preparations | 5,400 per 1,000 litres at 20°C |
| 2710.19.31 | AGO (Diesel) | 5,400 per 1,000 Litres at 20°C |
| 2710.19.32 | Diesel oil (industrial heavy, black for low speed marine and stationary engines) | 5,400 per 1,000 litres at 20°C |
| 2710.19.39 | Other gas oils | 5,400 per 1,000 litres at 20°C |
| 2710.19.41 | Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 125 centistrokes | 400 per 1,000 litres at 20°C |
| 2710.19.42 | Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 180 centistrokes | 400 per 1,000 litres at 20°C |
| 2710.19.43 | Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 280 centistrokes | 400 per 1,000 litres at 20°C |
| 2710.19.49 | Other residual oils | 400 per 1,000 litres at 20°C |
| 2711.11.00 | Liquefied natural gas | 400 per 1,000 litres at 20°C |

| | | |
|------------|---|--------------------------|
| 2711.12.00 | Liquefied propane | 400 per 1,000 kg at 20°C |
| 2711.13.00 | Liquefied butanes | 400 per 1,000 kg at 20°C |
| 2711.14.00 | Liquefied ethylene, propylene, butylenes and butadiene | 400 per 1,000 kg at 20°C |
| 2711.19.00 | Other liquefied petroleum gases | 400 per 1,000 kg at 20°C |
| 2711.21.00 | Natural gas in gaseous state | 400 per 1,000 kg at 20°C |
| 2711.29.00 | Other petroleum gases and other gases obtained from bituminous minerals | 400 per 1,000 kg at 20°C |
| 2713.20.00 | Petroleum bitumen | 400 per 1,000 kg at 20°C |
| 2713.90.00 | Other residues of petroleum oil or oils obtained from bituminous minerals | 400 per 1,000 kg at 20°C |
| 2714.10.00 | Bituminous or oil shale and tar Sands | 400 per 1,000 kg at 20°C |
| 2714.90.00 | Bitumen and asphalt or asphalts 400 per 1,000 kg at and asphaltic rocks | 400 per 1,000 kg at 20°C |
| 2715.00.00 | Bituminous mixtures | 400 per 1,000 kg at 20°C |

4.0 COMMITTEE RECOMMENDATION

13. Having examined the **Petroleum Development Levy (Amendment), Order, 2021** (*L.N. No. 77 of 2021*) against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Petroleum Development Fund Act, 1991, the Statutory Instruments Act, 2013 (*No. 23 of 2013*), and the Petroleum Development Levy Order, 2021 pursuant to which they are made **the Committee recommends that the House annuls in entirety the said statutory instrument as it contravenes section 11(1) and 11 (4) of the Statutory Instruments Act, 2013 and for other aforementioned reasons.**

Signed..... *William Kassaif Kamket* Date..... *29/9/2021*

THE HON. WILLIAM KASSAIF KAMKET, M.P.
(CHAIRPERSON)

**THE NATIONAL ASSEMBLY
PAPERS LAID**

DATE: 29 SEP 2021 **DAY:**

TABLED BY:

CLERK-AT THE-TABLE:

Committee on Delegated Legislation: Report on the Consideration of the Petroleum Development Levy (Amendment), Order, 2021, published vide Legal Notice Number 77 of 2021.

ANNEXURES

- 1. Adoption List**
- 2. Legal Notice Number (*L.N. No. 77 of 2021*) and the Explanatory Memorandum**
- 3. Committee Minutes**

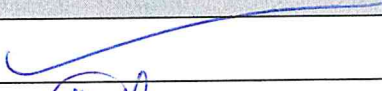


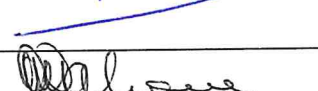



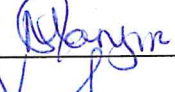
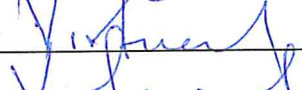
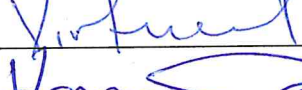


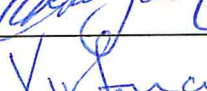
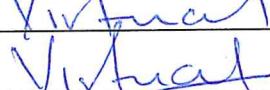
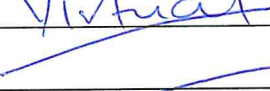
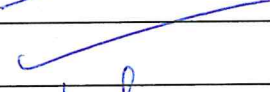

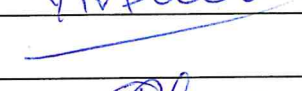
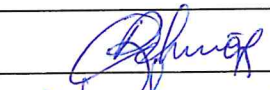


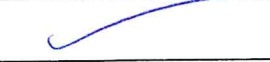

COMMITTEE ON DELEGATED LEGISLATION

ADOPTION LIST

Adoption of the Report on consideration of the Petroleum Development Levy (Amendment), Order, 2021 (Legal Notice Number 77 of 2021).

We, the undersigned, hereby affix our signatures to this Report to affirm our approval:

DATE: 29/09/2021 VENUE: 2nd Floor, Conference Hall.

| | HON. MEMBER | SIGNATURE |
|-----|--|---|
| 1. | Hon. Kassait Kamket, MP (Chairperson) |  |
| 2. | Hon. Muriuki Njagagua, MP (Vice Chairperson) |  |
| 3. | Hon. Isaac Waihenya Ndirangu, MP |  |
| 4. | Hon. Cecily Mbarire, MP |  |
| 5. | Hon. Alice Wahome, MP |  |
| 6. | Hon. Daniel Maanzo, MP |  |
| 7. | Hon. Robert Mbui, MP |  |
| 8. | Hon. Martha Wangari, MP |  |
| 9. | Hon. Ronald Kiprotich Tonui, MP |  |
| 10. | Hon. Timothy Wanyonyi, MP |  |
| 11. | Hon. William Kamoti, MP |  |
| 12. | Hon. Gideon Mulyungi, MP |  |
| 13. | Hon. George Gitonga Murugara, MP |  |
| 14. | Hon. Jennifer Shamalla, MP |  |
| 15. | Hon. Munene Wambugu, MP |  |
| 16. | Hon. Patrick Kariuki Mariru, MP |  |
| 17. | Hon. (Dr.) Wilberforce Oundo, MP |  |
| 18. | Hon. Abdi K. Tepo, MP |  |
| 19. | Hon. Edith Nyenze, MP |  |
| 20. | Hon. Robert Githinji Gichimu, MP |  |
| 21. | Hon. Sammy Seroney, MP |  |
| 22. | Hon. Tindi Mwale, MP |  |
| 23. | Hon. William Cheptumo, M.P |  |

MINUTES OF THE 52ND SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY 23RD SEPTEMBER, 2021 AT 10.00 A.M. IN THE COMMITTEE ROOM ON 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS

PRESENT

| | | |
|-------------------------------------|---|----------------------|
| 1. The Hon. Kassait Kamket, M.P. | - | Chairperson |
| 2. The Hon. Muriuki Njagagua, M.P. | - | Chairperson |
| 3. The Hon. Martha Wangari, M.P. | | |
| 4. The Hon. Daniel Maanzo, M.P. | | |
| 5. The Hon. George Murugara, M.P. | | (Virtual attendance) |
| 6. The Hon. Robert Mbui, M.P. | | (Virtual attendance) |
| 7. The Hon. Timothy Wanyonyi, M.P. | | (Virtual attendance) |
| 8. The Hon. Jennifer Shamalla, M.P. | | (Virtual attendance) |
| 9. The Hon. Sammy Seroney, M.P. | | (Virtual attendance) |
| 10. The Hon. Abdi Tepo, M.P. | | (Virtual attendance) |
| 11. The Hon. Ronald Tonui, M.P. | | (Virtual attendance) |
| 12. The Hon. Robert Gichimu, M.P. | | (Virtual attendance) |

ABSENT WITH APOLOGY

1. The Hon. Patrick Mariru, M.P.
2. The Hon. Alice Wahome, M.P.
3. The Hon. Edith Nyenze, M.P.
4. The Hon. Kamoti Mwamkale, M.P.
5. The Hon. Cecily Mbarire, MGH, M.P.
6. The Hon. Waihenya Ndirangu, M.P.
7. The Hon. (Dr.) Wilberforce Oundo, M.P.
8. The Hon. Gideon Mulyungi, M.P.
9. The Hon. Munene Wambugu, M.P.
10. The Hon. Nicholas Tindi Mwale, M.P.
11. The Hon. William Cheptumo, M.P.

