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RESEARCH ARTICLE

# Strategic Environmental Assessment Law in Kenya: Lacunae and Consensus

D. K. Okoth-Yogo
*School of Arts and Social Sciences, Moi University, P.O. Box 3900 30100, Eldoret Kenya*
*Kiboyye@justice.com*

## Abstract

*Strategic Environmental Assessment [SEA] is a methodical process for examining the significance of decisions taken to ensure that environmental considerations and alternatives are addressed on parity with economic and social factors in policies, plans and programs [PPP] for developments. SEA counteracts some of the limitations of Environmental Impact Assessments [EIA] as they provide room for assessment of actions that transcends specific projects. EIAs, though firmly rooted in Kenya, take place after many strategic decisions have been made regarding specific projects. This paper not only discusses SEAs wholesomeness but also legal lacuna that negates its benefits as one of the tools for implementing environmental law objectives. It recommends that for SEA to be effective, it should either be explicit, or the definition and the provision of EIA expanded to include assessment of not only projects but also plans, policies and programs from universally spatial and sector-wide perspectives.*

**Key Words:** Strategic Environmental Assessment, Environmental Law, Lacunae, Sustainable Development

## Introduction

Strategic Environmental Assessment (SEA) is a decision making support instrument for the formulation of sustainable spatial and sector policies, plans and programs aiming to ensure an appropriate consideration of the environment'(EU, 2001: Fisher, 2003: Briffet et al. 2003). Myriad legal stipulations for SEA in many jurisdictions fall under the Environmental Impact Assessment (EIA) legislation, broadening its use appropriately (Ahmed &Sanchez-Triana, 2008). An integral part of the environmental assessment tools alongside EIA and Environmental Audits (EAu), it is one of the innovative ways of meeting the environmental planning and law objectives. EMCA (1999), a framework environmental legislation, together with other sector specific legislations provides for various tools other than environmental assessments. These tools can be broadly categorized as command and control standards, environmental restoration orders, economic incentives, civil penalties, liability and criminal sanctions, protection of property rights, contractual arrangements and information dissemination. They meet environmental law objectives like ensuring adequate human health and safety, economic efficiency, peaceful coexistence between communities, sustainable development, equitable development and use of resources, advancement of science and technology, biocentrism and aesthetics and recreation.

Environmental assessments, whose fundamental objective are not so much the development of plans, programs, policies and projects that have no environmental impacts as mitigating the effects from untenable processes, are embodied under EMCA, the Physical Planning Act of 1996 and the Environmental (Impact Assessment and Audit) Regulations of 2003 [AAR]. They provide that the National Environmental Management Authority [NEMA], the lead agencies (a government ministry, department, state corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resource) and proponents do consider all reasonable and prudent alternatives to activities whose actions can exert significant negative impacts on the environment. Any person who desires to carry out a project, including any program or policy that might impact on the environment, shall before financing; or commencement, present a summary statement of the likely environmental effects of the proposed undertaking to NEMA (EMCA, 1999; Sections 2, 42 & 58). The rationale for environmental assessments has been captured by the case of Nzioka vs Tomin, 2001. Justice Hayanga asserted that since the injurious effects of the environment had not been established, it was important that an injunction be granted as prayed until such impacts are studied (Sifuna, 2007). Where the plaintiffs sought for an injunction to restrain the defendants, their agents and servants from constructing a slaughter house within Limuru Town as he had not sought for an EIA licence, among other stipulations, the court directed that the project can not continue until all the requirements are discharged. (Mwaniki & Others vs Gicheha, 2006). In another case, NEMA had given an EIA licence to a project that did not indicate the cumulative environmental impacts of

the project in the Maasai Mara ecosystem. It was held that it had acted contrary to its objects and functions as prescribed under EMCA. National Environmental Tribunal (NET), after considering all the facts ordered that a proper EIA be conducted. (Narok County Council & Others, 2006).

