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Critiquing the place of Environmental Impact Assessment as a tool for Enhancing Environmental Protection in Kenya

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Abstract

In a bid to protect the environment, the environmental law in Kenya has deliberately imposed an obligation on persons wishing to undertake various programmes, activities or projects to undertake Environmental Impact Assessment. Indeed, Environmental Impact Assessment has mandatorily become a prerequisite to undertaking various programmes, activities or projects that have an impact on the environment. This demonstrates the seminal role of environmental impact assessment in protecting the environment in Kenya.

This paper seeks to critique the role of Environmental Impact Assessment in the protection of the environment in Kenya. In doing so, the paper will analyze; what constitutes Environmental Impact Assessment, the legal framework governing Environmental Impact Assessment, the importance of Environmental Impact Assessment as a tool for enhancing environmental protection and lastly offer a conclusion.

1.0 Introduction

Development can have and has had over the years, major impacts on the environment, by degrading soils and waterways, altering landscapes and threatening biodiversity. In addition to harming our surroundings, these impacts can and do have significant economic costs and negatively affect human health. Environmental Impact Assessments (herein “EIA”) provide a tool that would assist in the anticipation and minimization of development’s negative effects on the environment.¹

Environmental Impact Assessments is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.²

United Nations Environment Programme (herein UNEP), defines Environmental Impact Assessment as a tool used to identify the

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¹United Nations Environment Programme, Training Manual on International Environmental Law page 295

²<<https://www.cbd.int/impact/whatis.shtml>>lastly accessed on 2/5/22

environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers.³ Statutorily, Environmental Impact Assessment is defined as a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.⁴

On the other hand, environmental protection has been defined as the practice of protecting the natural environment by individuals, organizations and governments.⁵ Its objectives are to conserve natural resources and the existing natural environment and, where possible, to repair damage and reverse trends.⁶

2.0 The Legal Framework Governing Environmental Impact Assessment in Kenya

Environmental Impact Assessment in Kenya is delimited by the Environmental Management and Co-Ordination Act No. 8 of 1999 and its subsidiary legislation namely Environmental (Impact Assessment and Audit) Regulations, 2003. Environmental Management and Co-Ordination Act No. 8 of 1999 under Part VI provides for Environmental Impact Assessment. Section 57A (1) of Cap No.8 of 1999 makes strategic environmental assessment *mandatory* for all policies, plans and programmes before their implementation.

Further, Section 57A (2) of Cap No.8 of 1999 provides that for the avoidance of doubt, the plans, programmes and policies are those that are;

³<<https://www.unep.org/resources/report/environmental-impact-assessment-and-strategic-environmental-assessment-towards>> lastly accessed on 2/5/22

⁴Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 and Regulation No. 2 of Environmental (Impact Assessment and Audit) Regulations, 2003

⁵<[yourdictionary.com.](https://yourdictionary.com/)> lastly accessed on 2/5/22

(Law Insider Dictionary-[Environmental protection](#) means any action designed to remedy or prevent damage to physical surroundings or natural resources by human activities, including to adapt to and mitigate climate change, to reduce the risk of such damage or to lead to more efficient and sustainable use of natural resources, including the use of sustainable renewable feed stocks, including and energy-saving measures and the use of renewable sources of energy and other techniques to reduce greenhouse gas emissions

<<https://www.lawinsider.com/dictionary/environmental-protection>> lastly accessed on 2/5/22

⁶<"What is Environmental Protection? Definition of Environmental Protection (Bryan A. Garner Black's Law Dictionary 9th Ed.)". The Law Dictionary. See; <https://www.igi-global.com/dictionary/environmental-protection/10073>> lastly accessed on 2/5/22

(a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority⁷ as likely to have significant effects on the environment.

This delimitation of policies, plans and programmes that are subject to strategic environmental assessment by Section 57A (2) of Cap No.8 of 1999 widens the scope of projects⁸ that are subject to environmental impact assessment.

Section 58 of Cap No.8 of 1999 provides for the application of an Environmental Impact Assessment licence from the National Environment Management Authority (herein Authority) by a proponent of a project, before financing, commencing, proceeding with, carrying out, executing or conducting the project.⁹

Section 59 of Cap No.8 of 1999 imposes an obligation upon the National Environment Management Authority to publish the Environmental Impact Assessment study report received from a proponent of a project in at least two newspapers circulating in the area of the project and over the radio a notice.

The importance of Environmental Impact Assessment is further demonstrated by Section 62 of Cap No.8 of 1999 which gives the National Environment Management Authority power to request a proponent of a project to carry out at his own expense further evaluation or Environmental Impact Assessment study, review or submit additional information to ensure that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.¹⁰

It is also noteworthy that Section 67 of Cap No.8 of 1999 gives the National Environment Management Authority power to revoke, suspend or cancel an Environmental Impact Assessment Licence issued to a proponent.

⁷Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines “Authority” as the National Environment Management Authority established under section 7 Cap No. 8 of 1999.

⁸Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines a “project” to include any project, programme or policy that leads to projects which may have an impact on the environment.