IN-ATTENDANCE

National Assembly Secretariat

| | | |
|----------------------------|---|---------------------------------------|
| 1. Mr. Mohamed Jimale | - | Clerk Assistant II |
| 2. Ms. Ruth M. Gakuya | - | Clerk Assistant II |
| 3. Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 4. Ms. Noelle Chelangat | - | Media Relations Officer |
| 5. Mr. Charles Ayari | - | Superintendent of Electronics (Audio) |
| 6. Mr. George W. Ndenjeshe | - | Fiscal Analyst III |
| 7. Ms. Terry A. Ondiko | - | Fiscal Analyst III |

8. Mr. Anthony Wamae - Serjeant-at-Arms
9. Mr. Mureithi Theuri - Intern

MIN.NO./NA/CDL/2021/227 PRAYER AND PRELIMINARIES

The meeting commenced at 10.20 a.m. with the Prayer.

MIN.NO./NA/CDL/2021/228 CONFIRMATION OF MINUTES

Minutes of the 51st sitting held on Tuesday, 21st September, 2021 were confirmed as a true record of the proceedings having been proposed by the Hon. Robert Mbui, M.P. and seconded by the Hon. Abdi Tepo, M.P.

MIN.NO./NA/CDL/2021/229 MATTERS ARISING

No matters arose.

MIN.NO./NA/CDL/2021/230 CONSIDERATION OF THE PETROLEUM DEVELOPMENT LEVY, 2021 (LN. No. 77 of 2021)

The Committee considered the Petroleum levy (Amendment) Order, 2021, and noted that:-

1. The Petroleum Development Levy (Amendment) Order, 2021 is made by the Cabinet Secretary for Petroleum and Mining pursuant to Sections 3(1) of the Petroleum Development Fund Act, 1991.
2. The Order was published in the gazette *vide LN No. 77 of 2021* on the 13th May 2021 and submitted to the Clerk of the National Assembly on 10th August, 2021 and tabled on the 17th August 2021 by the Leader of Majority Party.
3. The regulatory objective and justification of the statutory instrument is to amend the Petroleum Development Levy Order, 2020 by inserting AGO (Diesel) and the respective rate of levy to the First Schedule of the Petroleum Development Levy Order, 2020, which was published as *LN No. 124 of 2020* which, the Committee scrutinized, considered, and approved for operation on the 17th of February 2021
4. The amendment Order seeks to insert in the Schedule, "AGO (Diesel)" with its rate of Levy being Ksh. 5,400 per 1000 litres at 20° C. Section 9 of the Statutory Instruments Act exempts the requirement of a Regulatory impact statement where a proposed legislation provides for an amendment of a statutory instrument that does not fundamentally affect the legislation's application or operation or an amendment of a fee, charge, or tax consistent with announced government policy.

Committee Observation:-

The committee made the following observations –

- 1) **Statutory Timelines:** The Petroleum Development Levy (Amendment), Order, 2021 was published in the Gazette *vide Legal Notice No. 77 of 2021* on 13th May, 2021 and submitted to the National Assembly on 10th August, 2021 being out of the statutory timelines, hence contravenes section 11(1) and (4) of the Statutory Instruments Act, 2013. The Order ceased to have effect on the 27th May, 2021, by operation of law.
- 2) **Public Participation:** Articles 10 and 118 of the Constitution and sections 5, 5A of the Statutory Instrument Act requires a mandatory conduct of Public Participation by all regulation making authorities before publication of a statutory instrument. An amendment Order is a Statutory Instrument on its own published under a different legal notice (No.77 of 2021) and with the implications on the rates of levy chargeable on AGO (Diesel) hence the Ministry ought to have conducted public participation as required under the constitution and the relevant laws, and not chosen to ride on public participation conducted for *L.N. No. 124 of 2020* which did not contain AGO (Diesel) in the schedule.
- 3) **Error of Omission** - The Ministry indicated in the submission documents that they inadvertently omitted to include AGO (Diesel) in LN No. 124 of 2020. The error of omission on the record in a statutory instrument ought to have been rectified by a corrigendum and not an amendment Order since an amendment Order invites the Committee to subject it to all the statutory tests set out in the relevant laws.

Committee Resolution

Having examined the Petroleum Development Levy Order, 2021 (*L.N. No. 77 of 2021*) against the Constitution, the Interpretation and General Provisions Act (Cap 2), the Statutory Instrument Act, (No. 23 of 2013), the Petroleum Development Levy Order, 2020, (LN No. 124 of 2020) pursuant to which it is made, the Committee resolved to **annul the Order in entirety** having been proposed by the Hon. Abdi Tepo, M.P and Seconded by the Hon. Martha Wangari, M.P.

MIN.NO./NA/CDL/2021/231

CONSIDERATION OF THE INCOME TAX EXEMPTION ON THE SEND-OFF PACKAGE PAID TO EMPLOYEES OF THE KENYA AIRWAYS LIMITED FROM THE NATIONAL TREASURY AND PLANNING (*L.N. No. 115 OF 2021*)

The Committee considered the Legal Notice No.115 of 2021 on the exemption from Income Tax on the send-off package paid to employees of the Kenya Airways Limited, and noted **THAT:-**

1. Section 13(2) of the Income Tax Act (*Cap 470*) mandates the Cabinet Secretary, by notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in such notice and that

any such exemption shall cease to have effect either generally or to the extent specified in the notice.

2. Further, that where the Cabinet Secretary issues such a notice, the notice is to be laid before the National Assembly without unreasonable delay.
3. The Act also provides that if a resolution is passed by the National Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall henceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.
4. **Statutory Timelines** - the *L.N. No. 115 of 2021* was published on 15th July, 2021, submitted to the Clerk of the National Assembly on 19th August, 2021 and tabled on 1st September, 2021 which was **without reasonable delay** as contemplated in section 13 (2) of the Income Tax Act.
5. The Legal Notice was laid in the House on Wednesday, the 1st September 2021 during the special sitting since the House was on recess between 24th August, 2021 and 20th of September, 2021 hence the twenty - day statutory timeline would lapse on the 9th of October, 2021.
6. **Public Participation**
 - i. Section 13(2) of the Income Tax Act, (Cap 470) allows the Cabinet Secretary to exempt certain activities from taxation, save that if he so exempts then the notice must be published in the gazette [for information to the public] and that it must be submitted to the National Assembly without unreasonable delay.
 - ii. The Cabinet Secretary in publishing and submitting the Legal Notice No 115 of 2021 to the National Assembly was discharging a statutory mandate and conforming to the requirements of section 13 of the Income Tax Act.
 - iii. The Exemption is not a Statutory Instrument within the meaning of section 2 of the Statutory Instruments Act, 2013 and may therefore not be subject to public participation in the manner contemplated in sections 5 and 5A of the Statutory Instruments Act, 2013.
 - iv. The Cabinet Secretary, National Treasury and Planning submitted to the National Assembly an Explanatory Memorandum on the Legal Notice detailing the purpose of the Legal Notice, the policy background and the legislative context.

