

INSTITUTIONAL AND LEGAL FRAMEWORK FOR THE MANAGEMENT OF NATURAL RESOURCES

Policy, Legal and Institutional Framework governing Environmental Management in Kenya

Introduction

Development can have major impacts on the environment by degrading soils and waterways, altering landscape and destroying biodiversity and habitat. Other problems associated with development and human activity include land use conflicts, human and animal conflicts, water management and environmental pollution. In addition to harming the environment, these impacts can and do have significant economic costs and negatively affect human health. Environmental Impact Assessment (EIA) is a tool that assists in the anticipation and minimization of the adverse effects of development.

Undertaken in the early stages of project planning and design, EIA seeks to help shape development in a manner that best suits the local environment and is most responsive to human needs. The concept of EIA arose from the pollution and degradation of natural resources caused by rapid population growth, industrialization, agricultural development and technical progress. EIA recognizes that natural resources are finite and incapable of absorbing the unchecked demands of modern society.

There is a growing concern in Kenya and at global level that many forms of development activities cause damage to the environment. This has been aggravated by lack of awareness and inadequate information amongst the public on the consequences of their interaction with the environment. In addition there is limited local communities' involvement in participatory planning and management of the environment and natural resources. Recognizing the importance of natural resources and the environment in general, the Kenyan Government has put in place wide range of policy, institutional and legislative framework to address the major causes of environmental degradation and negative impacts on ecosystems emanating from industrial and economic development programmes.

It is now accepted that development projects must be economically viable, socially acceptable and environmentally sound. It is a condition of the Kenya Government to conduct Environmental Impact Assessment on development Projects. EIA assesses the impacts of a proposed project before commencement of implementation. In addition to helping formulate proper development policy, EIA provides for public participation in the decision making process in respect of a given proposed project. EIA serves the following purposes:

- i) Integration of environmental issues into planning and decision making processes;
- ii) Anticipation, minimization and mitigation of environmental damage and recommendation of alternatives;
- iii) Public participation in decision making and environmental conservation.

The steps included in and EIA are contained in the Environmental of the Environmental Management and Coordination Act No. 8 of 1999 (EMCA) at Sections 58 and 138 and the Environmental (Impact Assessment and Audit) Regulations 2003 (Legal No. 101 of 2003). All undertakings enumerated in the Second Schedule of EMCA require an Environmental Impact Assessment project/study report prepared and submitted to the National Environment Management Authority (NEMA) for review and eventual licensing before the development commences.

Policies, institutions and natural resource management

Policy provides guidelines for society to act in certain ways or provides a sense of direction to achieve certain goals. Policy failures may be in 3 forms:

- Broad macro economic and fiscal policies may influence the way people use NR.
- Regulatory policies governing NR may be inadequate to correct existing problems.
- Conservation policies may be inappropriately designed and implemented.

Policy and institutional failures are responsible for the many environmental problems we face (i.e. the difference between actual outcomes and optimal resource use). Policy failure refers to situations where inappropriate government policies or absence or required policies results into natural resources degradation by both private and public users.

Institutions

Institutions are rules of conduct that facilitate coordination or govern relationships between individuals or groups in a society. North (1995) an economist defined institutions more generally

as the rules of the game of a society. More formally, institutions are defined as humanly devised constraints that structure human interactions. Institutions can be

- Formal or
- Informal

Formal rules are crafted or approved or recognized by the state and include the constitution, property rights, laws etc.

Informal rules are crafted by communities and include norms of behavior, sanctions, taboos, and codes of conduct. Institutions important in natural resource management should:

- State **what** should (should not) happen to the resource
- State **who** is concerned
- State **how** that should happen
- State **what if** i.e. the fines and punishment for non compliers

For instance the forests act (CAP 365) defined the penalties imposed on illegal forest users while the wildlife act bans all extractive activities in within protected wildlife conservation area.

Institutions may fail due to:

- Unsupported policy(policies not supported by legislation cannot be legally enforced)
- Inadequate legal framework (sometimes legislation and supporting regulations may be outdated)

Organizations

Sometimes institutions are confused with organizations. Organizations are players or group of individuals bound by a common purpose to achieve certain objectives. Examples of organizations include political parties, regulatory agencies like NEMA, schools, colleges etc. Organizations usually craft institutions (rules) to shape how people interact.

- Institutions are distinct from organizations, which are material entities typically possessing personnel, offices, budgets, a legal personality and so forth. Organizations play important roles in the administration and management of regimes dealing with a wide range of topics (e.g. the US Environmental Protection Agency, the International Maritime Organization).
- Government ministries (list), parastatals (list), institutional responsibility for overall environmental management lies at ministerial level – MENR. The ministries have mainly a co-ordinating and regulatory role rather than an implementing role.

- Non-government players – environmental NGOs (NGOs and INGOs), Civil Society Organizations, Regional bodies, UN affiliated bodies.
- Communities – CBOs Associations, farmer/pastoralist groups.

