25th May 2017

Director General
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RE: SUBMISSION OF COMMENTS FOR THE DRAFT ENVIRONMENTAL (STRATEGIC ASSESSMENT, INTEGRATED IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2017

We thank you for this opportunity to submit comments on the draft Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017.

We have observed that the notice to advertise comments on the draft regulations were made in the Nation newspaper on the 28th of April, 2017 only. We understand that this should have also been advertised in the Gazette. We have heard from many groups and organizations that they were unaware of the comments period. This is concerning given the importance of public participation in this process. Whilst we have provided some comments, we respectfully request you leave open the period of comments for a further 30 days to allow greater conversation and participation in the formation of the Regulations.

Comment 1: *Regulation 2, Interpretation*

Cumulative impacts

We suggest that this definition is too limiting, as it assumes impacts often result from *individually minor and incremental processes of projects, programs or activities*. It fails to fully take into account the fact that impacts also result from successive and/or combined impacts.[1] Further, this definition fails to consider the cumulative impacts on the social aspects, and valued components in any assessment.

A good example of "cumulative impact" definition is found in the US Federal EIA Regulations:

[1] IFC *Cumulative Impact Assessment and Management: Guidance for the Private Sector in Emerging Markets* (2013) 19.

The impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Environmental license (Addition)

We recommend that a clause is added to define the following term:

"Environmental impact assessment license mean an environmental impact assessment license granted under Regulation11 and 26 of these regulation;"

Environmental monitoring

The current and proposed definition are different to that in EMCA. We suggest that the definition in the proposed Regulations be amended to reflect the following:

"*Environmental monitoring means the continuous or periodic determination of actual or potential effects of any activity or phenomenon ~~of~~ **on** the environment whether short-term or long-term;*

Natural resources

We note that this definition departs from that as stated in EMCA. We therefore suggest that the definition is edited to reflect EMCA:

"Natural resources ~~include resources of air, land. Water, animals and plants including their aesthetics qualities~~ has the meaning assigned under Article 260 of the Constitution;"

Project

"Project" is defined to include "any activity, undertaking, plan, policy or programme that leads to activities which may have an impact on the environment." This is problematic as many regulations (e.g. Regulation 3) refer to a specific project as compared to a plan, policy, or programme. We therefore suggest that a clear difference be explained between a project and a plan, policy and programme.

We propose the definition be edited to read as follows:

"Project means any project, activity or undertaking, including those arising from policies, plans and programmes, which may have an impact on the environment;"

We further propose that definitions of Policy, Plan and Programme be added in order to clarify the differences between these and projects. We have taken each definition from the NEMA SEA Guidelines 2012.

Policy

"Policy means a broad statement of intent that reflects and focuses the political agenda of government and initiates a decision cycle. A general course of action or proposed overall direction that a government is or will pursue; a policy guides ongoing decision making;"

Plan

"Plan means a purposeful, forward-looking strategy or design, often with coordinated priorities, options, and measures that elaborate and implement policy;"

Programme

"Programme means a coherent, organized agenda or schedule of commitments, proposals, instruments, and/or activities that elaborate and implement policy;"

Technical Advisory Committee

We recommend that this definition is edited to reflect the Environmental Management and Coordination Act, 1999 definition as follows:

"Technical Advisory Committee means the Technical Advisory Committee on environmental impact assessment established under Section 61 of the Act ~~and these Regulations~~;"

Comment 2: *Regulation 4 (1), Requirement for an approval of Integrated Environmental Impact Assessment*

- We note that the proposed regulation gives the project proponents a responsibility to conclude an integrated environmental impact assessment and approval before undertaking a project likely to have negative impacts on the environment. However, what this regulation does not capture expressly is the obligation to also obtain an environmental impact license.

  We recommend editing this section as follows:

  "No proponent shall implement a project

  a) *Likely to have a negative environmental impact; or*
  b) *For which an environmental impact assessment is required under the Act or these Regulations;*

  *Unless an integrated environmental impact assessment has been concluded and **an environmental impact license granted** in accordance with these Regulations."*

Comment 3: ***Regulation 5, Requirement for approval of Strategic Environmental Assessment***

- We suggest that sub-regulations 5(1) and 5(2) be interchanged so that the requirement for approval is introduced at first instance.