The difference between SEA and EIA lies in the fact that whereas SEA applies to the broader context of sector-wide, regional and national policies, plans and programs, EIA has evolved more as an aid to project decision-making (Abaza, 2000). SEA has two approaches. The first is a bottom up approach where the project level EIA's limited scope is expanded to higher level assessments of PPPs. The second approach is the top down approach where the sustainability principles are established and they trickle down to the PPPs and then to the specific projects (Shepherd Orlando, 1996). It is generally accepted that 'assessments at the level of plans, programs and policies overcomes limitations of assessments conducted for individual projects' (Ahmed & Sanchez-Triana, 2008).

Considering the many countries' practices the world over, the systematic objectives-led SEA has gained substantial global application which can provide appropriate benchmarks. Before SEA could be a statutory requirement for comprehensive plans in Sweden, several municipalities had embraced its importance and on their own initiative carried-out SEAs since the early 1990s. By 1996, this was already the case in the United States of America, especially in California, Nordic countries, Britain, Germany, and Canada (Partidorio, 1996). Under the Californian government, SEA is required for comprehensive planning by the Californian Environmental Quality Act (CEQA). CEQA requires the preparation of an Environmental Impact Report, an equivalent of SEA, for general plans. The European Unions Directive on Strategic Environmental Assessment (EU), 2001 has also furthered its adoption in the member countries. In 1990, the Canadian government announced a reform package for EA that included stipulations for Environmental Assessment processes for new policy and program proposals. In 1992, the Federal Environmental Assessment tool and Review Office [FEARO] released the Environmental Assessment in Policy and Program Planning, a source book demonstrating Canada's commitment to sustainable development (Noble, 2002). In 1999, Canada reinforced its commitment to integrate environmental considerations in higher order decision making processes with its release of the 1999 cabinet directive on the Environmental Assessment of Policies, Plans and Program Proposals (Directives). The Directives requires that considerations of environmental factors within all the federal government departments' policies and program initiatives be submitted to a cabinet for consideration (Ibid.). The Czech Republics EIA law requires environmental assessments for development concepts submitted to administrative authorities in many sectors (Czech EIA Act, 1992; Sec. 14). An example where this has been applied is the development of the Czech's tourism policy where SEA teams work in response to a draft policy proposal. Although occurring late in the policy design process, scores of points of interactions and exchanges may be called for between the experts and a policy making agency (Ortolano, 2008). Integration of SEA into the energy policy in the Slovak Republic is complete where SEA specialists are involved from the policy design level (ibid). In South Africa, SEA is not a legal stipulation but in applying the principles espoused under the National Environmental Management Act of 1998, it is already being used in providing technical information to support policy formulation and integration occurs at discrete points in policy design processes, while in Argentina's water and sanitation reforms, SEA experts form a team that is distinct from the policy making body (ibid). The team works together with the relevant policy making agency and in parallel with the myriad possible points of contact (ibid.).

**Statutory Basis for SEA**

In Kenya, SEA is a statutory requirement (AAR, 2003; Sec. 42) whose introduction came with the enactment of EMCA in 1999. First, EMCA provide for broader application of various tools in environmental management, so NEMA and the lead agencies can always adopt them as a matter of good practice. Secondly, in determining court cases, SEA principles can be used. This is embodied in the principle of public participation in the development of policies, plans and processes (EMCA, 1999; Sec.3 [5]). Thirdly, when interpreting section 58 [1] of EMCA read with the definition of the word project under section 2, it can be said that EIAs are a requirement not only for single projects but also for programs and policies that are likely to have an impact on the environment hence alluding to impact based SEA.

> …any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carry out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority…

Project includes any project, programme or policy that leads to projects which may have an impact on the environment. An emphasis is also provided under the AAR, which provides that a licensing authority can only grant one after ensuring that the envisaged activity does not contribute to cumulatively significant negative

environmental impacts (AAR, 2003; Sec. 8). Such licensing authority has to ensure a strategic environmental plan encompassing mitigation measures and approved by NEMA is in place (ibid.).