Committee Resolution

Having examined the the *Legal Notice No. 115 of 2021* on Exemption from Income Tax, 2021 against the Constitution, the interpretation and General Provisions Act (Cap 2), the Statutory Instrument Act, (*No. 23 of 2013*), the Income Tax Act, section 13(2) (Cap 470), pursuant to which the Exemption is made, the Committee resolved to **approve the Legal Notice No. 115 of 2021** having been **proposed by the Hon. Jennifer Shamalla, M.P and Seconded by the Hon. Timothy Wanyonyi M.P.**

1. Scheduling of pending business

The Committee was informed that the following business is pending before the Committee -

- i. Legal Notice No. 168 relating to the Water Services Regulations, 2021,
- ii. Legal notice No. 169 relating to the Water Harvesting and Storage Regulations, 2021
- iii. Legal Notice No. 170 on the Water Resources Regulations, 2021
- iv. Legal Notice No. 183 of 2021 relating to the National Youth Council (Election Council Members) Regulations, 2021

The Committee resolved to have a retreat with the regulatory making authorities in Mombasa from 14th to 18th October, 2021 to consider the said statutory instruments.

2. Breakfast meeting

The Committee was informed about the invitation of the Breakfast meeting scheduled for 28th September 2021 at 9.00am at the Serena hotel, Nairobi to consider the Environmental Management and Coordination Regulations relating to the LN No. 149 and 150 of 2016. The meeting was organized by the Open Forum on Agricultural Biotechnology in Africa (OFAB).

The Committee noted that the objective of the meeting is to bring to the attention of the committee that the publication of the Environmental Regulations, Legal Notice Number 149 of 2021 and the Legal Notice Number 150 of 2021, which were not submitted to the National Assembly and therefore have a number of provisions in breach of the constitution, the statutory Instrument Act, the Environment Management and Coordination Act, the Biosafety Act.

The Committee resolved to attend the breakfast meeting as scheduled.

MIN.NO. /NA/CDL/2021/233 ADJOURNMENT

There being no other business the meeting was adjourned at 10.45 a.m. Next meeting will be held on Wednesday 29th September, 2021 at 10.00 a.m.

Signed.....

Date.....


HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

29/9/2021



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

05 AUG 2021

Our Ref: AG/LDD/165/2/5
Your Ref: MOPM/P/21/2

3rd August, 2021

The Principal Secretary
Ministry of Petroleum and Mining
Office of the principal Secretary
Nyayo House
P.O. Box 30582-00100
NAIROBI

RE: THE PETROLEUM DEVELOPMENT LEVY ORDER, 2020

This has reference to your letter dated the 5th July, 2021, under Ref. No. MOPM/P/21/2, and the request for the published copy of the Petroleum Development Levy (Amendment) Order, 2021.

Kindly find enclosed herewith a copy of the published Order. It was published as Legal Notice No. 77 of 2021 on the 13th May 2021 as a Special Issue of the Kenya Gazette.

Samson Davies Maundu
Principal Parliamentary Counsel
FOR: ATTORNEY-GENERAL

Copy to: Hon. P. Kihara Kariuki
Attorney-General

Mr. Kennedy Ogeto CB
Solicitor-General

M.N. Nzioka (Mrs.)
Deputy Solicitor-General

| | |
|--------------------------------------|--------------|
| | |
| THE NATIONAL ASSEMBLY PAPERS LAID | |
| DATE: 17 AUG 2021 | DAY: TUESDAY |
| TABLED BY: | LOM |
| CLERK-AT THE-TABLE: | Moses Temuna |

C. Kamungu, for info.
6/8

Encl.

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box 40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/07119445555/0732529995
E-MAIL: info.statehouseoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELASSIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified



SPECIAL ISSUE

589

Kenya Gazette Supplement No. 98

13th May, 2021

(Legislative Supplement No. 35)

LEGAL NOTICE NO. 77

THE PETROLEUM DEVELOPMENT FUND ACT

(Cap. 426C)

IN EXERCISE of the powers conferred by section 3 (1) of the Petroleum Development Levy Fund Act, the Cabinet Secretary for Petroleum and Mining makes the following Order—

**THE PETROLEUM DEVELOPMENT LEVY (AMENDMENT)
ORDER, 2021**

1. This Order may be cited as the Petroleum Development Levy (Amendment) Order, 2021. Citation.

2. The Schedule to the Petroleum Development Levy Order, 2020, is amended by inserting the following new row immediately after the row containing tariff code 2710.19.29 of the description "other medium oils and preparations"— L.N. 124/2020.

| <i>Tariff Code</i> | <i>Description</i> | <i>Rate of Levy (KSh.)</i> |
|--------------------|--------------------|--------------------------------|
| 2710.19.31 | AGO (Diesel) | 5,400 per 1,000 litres at 20°C |

Made on the 1st April, 2021.

JOHN K. MUNYES,
Cabinet Secretary for Petroleum and Mining.



MINISTRY OF PETROLEUM AND MINING

EXPLANATORY MEMORANDUM TO THE PETROLEUM DEVELOPMENT LEVY (AMENDMENT) ORDER, 2021

PART I

Name of the Statutory Instrument: **The Petroleum Development Levy (Amendment) Order, 2021**

Name of the Parent Act: **The Petroleum Development Fund Act, 1991**

Enacted Pursuant to: **Section 3(1) of the Petroleum Development Fund Act, 1991**

Name of the Ministry/ Department: **Ministry of Petroleum and Mining**

Gazetted on: **13 May 2021**

Tabled on:

PART II

1.0 Purpose of the Statutory instrument

The regulatory objective and justification of the **Petroleum Development Levy (Amendment) Order, 2021** is to insert AGO (Diesel) and the respective rate of levy in the First Schedule of the **Petroleum Development Levy Order, 2020**.

The Amendment was published following the detection of the inadvertent omission of AGO (Diesel) from the First Schedule of the Order.

The **Petroleum Development Levy Order, 2020** was published as as Legal Notice No. 124 on 10 July 2020.

The **Petroleum Development Levy (Amendment) Order, 2021** was published as Legal Notice 77 on 13 May 2021, but was forwarded to the Ministry of Petroleum and Mining on 3 August 2021.

2.0 Legislative Context

The **Petroleum Development Levy Order, 2020** was published as as Legal Notice No. 124 on 10 July 2020. The Order was considered and approved by the National Assembly Committee on Delegated Legislation at its sitting of 17 February 2021 and communicated *vide* letter NA/AA&OSC/CDL/CORR/2021/015 of even date.

Upon publication and approval of the Order, it was discovered that AGO (Diesel) was omitted from the First Schedule. The **Petroleum Development Levy (Amendment) Order, 2021** therefore rectifies the omission by inserting the following row:

| | | |
|------------|--------------|--------------------------------|
| 2710.19.31 | AGO (Diesel) | 5,400 per 1,000 litres at 20°C |
|------------|--------------|--------------------------------|

3.0 Consultation

During the development of the **Petroleum Development Levy Order, 2020**, engagements were held with relevant stakeholders as evidenced in the following documents, copies whereof were reviewed by the Committee in February 2021:

- i. Article by the Kenya Private Sector Alliance summarising a meeting with the Ministry on 13 March 2020;
- ii. Annex 9 of the cost of services study showing an attendance for the study's stakeholder forum on 28 September 2017;
- iii. Petroleum Pump Pricing presentation;
- iv. Meeting Notes on Macro Crude Oil Trends / Crisis;
- v. Other relevant documentation.