  Further, current sub-regulation 5(1) refers to "SEA". This should be amended to "Strategic Environmental Assessment."

Comment 4: ***Regulations 6, Technical Advisory Committee***

- It would be helpful for the proposed Regulations to clarify when a Technical Advisory Committee is to be constituted. Currently, the public is completely unaware as to when the National Environmental Management Authority (NEMA) will constitute a Committee, which may lead to confusion. Clear direction in the Regulations would dispel any confusion and ensure that the citizenry has confidence in the process.

- In instances where projects may have a greater risk of impact, Technical Advisory Committees (TAC) are particularly critical to deal with the environmental risks, which are not fully known or knowable. We suggest that TACs are formed in most high-risk projects.

  Around the world, TACs have emerged to protect public interest in areas of potential conflict. In India, for example, TACs, are always used when providing environmental license approvals.

  A TAC brings together a unique knowledge and skills in order to more effectively guide decision-making. Although a TAC cannot issue directives it can make recommendations and provides key information, which would be very useful in environmental decision-making in Kenya.

- Further, we suggest that Regulation 6(2) provide further clarification as to whom "multi-disciplinary specialists" include. For instance, it would be important that such specialists not be limited to the sciences but also those who understand social impacts, such as those working with communities or even community representatives themselves.

Comment 5: ***Registration of Experts.***

Regulation 9, Accreditation of Training Institutions for Training Environmental Assessment Experts

- We note that sub-regulation 9 does not have a mechanism for public comment on accreditation of institutions. We suggest that applications for accreditation (Regulation 9(1)) or renewal (Regulation 9(5)), be advertised for public comment or feedback. This would allow the public to assist NEMA in highlighting areas of positivity or concern with the institutions standards of training.

Second Schedule, Criteria for Registration of Environmental Assessment Experts

- In relation to Part F, Vetting, we suggest that the public be given an opportunity to comment prior to registration. This period would enable the Registration Panel consider information based on experience of past IEIA's.

- Given that experts can have such a profound impact on people's lives through their recommendations in IEIA's, it would be very important, and consistent with the principle of public participation, that the public is given an opportunity to share their experience of the experts work.

Third Schedule, Code of Practice and Profession Ethics for Environmental Assessment Experts

- In relation to Section 13, Misconduct of Environmental Assessment Experts, we refer to sub-section 13(m) and suggest the subsection be widened to also include "projects" and committing exploitative actions for the gain of others also.

  (m) He exploit the inexperience, lack of understanding, illiteracy or lack of technical knowledge in environmental matters of a proponent, ***project,*** *Policy, Plan and Programme, or the public, for his personal gain* ***or gain of any other.***

- Section 14(2), Environmental Experts Advisory Committee: We note that there is no representative with expertise in social impacts on the Committee. Given the crucial role that environmental experts can play in the lives of affected communities, it is concerning that the Committee does not include someone to speak to social impacts. We suggest that membership be extended to a representative of civil society, including community based organizations.

- Section 16, Disciplinary Procedures: Section 16(1) is incomplete. This is an important section as it would allow members of the public, aggrieved by the conduct of an Environmental Assessment Expert, to file complaints. We suggest that the process of complaint be clearly outlined in the section, including reasons for any action taken.

Comment 6: ***Regulation 10, Preparation of a Project Report***

- Regulation 10(1)(m): We suggest it prudent to clarify what is intended by a "climate change vulnerability assessment" as this has not been defined in the Regulations.

- We suggest that an additional sub-regulation be added under Regulation 10(1) to ensure provision of information on all potential and final partners in the case of the project being sub-contracted or implemented through a public private partnership, including the nature of the partnership and its status. There is no reason why such information should be kept from the public. Provision of such information would also be consistent with the Access to Information Act.