AAR provides the most explicit provision for SEA. It is stipulated thereunder that the lead agencies in consultation with the NEMA are to subject all proposals for public policy, plans and programs for implementation to SEA (AAR, 2003, Sec. 42[1]). This is critical in ascertaining both the absence of environmentally damaging PPPs and cost effectiveness thereto when considered individually or in combination with others. In so doing the use of natural resources, protection and conservation of biodiversity is taken into consideration. Further to the foregoing, issues of human settlement and cultural issues, socio economic factors and the protection, conservation of the natural environment as well as the conservation of the built environment of historic or cultural significance is also to be examined (AAR [2003] sec. 42[2]). In addition, the alternatives, area affected, and the proposed strategies are to be affirmed. The same applies to environmental analysis covering baseline information, legislative framework and policy documents, views of the stakeholders, alternative policy options, and on-going projects and how they fit the PPPs as well as their predicted impacts. It is also stipulated that the recommendations of the suggested policy changes, mitigation, technical appendices and stakeholder deliberations are to be provided (AAR [2003] sec 43[2]).

**Gaps in the Legal Requirements for SEA**

The problem with the provisions for SEA is multi-faceted. First, it is not defined under any law in Kenya. No reference is made to a foreign legislation either. Secondly, it is provided for in a delegated legislation relegating its significance behind project level EIA's. Thirdly, the principle of public participation, which is integral to the effectiveness of an environmental assessment process, is not an explicit provision for SEA. Fourthly, expert assessment for SEA, just like for EIAs and EAus are inadequate as multidisciplinary expertise, a requisite for dealing with environmental issues is not a legal requirement and left gaping for the team leaders and proponents discretion. These can possibly encompass idiosyncrasies like making budget cuts, saving on time and convenience, at the expense of quality assessment.

EMCA provides that any person who desires to carry out a project (EMCA, 1999; Secs 2, 42 & 58), including any program or policy that might impact on the environment, shall before financing; or commencement, present a summary statement of the likely environmental effects of the proposed undertaking to NEMA (EMCA, 1999; Secs 2, 42 & 58). Policy herein can be defined as a course of action embraced, and which intersperse into and actuate a series of plans and programs. Program means an aggregate of schemes for executing a specific plan and the projects therein envisioned as due for implementation in a short period of time. The provision for EIAs under EMCA would have qualified to be an EIA based SEA if it also provided for the assessment of plans. A plan is an arrangement of series of action schemes with a specific spatial scope, a short span and a circumscribed direction for executing policies (Wang Yan et al, 2003).

The goal of SEA is to systematically examine possible environmental Impact of PPPs and minimise adverse impacts whenever possible. The same goal might be ascribed to project level EIAs. However, EIA faces an integration problem. EIA is not well integrated to planning (Shepherd Orlando,1996). As it is provided for under the EMCA, it's more likely to be an issue of *ex post facto* rationalisation for decisions. The case with the proposed Titanium Mining Project in Kwale District illustrates this issue. Despite the anticipated environmental impacts on the water supply in the area, on the kaya forests, displacement of populations, the danger of radio activity, anticipated effects of the proposed port at Shimoni, especially on the Wasini Island wherein you find the fossil Coral Garden, *inter alia*, the project has had to be embraced notwithstanding. The EIA carried out was more important in its justification of the decision, than for minimisation of risks (Abuodha, 2002). SEA performed at the early stages of decision making, preceding a project EIA, would permit dealing with sources rather than the symptoms of environmental deterioration (Shepherd & Orlando, 1996). Further, project by project impact assessment can overlook the area-wide impacts of developments. SEA justify a way to account for cumulative impacts which have been defined as the "result of additive and aggregate actions producing impacts that accumulates incrementally or synergistically over time and space'(Contant & Wiggind, 1993). In as much as EIAs are gaining wide acceptance in Kenya, they take place after many strategic decisions have been made and project details already drawn up. (Partidarin & Clark, 2000). These specifically come with irreversible decisions taken such as land acquisition, selection of the development proposal, and financing commitments made. Such factors have in the past led to sheer political subterfuge at the expense of reason. Proper applications of the SEAs anticipate the controversies hence igniting the engulfing of the flaws.

