

Environmental Impact Assessment (EIA) in Kenya

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1.0 Introduction

An Environmental Impact Assessment (EIA) is one of the tools for environmental management under EMCA.¹ It is a procedure for evaluating the likely impact of a proposed activity on the environment. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed.² It is also defined as a process which produces a written statement to be used to guide decision-making, which provides decision-makers with information on the environmental consequences of proposed activities, programmes, policies and their alternatives; requires decisions to be influenced by that information and ensures participation of potentially affected persons in the decision-making process.³

It has become an important tool in environmental management since its adoption in the US in 1969, in the 1972 Stockholm Conference and in the 1972 National Environmental Protection Act of USA. The need for EIA was succinctly expressed in Principle 17 of the 1992 Rio Declaration on Environment and Development which affords the strongest evidence of international support for EIA in the following terms;⁴

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent authority.”

Similarly, Agenda 21 endorses the need for individuals, groups and organizations to participate in EIA procedures. It calls on States to assess the environmental suitability of infrastructure in human settlements, ensure relevant decisions are preceded by EIA and take into account the costs of any ecological consequences, integrate environmental considerations in decision-making at all levels and in all ministries and ensure the

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¹The other tools for environmental management are: Environmental Audit and Monitoring; Environmental restoration, conservation and easement orders; environmental inspections, analysis and records and environmental quality standards.

² Patricia Birnie & Alan Boyle, *“International Law and the Environment”*, 2nd edn, (Oxford University Press, 2002), p.131-132

³ Philippe Sands, *“Principles of International Environmental Law,”* 2nd edn, (Cambridge University Press, 2003), 799-800

⁴ Patricia Birnie & Alan Boyle, *“International Law and the Environment”*, op.cit, p.131-132

transparency of and accountability for the environmental implications of economic and other policies.⁵ It has been found that an effective EIA may⁶;

- i) Provide an opportunity for public scrutiny and participation in decision-making;
- ii) Introduce elements of independence and impartiality;
- iii) Facilitate better informed judgments when balancing environmental and developmental needs;
- iv) At the international level, it may alert governments and international organizations of the likelihood of transboundary harm;
- v) Contribute to the implementation of national policies on sustainable development and precautionary action.

Both State and international practice have shown that prior EIA is a necessary part of the obligation of transboundary co-operation. Without prior assessment there can be no meaningful notification and consultation in most cases of environmental risk.⁷

In the *Gabcikovo-Nagymaros Case*⁸ it was alleged that an adequate EIA had not been carried out before proceeding with a hydro-electric project. Though the judgment did not address the need for prior EIA, it stressed that new environmental norms and standards have to be taken into account 'not only when states contemplate new activities but also when continuing activities begun in the past.' Court's view is that EIA is a continuum which will operate throughout the life of a project.

2.0 Principles of EIA

EIA should *inter alia* be guided by the following principles;

- i. It should be applied as a tool to achieve sustainable development;
- ii. It should be applied as a tool to implement environmental management rather than a report to gain project proposals;
- iii. It should be integrated in the project life cycle to ensure that environmental information is provided at the appropriate stages;
- iv. It should be applied to all proposed actions likely to have a significant adverse effect on environment and human health;
- v. It should include an analysis of feasible alternatives to the proposed action;
- vi. Should include meaningful opportunities for public participation;
- vii. Should be carried out in a multi-or inter-disciplinary manner using practicable science;
- viii. It should integrate information on social, economic and biophysical aspects.

3.0 EIA under EMCA

⁵ Philippe Sands, "*Principles of International Environmental Law*, op. cit, p.802-803

⁶ Ibid

⁷ Ibid, p. 133

⁸ Ibid. ICJ Rep. (1997),7

EMCA makes provision for EIA in sections 58 and 59 thereof. Section 58 *inter alia* obliges the proponent of a project to undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof. A proponent must not implement a project likely to have a negative environmental impact or for which an EIA is required under the Act or Regulations unless an EIA has been concluded and approved by NEMA.⁹ At the end of the environmental impact assessment study process an *environmental impact assessment study report* is produced.