5.0 Impact

Passing of the Amendment will ensure that AGO (Diesel) is lawfully included in the First Schedule of the Order thereby closing any lacuna in levying the product.

6.0 Contact

The contact below can answer any queries regarding this statutory instrument.

Charles Kamunya
Ministry of Petroleum and Mining
charles.kamunya@petroleum.go.ke

REGULATORY IMPACT STATEMENT (RIS)

THE PETROLEUM DEVELOPMENT LEVY (AMENDMENT) ORDER, 2021

AUGUST, 2021

Introduction

The Regulatory Impact Statement for the Petroleum Development Levy (Amendment) Order, 2021 was prepared in accordance with the provisions of sections 6 and 7 (1) and (2) of the Statutory Instruments Act, 2013 (No. 23 of 2013). Section 6 of the Act requires the regulation making authority to prepare a regulatory impact statement for the proposed regulations indicating the costs and benefits of the proposed regulations on the public and stakeholders. Sections 7(1) and (2) of the Act set out the contents of a regulatory impact statement for the proposed regulations as follows:

1.0 A Statement of the Objectives and Reasons for the Proposed Petroleum Development Levy (Amendment) Order, 2021

The regulatory objective and justification of the Amendment is to ensure that AGO (Diesel) is lawfully included in the First Schedule of the Petroleum Development Levy Order, 2020 thereby closing any lacuna in levying the product.

2.0 Statement on the Effect of the Proposed Levy Order

The Amendment is not expected to have any adverse effect in the petroleum public or private sector because levying of AGO (Diesel) has been in effect since the commencement of the Petroleum Development Levy Order, 2020 in July, 2020.

3.0 Statement on Regulatory and Non-Regulatory Options

3.1 Option 1: Maintaining the *Status Quo*

Maintaining the status quo exposes a potential lacuna in law, given that all other petroleum products are included in the First Schedule to the Petroleum Levy Order, 2020.

3.2 Option 2: Passing the Amendment

Passing and operationalization of the Amendment will properly bring the levying of AGO (Diesel) under the Petroleum Development Levy Order, 2020.

4.0 Recommendations

The Regulatory Impact Assessment recommends approval and operationalization of the Petroleum Development Levy (Amendment) Order, 2021.

REPUBLIC OF KENYA

Telegraphic Address
"Bunge", Nairobi
Telephone 2221291/2848000
Fax: 2243694
E-mail: clerk@parliament.go.ke
When replying please quote



NATIONAL ASSEMBLY

CLERK'S CHAMBERS
National Assembly
Parliament Buildings
P.O. Box 41842-00100
NAIROBI, Kenya

Ref:NA/AA&OSC/CDL/CORR/2021/015

17th February, 2021

Mr. Andrew Kamau, CBS
Principal Secretary
State Department for Petroleum
Ministry of Petroleum & Mining
P.O. Box 30582-00100
NAIROBI

Dear Mr Kamau

RE: APPROVAL OF THE PETROLEUM DEVELOPMENT LEVY ORDER, 2020 (LEGAL NOTICE NO. 124 OF 2020)

Reference is made to your letter Ref:MOPM/P/21/2 dated 14th July, 2020 submitting the Petroleum Development Levy Order, 2020 (Legal Notice No. 124 of 2020) for parliamentary approval.

The purpose of this letter is to inform you that the Committee on Delegated Legislation at its sitting held on 17th February, 2021 satisfied itself that the **Petroleum Development Levy Order, 2020 (Legal Notice No. 124 of 2020)** is in accord with the Constitution of Kenya, the Interpretation and the General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No. 23 of 2013*) and the Petroleum Development Fund Act (*No. 4 of 1991*) pursuant to which it is made.

This is, therefore, to convey the resolution of the Committee, in accordance with Standing Order 210(4) (a) of the National Assembly and the Statutory Instruments Act, 2013 that the above instrument as gazetted be and is hereby acceded to.

Yours

JEREMIAH W. NDOMBI
For: CLERK OF THE NATIONAL ASSEMBLY

SPECIAL ISSUE

1535

Kenya Gazette Supplement No. 116

10th July, 2020

(Legislative Supplement No. 75)

LEGAL NOTICE No. 124

THE PETROLEUM DEVELOPMENT FUND ACT, 1991

IN EXERCISE of the powers conferred by section 3(1) of the Petroleum Development Fund Act, 1991, the Cabinet Secretary for Petroleum and Mining makes the following Order—

THE PETROLEUM DEVELOPMENT LEVY ORDER, 2020

This Order may be cited as the Petroleum Development Levy Order, 2020 and shall come into operation on 15th July, 2020.

1. In this Order, unless the context otherwise requires—

“Authority” means the Energy and Petroleum Regulatory Authority established under the Energy Act, 2019.

“collector” means the Commissioner of Customs and Excise;

“levy” means the Petroleum Development Levy imposed by paragraph 2;

“cabinet secretary” means for the time being the Cabinet Secretary in charge of petroleum

“oil marketing company” means a person licensed under the Petroleum Act, 2019 to import petroleum products into Kenya;

“petroleum fuels” means petroleum products listed in the First Schedule;

“petroleum development fund” means a fund created under section 4 of the Petroleum Development Fund Act, 1991;

“remitter” means an oil marketing company registered by the collector.

2. There shall be paid a levy on all petroleum fuels consumed in Kenya with a tariff code and description specified in the first and second columns, respectively, of the First Schedule, at the rates specified in relation thereto in the third column of that Schedule.

3. The levy shall be paid to the Petroleum Development Fund.

4. The levy shall also be used for matters relating to the development of the oil industry including to stabilize local petroleum pump prices in instances of spikes occasioned by high landed costs above a threshold determined by the Authority. The Cabinet Secretary may by writing to the administrator request for a draw down from the Petroleum Development Fund to stabilize local petroleum pump prices where he deems it necessary.

5. An oil marketing company shall on or before the last day of the month immediately following the month in which he becomes an oil marketing company register with the collector as a remitter.

6. A person registered as a remitter who ceases either permanently or temporarily to be an oil marketing company shall, within thirty days of so ceasing, notify the collector accordingly in writing specifying the reasons for his ceasing to be a remitter.

7. (a) The remitter shall pay the levy to the collector immediately at the time of importation of petroleum fuel.

(b) The collector shall maintain records of importation of petroleum fuels and submit to the Cabinet Secretary a monthly return of payment of the levy received during the month.

(c) The collector shall remit to the Petroleum Development Fund all the levy paid during the month.

8. Without prejudice to any other form of remedy, any monies payable under this Order that remains unpaid for a period of thirty (30) days after the date that the same ought to be paid shall be recoverable summarily by the collector as a civil debt due and payable to the Petroleum Development Fund.

9. Notwithstanding the provisions of paragraphs 6 and 7, if a remitter fails to pay an amount payable by way of a levy within the time prescribed by this Order a sum equal to five per cent of that amount shall be added to the amount for each month or part of a month thereafter that the amount due remains unpaid.

10. The Petroleum Development Order, 1992 is revoked.

JOHN K. MUNYES.

Cabinet Secretary for Petroleum and Mining.