- Regulation 10 (3): A public notification period of 14 days is provided. This time-frame may be sufficient if the notification processes are adequate to inform affected parties. Unfortunately, the Regulations omit directions on notification processes. We therefore suggest that directions be given as to how notification takes place. For example:

    - *fixing a notice board at a place conspicuous to the public at the boundary or on the fence of*
        - *(i) the site where the project or activity to which the environmental license application relates is or is to be undertaken; and*
        - *(ii) any alternative site mentioned in the project report;*
    - *giving written notice to:*
        - *(i) the owner or person in control of that land if the proponent is not the owner or person in control of the land;*
        - *(ii) the occupiers of the site where the proposed project or activity is or is to be undertaken or to any alternative site where the proposed project or activity is to be undertaken;*
        - *(iii) owners and occupiers of land adjacent to the site where the proposed project or activity is or is to be undertaken or to any alternative site where the proposed project or activity is to be undertaken;*

        - *(iv) the ward administrator in which the site or alternative site is situated and any organization that represent the community in the area;*
        - *(vii) any other party as required by the Authority;*
    - *placing an advertisement in one local newspaper and the county Gazette;*
    - *using reasonable alternative methods, as agreed to by the Authority, in those instances where a person is desiring of but unable to participate in the process due to illiteracy, disability or any other disadvantage.*
    - *The meeting notice should also*
        - inform the affected parties and communities of the date, time, venue and purpose of the meeting and a copy thereof shall be attached to the project report;
        - provide details of the project report which is subjected to public; and
        - the nature and location of the activity to which the project or activity relates; and
        - where further information on the proposed project or activity can be obtained.

Comment 7: *Regulation 13, Comments on the Project Report*

- We suggest that the nature of the project or activity, low risk or medium risk, should not preclude the proponent or the Authority from facilitating adequate and effective public participation. Under Regulation 10 (Project Reports), the public are not given an opportunity to comment on the Project Report. This is entirely insufficient when considering some of the projects that fall within the low and medium risk range. Though the Regulations do provide for at least one meeting with the public in preparation of the project report, this would not provide all relevant information on the final project plan to affected people as project plans do change post public comment. Therefore, it is critical that there be provision for public comments on final project reports and this be included in Regulation 13(1).

- Regulation 13(1): a time-frame of 14 days for comments is inadequate to allow comments to be made on project reports. To ensure that comments are as helpful as possible to the decision-making process, a period of not less than 30 days should be instituted. Participation in environmental decision-making must be real and not illusionary. There is a risk of

injustice should this requirement be jeopardized in any way, or undertaken for formality purposes only.

Comment 8: ***Regulation 14, Record of Decision on the Project Report***

- Regulation 14 (1): The draft regulation requires a decision on the project to be communicated to the project proponent within 30 days of submission of the project report. Such a short time-frame places great time-pressures on the Authority. As proposed, the Authority is required to send the report to relevant institutions and agencies in the country, consider and assess all relevant, including technical information, and make a determination. Such a time-frame does increase risk of errors in decision-making. We suggest that a period of 90 days be allocated. This is not an onerous request and would also not prejudice business interests.

  "*14(1) On determination of the project report, the Authority shall communicate its decision ~~of the Authority~~ with the reasons thereof, in writing, ~~shall be communicated~~ to the proponent,* within ninety (90) ~~thirty (30)~~ days of the submission of the project report*, and a copy shall be made available for inspection* at the Authority's office."

- Regulation 14 infers that a project classified as low risk and medium risk does not require a full Integrated Environmental Impact Assessment study. As a result, the Authority has limited discretion in decision-making in so far as advising on next steps required once a project report is rejected.

  We recommend that the Authority have discretion to require a more complete assessment of the likely impacts if more information is needed to determine whether to grant an environmental license or reject the project.

  Further, the requirement for the Authority to provide advice to the proponent on suitable alternatives to proposed projects that are rejected is odd and it puts an undue burden on NEMA, given this is the responsibility of the proponent. We therefore suggest this be omitted.