Environmental laws in Kenya

Kenya's environmental policy and legislation are scattered in a multiplicity of resource and sector specific laws and policy papers. The institutions and departments that deal with environmental issues are equally numerous. Sector specific laws are deficient in that they are characterized by fragmented and uncoordinated sectoral legal regimes that are developed to facilitate resource allocation and to deal with environmentally adverse effects of resource exploitation. The sectoral institutions under these laws often find themselves in regulatory competition.

Formal institutions

Constitution of Kenya

The Constitution of Kenya in spite of being the supreme law of the land does not contain specific provisions regarding the environment. Section 70 however lists the right to life as one of the fundamental rights an individual is entitled to. The right life guaranteed by the Constitution can be interpreted to include the right to a clean and healthy environment.

Environmental Management and Coordination Act of 1999 (EMCA)

The Environmental Management and Coordination Act of 1999 (EMCA) was enacted to provide an appropriate legal and institutional framework for the management of the environmental and for matters connected therewith and incidental thereto. EMCA does not repeal the sectoral legislation but seeks to coordinate the activities of the various institutions tasked to regulate the various sectors. These institutions are referred to as Lead Agencies in EMCA. Lead Agencies refer to any Government ministry, department, parastatals, and State Corporation or local authority in which any law vests functions of control or management of any element of the environment or natural resource.

EMCA was assented to in 1999 and commenced in 2000, *as an ACT of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.*

Institutions under EMCA

National Environmental Council (NEC)

The National Environment Council (NEC) is established under Section 4 of EMCA.

NEC which is chaired by the Minister in charge of the environment, is the highest policy making body under EMCA. NEC is responsible for policy formulation and directions for purposes of EMCA. NEC sets national goals and objectives and promotes cooperation among both public and private organizations engaged in environmental protection programs.

The National Environmental Management Authority (NEMA)

The National Environmental Management Authority (NEMA) is established under Section 7 of EMCA. NEMA is the principal Government institution charged with the overall supervision and co-ordination over all matters relating to the environment as well as implementation of all policies relating to the environment. NEMA is responsible for dealing with EIA. NEMA has to date considerably developed its human and other resource capacity to enable it coordinate the environmental management activities of Lead Agencies.

Provincial and District Environment Committees

Under section 29 (1) of EMCA, the Minister shall by notice in the gazette appoint Provincial and District Environment Committees of NEMA in respect of every province and district respectively. These committees assist NEMA in effectively carrying out its function of proper management of the environment at these levels. It is instructive to note that the membership of these committees include inter alia representatives of farmers or pastoralists, business community, women and youth.

Public Complaints Committee PCC

The Public Complaints Committee is established under Section 31 of EMCA. The

PCC is concerned with the investigation of complaints relating to environmental damage and degradation generally. The PCC has powers to investigate complaints against any person or even against NEMA or on its own motion investigate any suspected case of environmental degradation. The PCC is required by law to submit reports of its findings and recommendations to NEC. The law however is weak in that it does not provide PCC with the mandate to see its recommendations carried through. Further, NEC is not specifically required to do anything with regard to the reports submitted by the PCC and will often note and adopt the same without any further follow up action. So far the PCC has experienced challenges such as failure to honour summons, hostility between parties, hostility directed at PCC investigators, lack of understanding of EMCA and abdication of duty by Lead Agencies.

Standards and Enforcement Review Committee

The Standards and Enforcement Review Committee (SERC) is a committee of NEMA and is established under Section 70 of EMCA. This is a technical Committee responsible for formulation of environmental standards, methods of analysis, inspection, monitoring and technical advice on necessary mitigation measures.

National Environmental Tribunal (NET)

The NET is established under Section 125 of EMCA for the purpose of hearing appeals from administrative decisions by organs responsible for enforcement of environmental standards. An appeal may be lodged by a project proponent upon denial of an EIA licence or by a local community upon the grant of an EIA licence to a project proponent. NEMA may also refer any matter that involves a point of law or is of unusual importance or complexity to NET for direction. The proceedings of NET are not as stringent as those in a court of law and NET shall not be bound by the rules of evidence as set out in the Evidence Act. Upon the making of an award, NET's mandate ends there as it does not have the power to enforce its awards. EMCA provides that any person aggrieved by a decision or award of NET may within 30 days appeal to the High Court.

National Environment Action Plan Committee (NEAP)

The National Environment Action Plan Committee (NEAP) is established under Section 37 of EMCA. This cross-sectoral committee is responsible inter alia, for the development of a five year national environment action plan. The national environment action plan shall contain among other aspects analysis of the natural resources of Kenya and their distribution, quantity and various uses. It shall also recommend legal and fiscal incentives for business that incorporate environmental requirements into their planning and operational processes as well set out guidelines for the planning and management of the environment and natural resources. The national environment action plan shall upon adoption by Parliament be binding on all organs of government. Provincial and district environmental committees are also required to develop their own five year environmental action plans which are incorporated in the national environment action plan.

Regulation 4 (3) states that “No licensing authority under any law in force in Kenya shall issue a trading, commercial or development permit or license for any micro project activity likely to have cumulative significant negative environmental impact before it ensures that a strategic environmental plan encompassing mitigation measures and approved by the Authority is in place”.