FIRST SCHEDULE

| <i>Tariff Code</i> | <i>Description</i> | <i>Rate of Levy (KSh.)</i> |
|--------------------|--|-----------------------------------|
| 2709.00.10 | Condensates | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.21 | Aviation spirit (gasoline) | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.22 | Motor spirit (gasoline), premium | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.24 | Jet fuel (spirit type) | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.25 | Special boiling point spirit and white spirit | 400.00 per 1,000 litres at 20°C |
| 2710.00.29 | Other light petroleum oils and preparations | 400.00 per 1,000 litres at 20°C |
| 2710.00.32 | Kerosene | 400.00 per 1,000 litres at 20°C |
| 2710.00.39 | Other medium petroleum oils and preparations | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.41 | Diesel oil (industrial, heavy, black, for low speed marine and stationery engines) | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.43 | Other gas oil | 5,400.00 per 1,000 litres at 20°C |
| 2710.00.44 | Residual fuel oils (marine furnace similar fuel oils engines) of 125 cSt | 400.00 per 1,000 litres at 20°C |
| 2710.00.45 | Residual fuel oils of 180 cSt | 400.00 per 1,000 litres at 20°C |
| 2710.00.46 | Residual fuel oils of 280 cSt | 400.00 per 1,000 litres at 20°C |
| 2710.00.47 | Other residual fuel oils | 400.00 per 1,000 litres at 20°C |
| 2711.11.00 | Liquefied natural gas | 400.00 per 1,000 litres at 20°C |
| 2711.12.00 | Liquefied propane | 400.00 per 1,000 Kg at 20°C |
| 2711.13.00 | Liquefied butanes | 400.00 per 1,000 Kg at 20°C |
| 2711.14.00 | Liquefied ethylene, propylene, butylenes and butadiene | 400.00 per 1,000 Kg at 20°C |
| 2711.19.00 | Other liquefied petroleum gases | 400.00 per 1,000 Kg at 20°C |
| 2711.21.00 | Natural gas in gaseous state | 400.00 per 1,000 Kg at 20°C |
| 2711.29.00 | Other petroleum gases | 400.00 per 1,000 Kg at 20°C |
| 2713.20.00 | Petroleum bitumen | 400.00 per 1,000 Kg at 20°C |
| 2713.90.00 | Other residues of petroleum oil or oils obtained from bituminous minerals | 400.00 per 1,000 Kg at 20°C |
| 2714.10.00 | Bituminous or oil shale and tar sands | 400.00 per 1,000 Kg at 20°C |
| 2714.00.00 | Bitumen and asphalt or asphalts and asphaltic rocks | 400.00 per 1,000 Kg at 20°C |
| 2715.00.00 | Bituminous mixtures | 400.00 per 1,000 Kg at 20°C |



MINISTRY OF PETROLEUM AND MINING
STATE DEPARTMENT FOR PETROLEUM

EXPLANATORY MEMORANDUM TO
THE PETROLEUM DEVELOPMENT LEVY ORDER, 2020

PART I

Name of the Statutory Instrument: **The Petroleum Development Levy Order, 2020**

Name of the Parent Act: **The Petroleum Development Fund Act, 1991**

Enacted Pursuant to: **Section 3(1) of the Petroleum Development Fund Act, 1991**

Name of the Ministry/ Department: **Ministry of Petroleum and Mining/ State Department for Petroleum**

Gazetted on: **10 July 2020**

Tabled on:

PART II

1.0 Purpose of the Statutory instrument

The regulatory objective and justification of the proposed Levy Order is to provide sufficient funds for the development of the petroleum sector including the stabilization of petroleum pump prices in instances of spikes occasioned by high landed costs above a threshold to be determined by the Energy and Petroleum Regulatory Authority (EPRA). The proposed Levy Order will ensure growth of the Petroleum Development Fund thereby enabling achievement of the following:

- i. Creation of a stabilization mechanism for petroleum pump prices to cushion consumers from spikes in the landed costs; and
- ii. Enhancement of capacity building in the petroleum supply chain thereby creating stability in supply.

2.0 Legislative Context

The Petroleum Development Fund Act, 1991 was enacted to provide for the establishment of a Petroleum Development Fund and the imposition of a petroleum development levy and for connected purposes. Section 3(1) of the Act empowers the Cabinet Secretary to make a petroleum development levy order imposing a levy on all petroleum fuels consumed in Kenya. The levy is to be collected by the Commissioner and the order may provide for the amendment of a previous petroleum development levy order and may make different provisions in relation to different descriptions of fuel.

The first Petroleum Development Levy Order was established in 1992 for the development of the petroleum sector. The 1992 Order has continued to be applied until 2020. The Petroleum Development Levy Order, 2020 repeals the Order of 1991 and establishes the stabilisation mechanism of petroleum pump prices in instances of spikes occasioned by high landed costs.

3.0 Policy Background

Kenya has been a net importer of petroleum fuels without sufficient facilities for maintaining strategic stocks. The situation has exposed consumers and the economy to high landed product costs triggered by a number of global factors including geopolitics. Most recently, the landed cost of products in Kenya was under significant threat when Russia and Saudi Arabia announced in 2019 that they will be abandoning the Organization of the Petroleum Exporting Countries (OPEC) agreement on production quotas.

Sector stakeholders and the Ministry of Petroleum and Mining recognised the need to cushion consumers and the economy from similar geopolitical factors. Several options were pursued including solutions facilitated by financial institutions. The Ministry also commissioned a study on the cost of services in supply of petroleum products in Kenya. This study shed light on petroleum products pricing in general and price stabilisation.

The specific objectives for the study included but are not limited to the following areas:

- i. Establish a price build-up structure that starts from import parity landed cost with added storage, transportation, other costs and margins that would be sustainable and flexible enough to suit a regulated pricing regime in Kenya*
- ii. Develop an adjustment mechanism identifying short-term adjustment parameters and frequency of, and the trigger for such adjustments in the current pricing formula in Kenya*
- iii. Develop a flexible economic model for estimation of input costs of PMS, RMS, AGO, DPK and LPG after an intensive consultative process with key industry players the Ministry of Energy and Petroleum, Kenya Pipeline Limited, Kenya Maritime Authority, Kenya Petroleum Refineries Limited, Oil marketing Companies, Oil transporting companies, other relevant Government Departments and Petroleum Institute of East Africa.*
- iv. Study the working of the oil price equalization fund (South Africa) and Zambia and the transport equalization fund (Ghana) and any other relevant equity mechanisms and assess their applicability or otherwise to the Kenyan scenario with a view to introducing either uniform prices or equitable ones countrywide, whichever is desirable.*
- v. Review the competitiveness of the Open Tender System (OTS) with regard to imported refined products and crude and the applicable cost factors.*

The cost of services study recommended that:

Petroleum Price Stabilization

- i. Should the government make a policy decision to introduce a Petroleum Price Stabilization Fund, the current pricing formula can effectively accommodate price stabilization should a decision be made to implement it.*
- ii. The operation of a similar Fund in Vietnam was found to be suitable for application in Kenya should it be decided to proceed with the Fund.*

As a result of the various multi-sectoral consultative efforts, it was found that it was necessary to legislate for the stabilization of petroleum pump prices in instances of spikes occasioned by high landed costs above a threshold to be determined by the EPRA. The Petroleum Development Fund Act, 1991 through an Order thereunder was found most suitable to house the mechanism by making provision for a reviewed levy.