4.0 Stages of an EIA

An environmental impact assessment undergoes through the following stages;

- A. Screening:** screening determines which projects or developments require a full or partial impact assessment study.
- B. Terms of reference:** an EIA study must be conducted in accordance with terms of reference developed during the scoping exercise by the proponent and approved by NEMA.¹⁰ *Scoping* is identification of the potential impacts that are relevant to assess and to derive terms of reference for the impact assessment. The terms of reference include matters required to be considered in the making of an EIA including;
 - ✓ Ecological considerations that is the impact of project on biological diversity, sustainable use and ecosystem maintenance.
 - ✓ Social considerations including economic impacts, social cohesion or disruption, effect on human health, immigration or emigration, communication and effects on culture and objects of culture value.
 - ✓ Landscape
 - ✓ Land uses
 - ✓ Water: impacts of the proposal on water sources and drainage patterns/drainage systems.¹¹
- C. Environmental impact assessment Study:** an EIA study is to be conducted in accordance with the general environmental impact assessment guidelines and sector EIA guidelines set out in the Third Schedule to the Regulations.¹²
An environmental impact assessment study must take into account environmental, social, cultural, economic, and legal considerations, and shall:¹³

⁹ Regulation 4 (1) of Legal Notice No. 101, the Environmental (Impact Assessment and Audit) Regulations, 2003

¹⁰ Ibid, Regulation 11

¹¹ Ibid

¹² Ibid, Regulation 12 (1)

¹³ Ibid, Regulation 16

- i) identify the anticipated environmental impacts of the project and the scale of the impacts;
- ii) identify and analyze alternatives to the proposed project;
- iii) propose mitigation measures to be taken during and after the implementation of the project; and
- iv) develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.

D. The Environmental Impact Assessment Study Report¹⁴

After an EIA study has been conducted the proponent submits to the Authority an EIA Study Report incorporating but not limited to the following information:

- i) the proposed location of the project;
- ii) a concise description of the national environmental legislative and regulatory framework, baseline information,
- iii) and any other relevant information related to the project; the objectives of the project;
- iv) the technology, procedures and processes to be used, in the implementation of the project;
- v) the materials to be used in the construction and implementation of the project;
- vi) the products, by-products and waste to be generated by the project;
- vii) a description of the potentially affected environment;
- viii) the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated;
- ix) alternative technologies and processes available and reasons for preferring the chosen technology and processes;
- x) analysis of alternatives including project site, design and technologies and reasons for preferring the proposed site, design and technologies.
- xi) an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment; including the cost, time frame and responsibility to implement the measures;
- xii) provision of an action plan for the prevention and management of foreseeable accidents and hazardous activities in the course of carrying out activities or major industrial and other development projects;

¹⁴ Ibid, Regulation 18 (1)

- xiii) the measures to prevent health hazards and to ensure security in the working environment for the employees and for the management of emergencies;
- xiv) an identification of gaps in knowledge and uncertainties which were encountered in compiling the information;
- xv) an economic and social analysis of the project;
- xvi) an indication of whether the environment of any other state is likely to be affected and the available alternatives and mitigating measures; and
- xvii) such other matters as the Authority may require.

The environmental impact assessment study report must also be accompanied by a non-technical summary outlining the key findings, conclusions and recommendations of the study and must be signed by the proponent and environmental impact assessment experts involved in its preparation.¹⁵

E. Public participation

Public participation is at the centre of EIA. During the process of conducting an environmental impact assessment study the proponent must in consultation with NEMA seek the views of persons who may be affected by the project.¹⁶ After the approval of the EIA Report by NEMA, the proponent must¹⁷;

- a) publicize the project and its anticipated effects and benefits by:
 - ✓ posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - ✓ publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and
 - ✓ making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks;
- b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
- c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
- d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

F. Comments from Lead Agencies

¹⁵ Ibid, Regulation 18 (2)

¹⁶ Ibid, Regulation 17 (1)

¹⁷ Ibid, Regulation 17 (2)

After NEMA has received the Report, has to submit a copy thereof to any relevant lead agencies for their comments. Lead agencies review the report to ensure that it complies with the terms of reference under Regulation 11 and that it is comprehensive. They thereafter send their comments to NEMA on the report within 30 days or such extended time as the Authority may specify.¹⁸ If no comments are received from the Lead Agencies the Authority may proceed with the determination of the application for the implementation of the project.¹⁹

G. Submission of comments and public hearing

Regulation 21 obligates NEMA to invite the public to make oral or written comments on the report. The invitation for public comments shall state;

- i) The nature of the project;
- ii) The location of the project;
- iii) The anticipated impacts of the project and the proposed mitigation measures to respond to the impacts;
- iv) The times and place where the full report can be inspected; and
- v) The period within which the Authority shall receive comments.

Upon receipt of both oral and written comments the Authority may hold a public hearing. On conclusion of the hearing, the presiding officer shall compile a report of the views presented at the public hearing and submit a report to the Director General of NEMA within 14 days from the date of the public hearing. The Authority may then approve the Environmental Impact Assessment Study Report and issue an EIA Licence under Regulation 24.

5.0 Strategic environment assessment/integrated impact assessment

This is a process of subjecting public policy, programmes and plans to test for compliance with sound environmental management. Agenda 21 emphasizes the importance of integrated environment and development decision-making and promotes the use of EIA and other policy instruments for this purpose. Whereas EIA concerns itself with the biophysical impacts of proposals only (e.g. effects on air, water, flora and fauna, noise levels, climate etc), SEA and integrated impact assessment analyze a range of impact types including social, health and economic aspects.