The terms of reference, approved by NEMA for the EIA study, are developed during the scooping study conducted by the proponent. Other than any issue communicated to the proponent in writing by NEMAs Director General, the concerns to be considered in an

EIA are provided for under the second schedule to the AAR. The provisions herein should have gone further to state that the EIA report should take cognizance of established SEAs. The ascertaining of impacts and the mitigation measures should be hinged on the universal impacts in a given region, and not just for a specific project, program or policy.

It is stipulated under the AAR that EIAs are to be done at the proponents' expense. It is also the proponent who appoints the expert(s). Further to the foregoing, a project report to be presented by a project proponent can only be prepared by an individual designated, and licensed by NEMA as a lead expert or a firm, registered in Kenya, and comprised of at least one lead expert (AAR, 2003 Sec. 13). The fact that the EIAs are to be conducted at the expense of the proponent is already proving to be a hiccup especially for the small-scale operator. It has become common knowledge that many small businesses do not have the wherewithal to conduct EIAs, or even audits, yet the cumulative effects of their activities are enormous. With requisite plans and SEAs in place, it is possible to apply licensing outside of the usual EIA system. Monitoring and inspection as tools of environmental management can then be applied to a certain level of development activities.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. (UNCED, 1992). "Public participation makes a major contribution to sound environmental governance in the sense that besides acting as a check on the quality of the EIA process, it also promotes transparency and accountability' (Situma, 1997). It is premised on the fact that every project, plan, program or policy, however desirable would have an impact on the environment, whether negative or positive (Okoth-Yogo & Oluoch, 2008). On environmental issues, courts are guided by the principles of public participation, among others, in reaching decisions (EMCA, 1999; Sec. 3[5]). Secondly, the public as a whole has *locus standi* to sue for any environmental wrongs, even if they themselves are not directly affected (EMCA, 1999; Sec. 3[2]). Third, Public participation, encompassing advertisements and public hearings, is unmistakably stipulated under the provisions for environmental impact assessments.

AAR provides for SEA reports that include views of stakeholders consulted (AAR, 2003 Sec. 43 (2 d [iii]). There are two implications. First, NEMA and the involved lead agency(ies) exercises discretion on who to consult. Secondly, views of the general publics are not necessarily integrated into a report. Compared to provision for public participation in EIAs, this is a chocking provision. On the other hand since the entire public has *locus standi* on litigation, the extension of such role to SEA cannot be gainsaid. Be that as it may, public interest litigation is an ivory tower undertaking with the vulnerable groups rarely participating. Litigations are also expensive, plus they take time to the detriment of both development and communitarian interests. Therefore, the opportunity for developing an incisive understanding of the synergies between environmental goals, economic growth and improving individual livelihoods and community stability especially of the vulnerable from broader perspectives is lost. 'Vulnerable households are often the first to experience the direct and indirect impacts of policies and to be the most affected by them. Only they can truly feel and explain their perspectives' (Kende-Robb & Warren, 2008). These can be galvanized by 'creating space for deeper public participation, and not just statements from key stakeholders, a provision which creates selective involvement.

Environmental Assessment of any nature is a knowledge-based undertaking. The judgements also require a high level of integrity. 'The quality of a SEA report will depend on the qualifications, experience and the degree of independence of the reviewers. The availability of the relevant documentation for review is also important.' Equally important is the use made of the findings at the subsequent environmental processes and project cycles. (Lee, 2000). However, the training and authentication of expertise is a loose stipulation as to date there is no professional training that is prescribed by law. Further, whereas assessments are a multidisciplinary affair, just one expert can ascertain that the assessments meet the requirements. It does not matter that he is an economist, geologist, *inter alia*. It does not matter that the environmental issues an expert is addressing are far removed from his area of expertise. In Europe, similar problems have been noted in regard to the issue of human health in EIAs and SEAs.