4.0 Consultation

Engagements were held with relevant stakeholders as evidenced in the following documents, copies whereof are annexed to this memorandum:

- i. Article by the Kenya Private Sector Alliance summarising a meeting with the Ministry on 13 March 2020;
- ii. Annex 9 of the cost of services study showing an attendance for the study's stakeholder forum on 28 September 2017;
- iii. Petroleum Pump Pricing presentation;
- iv. Meeting Notes on Macro Crude Oil Trends / Crisis;
- v. Other relevant documentation.

5.0 Impact

Passing and operationalization of the proposed Levy Order will:

- a) Further enable a self-sustaining funding mechanism for the development and operationalization of petroleum pump price stabilization mechanism; and
- b) As a result of (a) above, the economic environment will be more predictable and hence boosting investor confidence.

5.1 Effects on the Public Sector

The public is expected to benefit in the following ways;

- i. Enhanced capacity building and development of the petroleum industry which will enhance better planning and improve efficiency in supply; and
- ii. Stability in petroleum prices in instances of spiked landed costs will boost affordability of goods and services by consumers.

5.2 Effects on the Private Sector

Petroleum supply and price stability will encourage local investment due to a predictable business environment.

5.3 Effects on Fundamental Rights and Freedoms

The Levy Order is not envisaged in any way to curtail the rights and freedoms of its citizens as enshrined in the Constitution.

An impact assessment is attached to this memorandum.

6.0 Monitoring and review

The Levy Order will be subjected to the applicable statutory review time-lines.

Further, the levy shall be under constant review by EPRA, the Ministry and private sector. EPRA is empowered to make recommendations to the Cabinet Secretary in the event policy intervention is required.

7.0 Contact

The contact below can answer any queries regarding this statutory instrument.

Charles Kamunya
State Department for Petroleum
Ministry of Petroleum and Mining
charles.kamunya@petroleum.go.ke

From the desk of

MUTUMA MARANGU

13TH MARCH 2020 – KEPSA – MEETING NOTES ON MACRO CRUDE OIL TRENDS / CRISIS

- GENESIS OF THE CRISIS:

A. THE 178TH [EXTRAORDINARY] MEETING OF THE CONFERENCE OF OPEC ON THURSDAY, 5TH MARCH 2020, WHERE RUSSIA REFUSED A SAUDI ARABIA LED PROPOSAL FOR DEEPER AND LONGER SUPPLY PRODUCTION CUTS TO STABILISE CRUDE OIL PRICES IN AN ENVIRONMENT WHERE DEMAND WAS NEGATIVELY AFFECTED BY CORONAVIRUS DEMAND DESTRUCTION.

B. SAUDI ARABIA REACTED BY: 1. SLASHING ITS EXPORT PRICES FOR CRUDE OIL; 2. INCREASING ITS PRODUCTION FROM 9.9MN B/D TO 12.3 MN B/D. IT ALSO FOCUSED ITS INCREASED 2.5 MN B/D PRODUCTION [ARAB LIGHT] TO NON – TRADITIONAL WESTERN EUROPEAN MARKETS PRICED TO DISPLACE RUSSIAN [URALS]. RUSSIA CURRENTLY PRODUCES 11.3 MN B/D.

C. BEFORE THE CRISIS, WORLD CRUDE OIL DEMAND WAS RUNNING AT 100MN B/D, AND WAS PRIMARILY SUPPLIED BY: 1. THE USA

[SHALE OIL] – PRODUCED 12.23MN B/D; 2. RUSSIA – PRODUCED 11.3MN B/D; 3. SAUDI ARABIA – PRODUCED 9.9MN B/D.

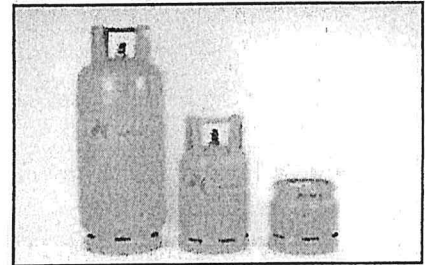
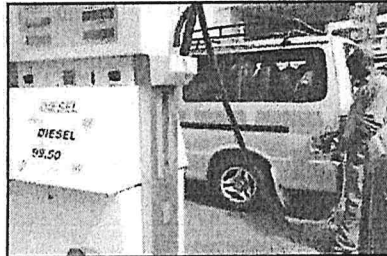
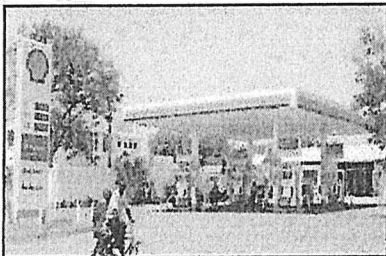
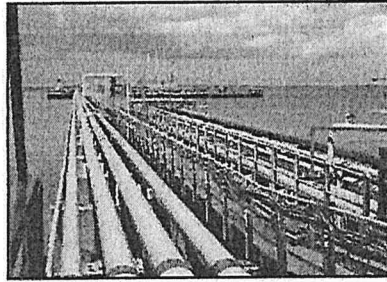
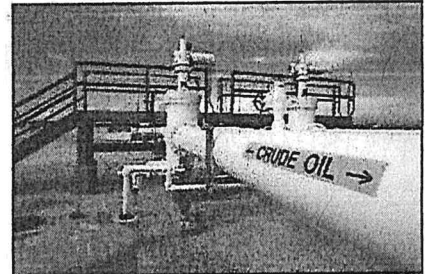
- D. THE FINANCIAL AND PRODUCTION DYNAMICS FOR EACH COUNTRY WERE VERY DIFFERENT: 1. THE USA IS PRIVATE SECTOR LED, WITH SHALE OIL & GAS COMPANIES HAVING HIGH DEBT LEVELS, THEREFORE NEEDING SUSTAINED HIGH OIL PRICES TO REMAIN VIABLE; 2. RUSSIA WHICH IS GOVERNMENT LED, WITH THE LOWEST CRUDE OIL PRICE TO BALANCED BUDGET RATIO [\$42/BBL, DOWN FROM \$100/B – 5 YEARS AGO] AND THE LARGEST FOREIGN RESERVES SURPLUS [\$570BN] AMONGST LARGE CRUDE OIL PRODUCERS; 3. SAUDI ARABIA WHICH IS GOVERNMENT LED, WITH A \$70/BBL CRUDE OIL PRICE TO BALANCED BUDGET RATIO AND A LARGE FOREIGN RESERVES SURPLUS [\$500BN].
- E. RUSSIA REFUSED TO AGREE WITH SAUDI ARABIA AS THE USA CRUDE OIL PRODUCTION SHARE INCREASED BY 4.5MN B/D FROM 2016 – 2020 OR APPROXIMATELY 4% WHILE THE SAUDI ARABIA + RUSSIA COMBINED SHARE WAS DOWN BY 3%.
- F. RUSSIA WANTED TO SEEK READDRESS FOR SANCTIONS BY THE USA ON THE RUSSIAN OIL & GAS SECTOR AND DECIDED THAT THIS WAS THE TIME TO IMPLEMENT THIS STRATEGY, WHICH STARTED IN 2014, WHEN RUSSIA WAS

SENT INTO A RECESSION DURING THE LAST MAJOR PRICE DROP. IT APPEARS THAT RUSSIA DID NOT ANTICIPATE SAUDI ARABIA'S REACTION.