- We therefore recommend that sub-regulation 14(3) is edited to read as follows:

  "(3) If the Authority finds that the project will have significant irreversible impacts on the environment, or there is non-conformity with existing planning framework, or considering the precautionary principle, the Authority shall require any

proponent of a project to ~~reject the application with reasons and advise the proponent on suitable alternatives~~:

(a) Carry out at his own expense further evaluation and submit additional information; or

(b) Carryout an Environmental Impact Assessment Study according to Part IV of these regulations

To ensure that the information provided is as accurate and exhaustive as possible, and the Authority may, after being satisfied as to the adequacy of the evaluation of study, issue an environmental impact assessment license on such terms and conditions as shall be appropriate and necessary to facilitate sustainable development"

Comment 9: ***Regulation 15, Scoping of proposed projects for integrated environmental impact assessment study***

- Sub-regulation 15(3): whilst this sub-regulation seeks to outline a procedure for carrying out the scoping study, it fails to outline the correct order in which actions should be undertaken. We recommend that sub-regulation 15(3) be edited to read as follows:

  "In carrying out the scoping study, the proponent ~~procedure for carrying out the scoping study~~ shall ~~entail~~:

  a) *Consult~~ing~~ and inform~~ing~~ the affected public about the proposed project;*
  b) *Consult~~ing~~ and gather~~ing~~ the views and concerns of key stakeholders about the proposed project;*
  c) *Review~~ing~~ relevant documents such as laws, regulations, guidelines, standards, policies, plans and programs."*

- Sub-regulation 15(4)**:** We recommend that the sub-regulation be edited to also include: "the objectives of the project". Though this is a requirement of the IEIA Study Report, we also suggest it will be important to include from the scoping stage.

Comment 10: ***Regulation 17, Integrated Environmental Impact Assessment Guidelines***

- Guidelines on IEIAs would provide proponents, EIA experts and the public greater clarity on good process in IEIAs. We therefore strongly suggest that the formation and use of guidelines be obligatory and would therefore amend the wording of Regulation 17(1).

"An Integrated Environmental Impact Assessment Study shall be conducted in accordance with the general integrated environmental impact assessment guidelines that shall ~~may~~ be issued by the Authority from time to time."

Comment 11: *Regulation 19, Preparation of Integrated Environmental Impact Assessment Study Report*

- It may be prudent to conduct baseline surveys to not only provide information on the state of the environment but also as a foundation for environmental management plans when monitoring the degree and quality of change that arises during implementation of a project.

- We therefore recommend that regulation 19 has an additional clause inserted before the current clause (a) that reads as follows:

  "Provide the socio-economic and environmental baseline characteristics of the area likely to be affected by the project."

Comment 12: *Regulation 20, Public Participation*

- It is concerning that the section on public participation in the draft Regulation is considerably weaker than the current Regulation. An important element of sustainable development in the extractives and infrastructure sector is reducing social conflict over development and its impact on communities. Extractives / infrastructure projects and social conflict are closely associated in Kenya. Stakeholder participation is one of the ways in which conflict can be minimized. Stakeholder participation involves, at the very least, adequate provision for meaningful consultation with affected communities, and requires that those parties being consulted are provided with all of the information that they need in order to be able to participate meaningfully in the decision-making processes.

- Regulation 20(1): It is unclear whether a difference is made between public meetings held during the scoping study and the IEIA study. Therefore, there is a danger that a project proponent may hold all meetings during the scoping phase only. This could prejudice the public as the proponent is likely to have more information on the project post the completion of the scoping study. We have already witnessed this in 2 recent Kenyan cases. One of these cases is currently before the Environmental Tribunal.

The scoping study is designed to "determine the significant issues, study boundaries and alternatives that must be considered in an IEIA". This then leaves open the possibility that a project will change through the course of both the scoping and IEIA study.

To ensure that projects adequately consider all environmental and social impacts it would be vital for public meetings to occur during ***both*** the scoping and IEIA study phases. The scoping meetings would be an important opportunity for the proponent to understand important social consideration in the formation of the project and the IEIA meetings critical for the public to understand and respond to the components of the project and possible impacts.

- Regulation 20(1)(a): The current draft states that meetings should be held in "strategic locations within the proposed project area." The two concerns we have with the draft Regulation are:
    1) It is unclear what "strategic locations" refers to and thus may be interpreted in different ways.
    2) Impacts may be felt well outside a project area thus requiring affected, and often marginalized, persons to travel great distances.