⁹Environmental Management and Co-Ordination Act No. 8 of 1999

¹⁰Section 62 of Cap No.8 of 1999; Further Environmental Impact Assessment

Lastly, the subsidiary legislation namely; Environmental (Impact Assessment and Audit) Regulations, 2003 in detail outlines the practical aspects and steps that should be followed in acquiring an Environmental Impact Assessment Licence by a proponent.

The Environmental (Impact Assessment and Audit) Regulations, 2003 under regulation 42 outlines what the environmental impact assessment that is to be carried out on a project should consider. This includes; (a) *the use of natural resources*; (b) *the protection and conservation of biodiversity*; (c) *human settlement and cultural issues*; (d) *socio-economic factors*; and (e) *the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of the built environment of historic or cultural significance*. This demonstrates the significance of environmental impact assessment in environmental protection.

Further, regulation 46 of Environmental (Impact Assessment and Audit) Regulations, 2003 provides for an *appeal* within sixty (60) days to the National Environment Tribunal¹¹ where a person is aggrieved by the decision of the National Environment Management Authority on the Environmental Impact Assessment Licence.

This includes where any person who is aggrieved by; (a) a refusal to grant a licence or by a refusal to transfer a licence by the Authority (b) the imposition of any condition, limitation or restriction on a licence (c) the revocation, suspension or variation of a licence issued by the Authority; (d) the amount of money which the person is required to pay as fees by the Authority (e) the imposition of any environmental restoration order or environmental improvement order on the project by the Authority or (f) the approval or reinstatement by the Authority of an environmental impact assessment licence.¹²

Environmental Impact Assessment has found its place in international law as captured by the Convention on Environmental Impact Assessment in a Transboundary Context (informally called the Espoo Convention).¹³ However, Kenya is not a signatory and/or has not ratified the Convention

¹¹Established under Section 125 of the Environmental Management and Co-Ordination Act No. 8 of 1999

¹²Regulation 46 of Environmental (Impact Assessment and Audit) Regulations, 2003

¹³<https://unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf> lastly accessed on 2/5/22

on Environmental Impact Assessment in a Transboundary Context which was signed in Espoo, Finland, in 1991 and entered into force in 1997.¹⁴ The Convention on Environmental Impact Assessment in a Transboundary Context sets out the obligations of Parties, that is, States that have agreed to be bound by the Convention to carry out an Environmental Impact Assessment of certain activities at an early stage of planning.¹⁵

The Convention on Environmental Impact Assessment in a Transboundary Context also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.¹⁶

3.0 The importance of Environmental Impact Assessment as a tool for enhancing environmental protection in Kenya

Environmental Impact Assessment arose out of the need to curb pollution and unnecessary degradation of natural resources caused by rapid population growth, industrialization, agricultural development, and technological progress. EIA recognizes that natural resources are finite and incapable of absorbing the unchecked demands of modern society. Over time, *EIA* has become one of the most effective and practical tools to protect the environment as it is a means of promoting sustainable development and its integrative aspects.¹⁷

It is worth noting that, when Environmental Impact Assessment is undertaken in the early stages of project planning and design, it can help shape development in a manner that best suits the local environment and is most responsive to human needs.¹⁸

Indeed, without any shadow of a doubt, EIA serves as a standard for determining whether or not due diligence was exercised by persons wishing to undertake various programmes, activities or projects that would have an impact on the environment.¹⁹

¹⁴<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X XVII-4-b&chapter=27#1> lastly accessed on 2/5/22

¹⁵Article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context

¹⁶Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context

¹⁷United Nations Environment Programme, Training Manual on International Environmental Law page 295

¹⁸Ibid No.17

¹⁹United Nations Environment Programme, Training Manual on International Environmental Law page 33

By using EIA both environmental and economic benefits can be achieved, such as reduced cost and time of project implementation and design, avoided treatment/clean-up costs and impacts of laws and regulations.²⁰

EIA assesses the impacts of a proposed project before work on the project begins. In some circumstances, where the impact of policies, plans and programmes is under consideration, EIA is carried out as a Strategic Environmental Assessment (“SEA”)²¹ and provides decision-makers with information about the consequences of the development programmes under consideration.²²

In addition to helping formulate proper development policy, EIA also provides for *public involvement in the decision making process*. Thus, EIA serves three main functions²³:

- a) *Integration of environmental issues into planning and decision-making;*
- b) *Anticipation and minimization of environmental damage; and*
- c) *Public participation in decision-making and environmental conservation*

EIA’s focus on environmental conservation and sustainable development echoes general principles and concepts of customary law. The focus is embodied in many Multilateral Environmental Agreements, including the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea.²⁴

Environmental Principle 17 of the UNCED Rio Declaration states verbatim that “*Environmental impact assessment, as a national*

²⁰<https://www.cbd.int/impact/whatis.shtml> lastly accessed on 2/5/22

²¹Barry Dalal-Clayton and Barry Sadler, Strategic environmental assessment: A rapidly evolving approach (Defined Strategic Environmental Assessment (SEA) as the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations.) <<https://www.cbd.int/impact/whatis.shtml>> lastly accessed on 2/5/22