- G. THE SAUDI ARABIA REACTION HAS MOVED FROM 'TALK' TO 'ACTION', AS OF THIS WEDNESDAY, 11TH MARCH 2020, THEY HAVE CHARTERED AN UNPRECEDENTED AMOUNT OF VLCCs TO 'DELIVER' ON THE ADDITIONAL 2.5MN B/D PRODUCTION INCREASE.
- H. FOR INDICATORS OF WHERE PRICES WILL LIKELY MOVE IN THE NEXT 3 – 6 MONTHS, THE INCREASE IN CRUDE OIL SUPPLY OF 1.5MN – 2.5MN B/D AND THE DECREASE IN CRUDE OIL DEMAND OF 2MN – 4MN B/D WILL LEAD TO WHAT RYSTAD ENERGY SAID WAS '\$20 OIL NOT FAR OFF AS OPEC+ IS CAPABLE OF UNLEASHING 2.5 MILLION EXTRA BPD ON THE MARKET'.
- I. WORLD SUPPLY OF CRUDE OIL IS DRIVEN BY 2 INDIVIDUALS / WORLD DEMAND OF CRUDE OIL IS DRIVEN BY WORLD PEAK PANDEMIC CORONAVIRUS INFECTIONS BUT ALL INDICATIONS ARE THAT THIS GAP WILL LEAD TO LOWER PRICES, POTENTIALLY FOR A LONG TIME.

Consultancy services to undertake a study on the cost of services in supply of petroleum products in Kenya

FINAL REPORT



Prepared for



**Ministry of Energy and Petroleum,
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Nairobi Kenya**

Prepared by



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Hass Plaza, 4th Floor, Lower Hill Road,
Upper Hill
P. O. Box 16989 – 00620
Nairobi, Kenya**

11.9 Annex 9: Attendance for COSSOP Stakeholder Forum on 28 Sept 2017

| | Name | Organisation |
|----|--------------------|-------------------|
| 1 | Maggy Waithiru | World Bank/KEPTAP |
| 2 | David Wainaina | MOEP/KEPTAP |
| 3 | Dr. F. Nyang | ERC |
| 4 | DR. John Mutua | ERC |
| 5 | Robert Githinji | ERC |
| 6 | Cyprian Nyakundi | ERC |
| 7 | Silas Cheboi | ERC |
| 8 | Ezra Terer | ERC |
| 9 | Hamid Mohamed | ERC |
| 10 | Leonard Yegon | ERC |
| 11 | Eunice Ayodo | ERC |
| 12 | Beldine Wakajummah | ERC |
| 13 | Jecinta Juma | ERC |
| 14 | Dildier Madzayo | ERC |

Cost of services in supply of petroleum products in Kenya

FINAL REPORT



| | | |
|----|--------------------|-----------------------|
| 15 | Pavel Oimeke | ERC |
| 16 | Isabel Joy A. | National Treasury |
| 17 | Joel M Kimani | KPC |
| 18 | Elizabeth Akinyi | KPC |
| 19 | Zilper Abong'o | KPC |
| 20 | Martin Kimani | KPC |
| 21 | E. Nyamongo | Central Bank of Kenya |
| 22 | Julius Bett | Central Bank of Kenya |
| 23 | Nguru P.N | KRA |
| 24 | Lucy Muchai | KRA |
| 25 | Nicholas Nyesya | KEBS |
| 26 | Joseph Kamochi | KEBS |
| 27 | Dr. Julius Muia | DG Vision 2030 |
| 28 | Damaris A. | CAK |
| 29 | John K. Daina | CAK |
| 30 | James Mutisya | CAK |
| 31 | Helen Hoka | KIPPRA |
| 32 | Kevin Adundo | PIEA |
| 33 | Wanjiku Manyara | PIEA |
| 34 | DR Rachel Mulungye | Supplycor |
| 35 | James Ondingo | Supplycor |
| 36 | David Kalonjo | Vivo Energy |

Cost of services in supply of petroleum products in Kenya

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| | | |
|----|-------------------|-------------------|
| 37 | Lucy Mwihaki | Vivo Energy |
| 38 | Peter Mwangi | Vivo Energy |
| 39 | Werna Oreyer | Vivo Energy |
| 40 | Andrew Waititu | Vivo Energy |
| 41 | Ezan Pierre | Vivo Energy |
| 42 | Premanand Dhooron | Total Kenya |
| 43 | Martine Muriuki | Total Kenya |
| 44 | James Ngugi | Oryx Energy Kenya |
| 45 | Fredrick Gendi | Oryx Energy Kenya |
| 46 | Maimuna Said | NOCK |
| 47 | Martine Mwangi | NOCK |
| 48 | Sylvia Atieno | Engen Kenya |
| 49 | Wesley Kimeto | Kenol/Kobil |
| 50 | Ruto Lyoba | Libya Oil |
| 51 | Albert Wetiata | Mogas Kenya Ltd |
| 52 | Stephen Tunui | Gulf Energy |
| 53 | Pius A. Omollo | Gulf Energy |
| 54 | DR. M. Irungu | Gapco |
| 55 | Ongerí Mark | Dalbit Petroleum |
| 56 | Caroline Mugambi | Dalbit Petroleum |
| 57 | Parthiban E. | ASpam |
| 58 | Solomon Osundwa | VTTI |

Cost of services in supply of petroleum products in Kenya

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| | | |
|----|------------------|--------------------------|
| 59 | Peter Mecha | Petrocity |
| 60 | Musyoki Muindi | Bill Inv. Ltd |
| 61 | Jecinta Njoroge | Brainfield |
| 62 | Dorothy Oige | Brainfield |
| 63 | Farooq Charani | Argwings Total |
| 64 | D. Murashiki | LOKL |
| 65 | Mohaz Karmal | Retail/OMC |
| 66 | Abdul Aziz A. | Stabex |
| 67 | Kevin Owino | Texas |
| 68 | Sophia Munguti | Stanbic Bank |
| 69 | Salim Awadh | Salim Awadh |
| 70 | Sam Washilonga | Trista |
| 71 | Erastus Wahome | NT |
| 72 | James N. Mwangi | Kurrent Technologies Ltd |
| 73 | Sanjay Gandhi | Kurrent Technologies Ltd |
| 74 | Mercy Wambugu | Kurrent Technologies Ltd |
| 75 | George Wachira | Kurrent Technologies Ltd |
| 76 | Peter Murage | Kurrent Technologies Ltd |
| 77 | Gideon Owen | Kurrent Technologies Ltd |
| 78 | Hottensia Kabuki | Kurrent Technologies Ltd |

Petroleum Pump Pricing

Key variables in the pricing formula are

- Wholesale
 - Landed Cost
 - The weighted average cost for all imported cargoes;
 - The transportation cost from Mombasa to the nearest whole sale depot, which is made of x percent of pipeline tariff and 100-x percent of road bridging costs;
 - Allowed losses in the pipeline as set at 0.08%;
 - Allowed losses in the depot as at 0.50% for PMS and 0.30% for AGO & IK;
- Allowed oil marketing company's gross wholesale margin set at KShs. 7 per litre.

Petroleum Pump Pricing

Retail

- The allowed maximum retail gross margin set at KShs. 3.89 per litre;
- The delivery rate from the nearest wholesale depot to a retail dispensing site in shillings per litre set at KShs. 0.62 per km/litre
- The total taxes and levies for petroleum products in shillings per litre:
 - PMS – KShs. 39.14 per litre – 37% of the current price
 - AGO- KShs. 29.53 per litre – 31% of the current price
 - IK – KShs. 8.38 per litre – 11% of the current price
- The maximum retail pump price of super petrol, kerosene or automotive gas oil/diesel applicable, in shillings per litre;
- The formula's output faithfully reflects the movements of the international global petroleum prices, landing costs and Kenya's exchange rate regime.