- Given the essence of this entire process is to gather the views of the public ***and*** provide information on the project to the public it is essential that as many people are involved as possible. To facilitate this, we suggest that the language of the sub-regulation be amended to include:

  "……meetings at venues convenient and accessible to people likely to be affected by the project…"

- In considering the persons to be included in the public meetings, we refer to the National Environmental Management Act (1998) Environmental Impact Assessment Regulations, which require that notices on meetings be sent to:

  (i) the owner or person in control of that land if the proponent is not the owner or person in control of the land;
  (ii) the occupiers of the site where the proposed project or activity is or is to be undertaken or to any alternative site where the proposed project or activity is to be undertaken;
  (iii) owners and occupiers of land adjacent to the site where the proposed project or activity is or is to be undertaken or to any

alternative site where the proposed project or activity is to be undertaken;
(iv) the organ of state [e.g. ward administrator] in which the site or alternative site is situated and any organization that represent the community in the area;
(vii) any other party as required by the Authority;
(vii) using reasonable alternative methods, as agreed to by the Authority, in those instances where a person is desiring of but unable to participate in the process due to illiteracy, disability or any other disadvantage

- Regulation 20(1)(b): the draft sub-regulation weakens the existing Regulation. The draft does not provide any guidance on the types of notices that should be used to inform the public of meetings. This is a significant gap in the draft. We also suggest that a notification period of only one week is grossly insufficient for the public to adequately organize themselves. Public meetings must be free, fair and transparent, enabling maximum participation.

- We suggest that a schedule of meetings be developed, clearly setting out the dates, times and venues of the meeting and this be circulated at least 21 days prior to first scheduled meeting.

- Further, we suggest that circulation of the schedule be through newspaper, radio and posters. We refer to sub-regulations 17(2)(a)(ii and iii) of the current Regulations but with the following amendment (in bold):

  ii. *Publishing a notice on the proposed project for two successive weeks in a newspaper with a wide circulation in the project affected area;*
  iii. *Making an announcement of the notice in both official and local languages in a local radio widely broadcasting in the proposed area of the project* ***affected area*** *for at least once a week for two consecutive weeks.*

- Regulation 20(d): we suggest that the posting of posters also occur 21 days prior to the first scheduled meeting.

- Regulation 20(c): we recommend that “reports, minutes and other relevant communications” be annexed to the IEIA study report.

- Format of meetings: We note the draft Regulations do not provide any guidance on how IEIA public meetings should be conducted. From our experience, we have noted that meetings during the EIA process are often held in different ways affecting the openness and fairness of the process. In order to avoid conflict out the outset, it's crucial that the public meetings are held in a manner that facilitates the dissemination of all information and sufficiently responds to the concerns of the public.

  We suggest that the Regulations provide guidance on IEIA meeting process, including: information that the proponent must share, languages that should be used, requirements for written information (including in local language), period for oral and written comments, clarity on how comments will be taken into account, and an opportunity to confirm minutes of the meeting.

  Further, we recommend that Regulation 17(2)(d) remains, with one amendment (below), as it provides guidance on recording comments during public meetings.

  > *17(2)(d) ensure that, in consultation with the Authority, a suitably qualified coordinator is appointed to receive and record oral and written comments and any translation thereof received during all public meetings* ***are annexed to the Integrated Environmental Impact Assessment Study Report, for onward transmission to the Authority.***

Comment 13: ***Regulation 21, Contents of an Integrated Environmental Impact Assessment***

- We suggest that the following points be added to the sub-regulations under Regulation 21(1):

  1. Information on all potential and final partners in the case of the project being sub-contracted or implemented through a public private partnership, including the nature of the partnership and its status. *See justification at Comment 6.*
  2. In line with Comment 11 (above), we suggest that *baseline information of the environment, socio-economic and environment, and any other relevant information related to the project area* be included in the IEIA.
  3. We note that the requirement to include an economic and social analysis of the project is now removed and grouped under draft regulation 21(1)(i). This is potentially problematic as the regulation

appears to view the economic and social analysis through an environmental impacts lens only. It is an important consideration for the Authority if the project provides economic benefit to the country.

4. There is no specific sub-regulation on reporting the IEIA public participation. Such a section would clearly set out the meetings held and with whom.

- We also recommend that sub-regulation 21(2) be amended to also include a provide an overview of the project. This would ensure a greater understanding of the project and IEIA.

  "The Integrated Environmental Impact Assessment study report shall be accompanied by a non-technical summary providing an overview of the project, the key findings, conclusions and recommendations of the study and shall be signed by the proponent and the lead expert involved in its preparation."