> … when health aspects are addressed, assessments tend to estimate only the negative effects resulting from expected changes in [Physical] environmental media, neglecting the effects of modifications on other health determinants such as the socio-economic ones, and the possibility of promoting health…..Further, the human health component of an EIA of SEA is not generally undertaken by a health professional, but rather by an environmental or social scientist, further diminishing the consideration of Health (Cabridgeshire, 2002).

The same statement can be said of the Kenyan scenario and the Sam Odera case is illustrative. The applicants had moved the court under both certiorari and prohibition seeking to stop the respondent from installing a Base Tranreceiver Station [BTS] on the roof of their apartment, stating that such a move would pose a health risk to them. NEMA had approved an EIA

report. The court's decision, in agreement with the applicants, and founded on the precautionary principle, ordered that the equipment be removed from the apartments within seven days (Odera & others vs NEMA, 2006). The rejected report was definitely a failure to appreciate health impacts hence a reflection of a shortcoming to have a legal provision for adequate expert involvement.

Some SEAs have been performed in Kenya. They reflect both the strengths and weaknesses of its provisions as discussed herein. In 2006, the Department of Forestry, together with the World Bank, Forest Sector Reform Program, performed a SEA on the Forest Act of 2005 (World Bank, 2007). The Act was an outcome of the Kenya Forest Master plan finalized in 1994. In the new Forests Act the government embraces the concept of participatory forest management. The act gives particular consideration to formation of forest community associations, which will be recognized as partners in management. The act also opens commercial plantations to lease arrangements by interested groups to supplement government efforts. This is a radical departure from previous practice where the government assumed full management responsibilities in gazetted forest reserves. A main conclusion of the SEA is that the principles of reform set out in the act are appropriate but the challenge lies in giving real effect to them. This is particularly the case in ensuring the active participation of civil society, nongovernmental organizations (NGOs), and the private sector in critical levels of decision making, from functioning of the Kenya Forestry Services (KFS) board and area conservation committees, down to drawing up of management plans and contracts for individual forest areas. The SEA highlights three areas where priority for action exists, thus (ibid): Strategic management and planning of the KFS, enabling community participation and benefit sharing and enhancement of both public and private investment to enable sustainable forestry management (Ibid). In 2007, ESF Consultants conducted a SEA for tissue-cultured banana, covering 5 districts in Kenya. Pilot projects were undertaken by Kenya Agricultural Research Institute (KARI) and the International Service for the Acquisition of Agri-biotech Applications (ISAAA- AfriCentre). The study examined capacities, phyto-sanitary regulations and Biosafety procedures within the various laboratories undertaking in-vitro propagation. The project was funded by International Development Research Council [IDRC], Canada and International Development Research Centre (IDRC) in partnership with the Rockefeller foundation.

Since the legislation for SEA in Kenya, less than five percent of projects requiring SEA have undergone the process. Secondly, most of the programs, plans and policies that have been subjected to SEA have been at the instance of some external financier, like the World Bank. Thirdly, performance of SEA has been "after the fact undertakings, like Forest Act that was subjected to SEA after its enactment. Part of the problem herein is the weakness in enforcement mechanisms as discussed herein above.

**Conclusion**

There is always a cogent possibility that when appropriately applied, SEA can influence positive decision-making at the onset of planning. This is especially important where environmental impacts are cumulative (Sadler, 1996). Where there is an existing SEA, NEMA is empowered, especially through its authority in determining the terms of reference, to ascertain that a project EIA or EAu is based on it. The public, through public participation and/or recourse to court can also fight for the establishment of SEA and demanding that the report is followed. However it makes better sense to provide for their use through unambiguous definition and an unequivocal legal stipulation.

SEA, if properly applied, can help ensure those environmental issues of importance, be they local, regional, national and global, are inculcated in the PPPs at different administrative hierarchies (Fisher, 2003). SEA not only provide input for sustainability planning and decision-making purposes but also lessen the aggregate and intricacies of project EIAs (ibid.) Further to the foregoing, it is anticipated that if the developmental and ecological considerations are carefully thought out in an unrestricted and accountable manner that respects the communitarian values, there will be little or no dissension. Consequently, there will be fewer questions and uncertainties further down the decision-making order (ibid).

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