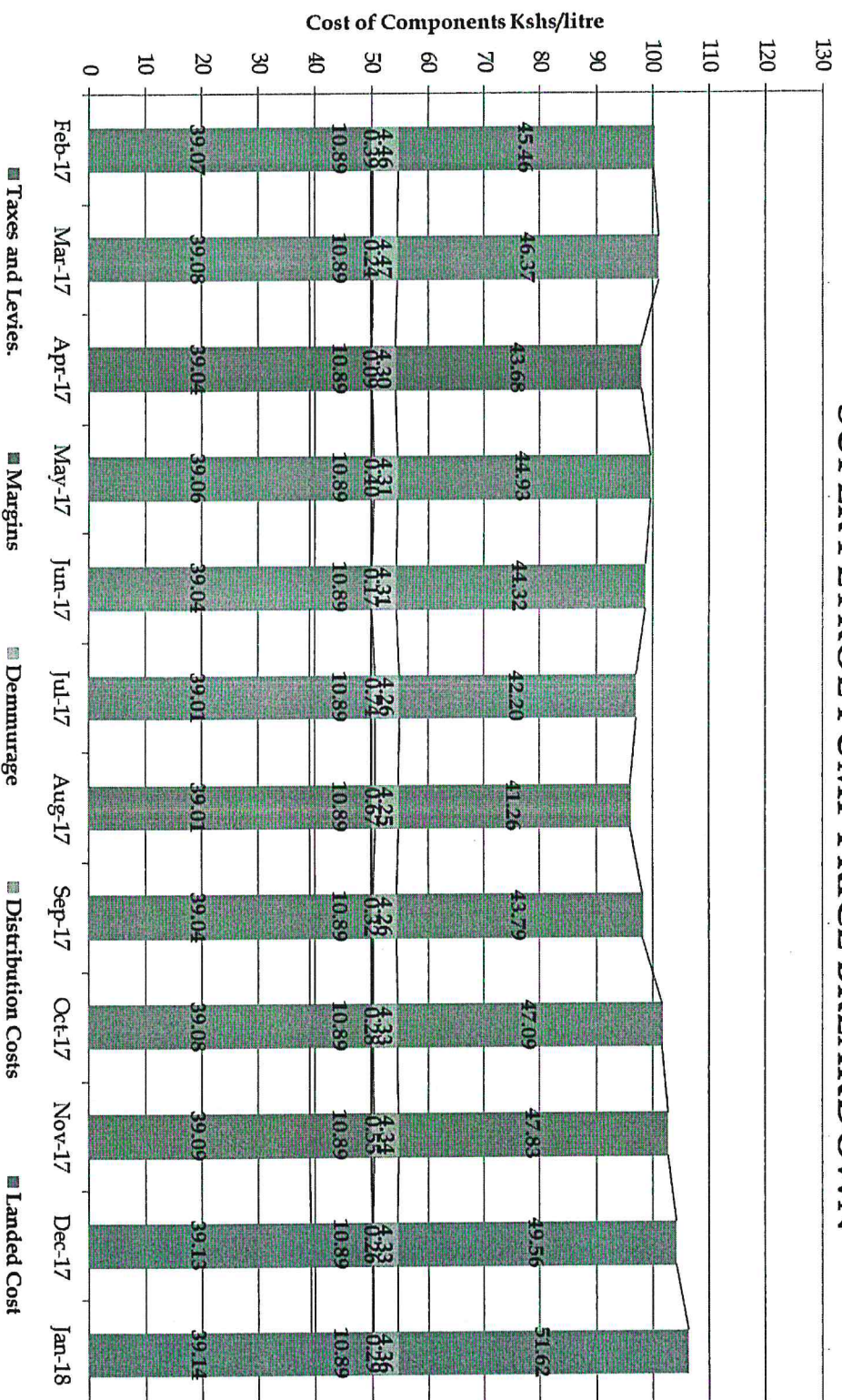
The Petroleum pricing formula is under review through Cost of Service Study

Template – Price Build up

| Sr. No. | Cost Component | Description | Super Petrol (KES/Litre) | Kerosene (KES/Litre) |
|---------|--------------------------------------|--|-----------------------------|----------------------|
| 1 | Free On Board (FOB) | Weighted Average of Platts | 45.970 | 47.400 |
| 2 | Freight & Premium (F&P) | Weighted Average | 2.500 | 0.549 |
| 3 | Letter of Credit Charges (LC) | [1.20%*C&F] - Finance institutions | 0.580 | 0.600 |
| 4 | Import Declaration (IDF) Fees | [2%*CIF] | 0.960 | 0.960 |
| 5 | Marine Insurance | [1.003 *C&F*0.0770%] | 0.130 | 0.125 |
| 6 | War Risk Insurance | [1.003 *C&F*0.0275%] | 0.010 | 0.014 |
| 7 | KPA Wharfage | [USD 2.20/MT + 16% VAT] | 0.200 | 0.220 |
| 8 | Stevedoring Charges | [USD 1.65/MT] - Local Pilot Charge | 0.130 | 0.141 |
| 9 | Ocean Losses | [0.50%*CIFLW] | 0.250 | 0.260 |
| 10 | Administration Fees | [0.5% of CIF] | 0.250 | 0.250 |
| 11 | Inspection Charges | As charged | 0.008 | 0.008 |
| 12 | Analysis and Recertification Charges | [0.50%*CIF] | 0.004 | 0.001 |
| 13 | Merchant Shipping Levy | [USD 0.3/MT] - KMA | 0.024 | 0.026 |
| 14 | Kipevu shore handling charges | [3USD*16%VAT] - KPC | 0.330 | 0.360 |
| 15 | KPRL Storage Charges | [3.56USD*16%VAT] - KPC | 0.280 | 0.426 |
| 16 | Direct Order charges | As charged | 0.006 | 0.000 |
| 17 | Demurrage costs | As charged | 0.280 | 0.600 |
| 18 | Pipeline Transport (Msa-Nrb) | Pipeline (80%PMS,AGO) 100% DPK | 2.180 | 2.720 |
| 19 | Road Transport (Msa-Nrb) - Bridging | Road (20% PMS,AGO) | 1.030 | 0.000 |
| 20 | Pipeline Losses | Pipeline (0.08%) - Actual Loss | 0.070 | 0.050 |
| 21 | Depot Losses | 0.5% PMS, 0.3% DPK,AGO | 0.460 | 0.180 |
| 22 | Delivery within 40kms of Nrb | Delivery to petrol stations | 0.620 | 0.620 |
| 23 | Importers Margin | Importers Financing and Profit | 7.000 | 7.000 |
| 24 | Retail Margin | Petrol station Dealer's Financing and Profit | 3.890 | 3.890 |
| 25 | Excise Duty | Tax - Exchequer Funding | 19.900 | 7.205 |
| 26 | Road Maintenance Levy | Levy - Kenya Roads Board | 18.000 | 0.000 |
| 27 | Petroleum Development Levy | Levy - Training & Development | 0.400 | 0.400 |
| 28 | Petroleum Regulation Levy | Levy - ERC Funding | 0.120 | 0.050 |
| 29 | Railway Development Levy | Levy -SGR Funding | 0.720 | 0.720 |
| | Nairobi Pump Price | Sum of the cost components | 106.302 | 74.775 |

Super Petrol Pump Price Break down

SUPER PETROL PUMP PRICE BREAKDOWN



Pump Price Trends

CRUDE OIL AND LOCAL PUMP PRICE TRENDS FOR THE
PERIOD 2010 -2018