Regulation 42 (1) obligates lead agencies in consultation with the Authority to subject all proposals for public policy, plans and programmes for environmental implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others.

Such an assessment has to consider the effect of implementing alternative policy actions taking into consideration: the use of natural resources; the protection and

¹⁸ Ibid, Regulation 20 (2)

¹⁹ Ibid, Regulation 20 (3)

conservation of biodiversity; human settlement and cultural issues; socio-economic factors; and the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance. Government and all the lead agencies will have to incorporate principles of strategic environmental assessment in the development of sector or national policy. The content of a strategic environmental impact report are provided in Regulation 43 (1).

6.0 EIA and Monitoring

Monitoring has been defined as a process whereby states observe, measure, evaluate and analyze by recognized scientific methods the risks or effects' of pollution or environmental harm. It is a continuous or periodic determination of actual and potential effects of any activity or phenomenon of the environment whether short-term or long-term. Unlike prior EIA, monitoring is generally undertaken after the project has begun, to check initial EIA predictions and determine whether further measures are needed in order to abate or avoid pollution or environmental harm.²⁰ It is also done for purposes of conducting research or identifying patterns and trends which reflect the state of the environment.²¹

Under Article 1 of the 1992 OSPAR Convention, monitoring has been defined as the 'repeated measurement' of the following three factors;²²

- i) The quality of the environment and each of its compartments;
- ii) Activities or natural and anthropogenic inputs which may affect the quality of the environment; and
- iii) The effects of such activities.

7.0 Environmental Audit

Section 68 of EMCA obligates NEMA with the responsibility of carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental audit study must be undertaken on development activities likely to have adverse environmental impacts such as ongoing projects commenced prior to the coming into force of the regulations or new projects undertaken after completion of an environmental impact assessment study report.²³ In carrying out an environmental audit study the auditor must carry out an appraisal of all the project activities including the production of goods and services; give adequate consideration to environmental regulatory frameworks, environmental health and safety measures and sustainable use of resources.²⁴ The principles applicable to EIA are also relevant in an environmental audit.

²⁰ Patricia Birnie & Alan Boyle, "*International Law and the Environment*", op.cit, p.130-131

²¹ Philippe Sands, "*Principles of International Environmental Law*, op. cit, p.847

²² Ibid, p.848

²³ Regulation 31 (1), op.cit

²⁴ Ibid, Regulation 31 (6)

8.0 Challenges and way forward

Sustainable development is one of the national values and principle of governance under Article 10 of the constitution. To attain sustainable development there is need for all proposals for development projects to consider EIA. This will be essential considering the obligations in relation to the environment as envisaged in Article 69 of the constitution. However, recent infrastructural developments in Kenya, do not seem to have adequately complied with sound environmental management practices. For example, when mangrove forests were destroyed and human settlement disrupted, it can be said that the Lamu Port and Lamu Southern Sudan-Ethiopia Transport Corridor (LAPSSET) was not subjected to a strategic environmental assessment.

There is also a challenge in implementing EIAs due to the numerous lead agencies dealing with specific components of the environment e.g. agencies under the forestry, water, roads and other ministries. Sound environmental management has thus been hampered by the lack of a harmonized regulatory framework. Though NEMA is to be the overarching lead agency in environmental matters, there has been conflict of interest with other agencies.

Poor information sharing, lack of consultation, incomprehensible language, lack of familiarity with EIA guidelines and lack of a harmonized regulatory and institutional capacity are other challenges facing EIAs in Kenya.

Be that as it may, there are opportunities that have been created by the new constitution. It for example obligates the State to encourages public participation in the management, protection and conservation of the environment²⁵ and the establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment.²⁶ This provision bolsters the need for EIA, EA and monitoring of the environment in development projects. However, it is requisite that the three tools be used in tandem in an attempt to ensure that projects, programs, plans and related activities address all environmental, social and biophysical considerations.

9.0 Conclusion

EIA as an environmental management tool will be quintessential in the country's quest to attain vision 2030. Several projects will have to be undertaken in this regard. Since sustainable development demands a balance between the need for economic development and environmental conservation, EIA will play a critical role in the development trajectory the country is taking. EIA promotes sustainable development by ensuring that development proposals do not undermine natural resource and ecological functions or the wellbeing, lifestyle and livelihood of the communities and peoples who depend on them. in the long run EIA will protect human health and safety; avoid irreversible changes and serious

²⁵ Article 69 (1) (d) of the Constitution

²⁶ Ibid, Article 69 (1) (f)

damage to the environment; safeguard valued resources, natural areas and ecosystem components and address societal aspects of the environment.