²²United Nations Environment Programme, Training Manual on International Environmental Law page 295

²³Ibid No 22

²⁴Article 14 of the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea provides; Each Contracting Party, as far as possible and as appropriate, shall: Introduce appropriate procedures requiring **environmental impact assessment** of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

*instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.*²⁵

Thus, EIA reflects the “no-harm” obligation of customary law in the trans-boundary context.²⁶ The fundamental components of an EIA would necessarily involve the following stages²⁷:

- a. *Screening* to determine which projects or developments require a full or partial impact assessment study;
- b. *Scoping* to identify which potential impacts are relevant to assess (based on legislative requirements, international conventions, expert knowledge and public involvement), to identify alternative solutions that avoid, mitigate or compensate for adverse impacts on biodiversity (including the option of not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts), and finally to derive terms of reference for the impact assessment;
- c. *Assessment and evaluation of impacts and development of alternatives*, to predict and identify the likely environmental impacts of a proposed project or development, including the detailed elaboration of alternatives;
- d. *Reporting the Environmental Impact Statement (EIS) or EIA report*, including an environmental management plan (EMP), and a non-technical summary for the general audience.
- e. *Review of the Environmental Impact Statement (EIS)*, based on the terms of reference (scoping) and public (including authority) participation.
- f. *Decision-making* on whether to approve the project or not and under what conditions; and
- g. *Monitoring, compliance, enforcement and environmental auditing*. Monitor whether the predicted impacts and proposed mitigation measures occur as defined in the EMP. Verify the compliance of the proponent with the EMP, to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion.

²⁵<<https://www.cbd.int/doc/ref/riodeclaration.shtml#:~:text=Principle%2017,of%20a%20competent%20national%20authority.>>lastly accessed on 2/5/22

²⁶United Nations Environment Programme, Training Manual on International Environmental Law page 295

²⁷<<https://www.cbd.int/impact/whatis.shtml>> lastly accessed on 2/5/22

However, despite the importance of EIA in environmental protection, it can be a barrier to meaningful public participation. The first barrier that Environmental Impact Assessments (EIA) present is the quality of the information.

Having a look at the EIA reports published by the National Environmental Management Authority will tell you how the reports are presented is wanting. The reports are usually too wordy and this makes it difficult for a layperson to capture the important details. This goes hand in hand with the method used to relay this information. EIA advertisements for the public are mostly done in daily newspapers.²⁸

This action faces the problem of inadequate interpretation of the message as a result of English being used and consequently, important aspects of the message are left out. The problem with newspapers is that not all people get access to them, which only worsens the situation.²⁹

The second barrier is the language used. Language plays an important role in ensuring that the target audience absorbs the information being relayed. Truth be told, the majority of the people in these communities likely to be affected by the operations are illiterate and if literate, they face difficulties in trying to understand the Queen's Language.

Research has shown that English is used in pamphlets, photos and maps used in public participation events. *"Although English is Kenya's national language and the literacy level maybe 79%, often the message is lost because of inadequate interpretation. Consequently, there is an inadequate explanation of the background and technical material that may help the public to contribute effectively in EIA deliberations."*³⁰

It is however my recommendation that to prevent Environmental Impact Assessment from being a barrier to meaningful public participation as pointed out above, the pamphlets, posters, as well as EIA study reports should be written in an indigenous language.³¹ This will help the public

²⁸Nick Okello Lindsay Beevers Wim Douven & Jan Leentvaar, 'The doing and undoing of public participation during environmental impact assessments in Kenya' (2009) 27(3) *Impact Assessment and Project Appraisal* 222

²⁹Ibid No. 28

³⁰Nick Okello Lindsay Beevers Wim Douven & Jan Leentvaar, 'The doing and undoing of public participation during environmental impact assessments in Kenya' (2009) 27(3) *Impact Assessment and Project Appraisal* 222

³¹This is in accordance with, Section 59 of Cap No.8 of 1999 which imposes an obligation upon the National Environment Management Authority to publish the environmental impact assessment study report received from a proponent of a project in at least two newspapers circulating in the area of the project and over the radio a notice.

digest the information as well as contribute effectively to public participation events. Simple examples and illustrations, especially diagrams should be included as well. Diagrams tend to stick in the mind better than plain text.

4.0 Conclusion

Premised on the foregoing, it is not in doubt the significance of Environmental Impact Assessment as a tool for enhancing environmental protection in Kenya. Environmental Impact Assessment act as a preventive measure to promote environmental protection. The preliminary stage at which Environmental Impact Assessment has to be undertaken in accordance with the law³² means that it can act as a tool for enhancing environmental protection and upholding the right to a clean and healthy environment as guaranteed under *Article 42 of the Constitution of Kenya 2010*.

³²Section 57A of the Environmental Management and Co-Ordination Act No. 8 of 1999 and Regulation 4 of Environmental (Impact Assessment and Audit) Regulations, 2003

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