Comment 14: ***Regulation 24, Invitation for comments by the public***

- We note Kenya's language diversity and illiteracy problems. Further, experience shows us that in the absence of an express provision for oral submissions and comments in this regulation, the right to fair administrative action will not be realized. Again, this exposes decisions to appeal or review on administrative grounds.

- In addition, we note that the regulation does not expressly provide the minimum timeline requirement for submitting comments. Hence read together with section 59 of the Act, the Authority's discretion to determine the period for submitting comments is unreasonable. As a consequence, interested and affected parties are likely not to be afforded adequate opportunity to consider and comment on complex, detailed applications. This violation of the right of interested and affected parties to fair administrative action is a basis for a decision to be appealed or reviewed.

- The methods of notice are such that those affected by projects rarely see the notices, rendering the usual 30-day period for submission of comments and objections even more unfeasible.

- We recommend that regulation 24 be edited to read as follows:

  "24(1) The Authority shall, within 14 days of receiving the Integrated Environmental Impact Assessment study report,

invite the public to make oral and written comments on the report.
(2) Where a comment under sub-regulation (1) is made orally, the Authority shall cause the comment or submissions to be recorded in writing"

- Regulation 24(2)(a): Whilst it is very important to include "at least two newspapers circulating in the area or the proposed areas of the project", it remains important to retain a paper of nation-wide circulation. This would also assist the public, outside of direct the geographical area of the project, to also provide comments, if needs be.

- We also recommend that to bring this regulation in line with the Environmental Management and Coordination Act, Regulation 24 has an additional clause inserted to read as follows:

  "24(2)(c) The Authority shall ensure that its website contains the study report and non-technical summary of the report referred to in regulation"

- Regulation 24(3): We note that to realize the right to information, this draft regulation does not take the necessary steps to provide details and sufficient particulars, which facilitate easy access to the Integrated Environmental Impact Assessment study report. The authors have often had difficulties accessing EIAs without a Project Number.

  We therefore suggest that the Project Number assigned by the Authority be included in sub-regulation 24(3).

- Regulation 24(3)(e): Section 59(d) of EMCA specifies that a time-period not exceeding 60 days be given for public comments. However, we have often experienced that 30 days are given for comments on EIAs, which are often long and technical.

  We suggest that a minimum period of 45 days be given for comments on IEIAs. This would allow affected groups and supporting organizations more time to understand and comment on IEIAs, which in the end is of benefit to the Authority.

Comment 15: ***Regulation 25, Public Hearing***

- Regulation 25(1): Holding a public hearing is currently optional under the Regulations. However, public hearings a critical as they provide affected

persons a place and an occasion to express their views regarding a particular project. Further, a public hearing is a form of social audit as it provides the affected persons opportunity to get information that otherwise would not be disclosed to them.

For many citizens that are unable to provide comments on an IEIA study report (often through difficulties with language, literacy or capacity) the public hearing provides the *only* opportunity to understand the final proposal of the project and provide comments. To this end, a public hearing is of utmost importance especially for projects that have a high investment or require land such as power projects, mining, road and port construction.

Holding public hearings as a mechanism to obtain comments is often a requirement in other jurisdictions. For example, public hearings are mandatory in India.

We therefore suggest that sub-regulation 25(1) is edited to read as follows:

Upon receipt of written comments as specified by section 59 and 60 of the Act, the Authority ~~may~~ shall hold a public hearing.

- Regulation 25(2): We suggest there be further direction as to who would be suitably qualified to preside over a hearing. For instance, it would be critical that this person not be biased towards a particular course or outcome and be perceived by attendees as neutral. Those with political positions should be avoided. Further, the individual should have the requisite experience in presiding over public meetings.

- Regulation 25(3): The purpose of a public hearing is to provide a democratic space within which the opinion of the public, regarding a proposed project and its implication is voiced out. To achieve the intended purpose of a public hearing, adequate publicity ought to be given to a public hearing before it is held otherwise concerned persons would not be able to participate.

  The seven-day period provided for publicizing the hearing in sub-regulation 25(3) is inadequate and we suggest it is edited:

  "The date, time and venue of the public hearing shall be publicized at least ~~seven (7)~~ thirty (21) days prior to the meeting-"

Further, 25(3)(a) should also be amended to include "one daily newspaper of national circulation ***and*** **one of local circulation**"

- Regulation 25 (5), (6) and (7): Adequate information is the cornerstone of effective and meaningful participation. It serves no one to have the project proponent present and respond to the issues arising, if the project-affected persons are not fully aware of the project. The public or the project-affected persons ought to approach the meeting from a knowledgeable standpoint.

  We therefore suggest that:

  1. The Authority shall make available the executive summary of the IEIA to affected persons at least thirty (30) days prior to the public hearing;
  2. The project proponent must set out the project components, IEIA findings, including impacts and proposed mitigation measures.
  3. A peer review panel, which is pre-appointed in conjunction with the Authority, provide an overview of the IEIA to the hearing attendees. Such a body would provide a more neutral point of view on the proposed project based on the information provided, knowledge of the project and expertise.
  4. A public hearing should at all times be free, fair and transparent. The information noted in the report submitted to the Director General should be a reflection of the discussions at the public hearing. To further strengthen this transparency pillar, we suggest that the minutes of the hearing be read out to and agreed by participants of the meeting on the day of the hearing. Further, the entire public hearing should also be video recorded and the same made available to the Authority as well as the public upon request.

Comment 16: ***Regulation 26, Decision of the Authority***

- Regulation 26(1): a time-frame of 3 months between receiving the IEIA study report and making a decision may not be sufficient, particularly when the public is given up to 60 days to provide comments, a public hearing is held and a Technical Advisory Committee formed. We suggest that the Authority be provided at least 4 months to make its decision. This is a fair time-frame, particularly with larger, complex projects.

- Regulation 26(2): We suggest that in addition to availing the record of decision to the proponent and making a copy available for inspection at the Authority's office, the Authority must further be obliged to keep the

interested and affected parties informed and updated about the outcome of any administrative action in line with Article 47(2) and Section 5 of the Fair Administrative Action Act.

We recommend that the sub-regulation 26(2) be edited and sub-clauses added to read as follows:

> *"(1) The Authority shall give its ~~Record of~~ Decision on an Integrated Environmental Impact Assessment study report within three (3) months of receiving the study report.*
> *(2) ~~The Record of Decision of the Authority shall be in writing and shall contain reasons thereof~~ Where the Authority proceeds to make a decision, it shall issue a record of decision which shall:*
> *(a) be in writing, giving reasons for the decisions*
> *(b) specify the internal mechanisms available to the person directly or indirectly affected by the decision to appeal;*
> *(c) specify the manner and period within which such appeal shall be lodged.*

- Regulation 26(3): We suggest that the minutes of the public hearing, and comments expressed therein, also be included and considered by the Authority. This would be in addition to the report provided by the presiding official.

  26(3)(d) the report of the presiding official and the minutes of the public hearing specified under regulation 25….

- Regulation 26(4) be edited to read as follows:

  > "(4)~~The Authority record of decision shall be availed to the proponent by the Authority within fourteen (14) days from the date of the decision and a copy thereof shall be made available for inspection at the Authority's offices immediately thereafter.~~
  > *The record of decision shall, within fourteen (14) days from the date of the decision, be:*
  > *(a) be availed to the proponent by the Authority;*
  > *b) published in the Gazette; and*
  > *(b) a copy shall be made available for inspection at the Authority's offices immediately."*

Comment 17: ***Regulation 27, Environmental Impact Assessment License***

- Regulation 27: As currently drafted, the Regulation does not make license terms and conditions mandatory. They may be added at the Authority's discretion.

  We suggest that the template for the EIA license in Form 10 should be revised to ensure that commitments identified in the EIA report and accompanying mitigation plans are binding and enforceable. This will foster greater accountability on the part of project proponents and NEMA during the project implementation process.

- At a minimum, Form 10 should include a set of standard terms and conditions that apply to all projects. For example, in Tanzania, environmental authorities are required to include a set of general terms and conditions in each environmental certificate. See Environmental Impact Assessment and Audit Regulations, 2005, Section 34 & Third Schedule Form 3 (available at http://api.commissiemer.nl/docs/mer/diversen/eia_and_audit_regulation_2005.pdf)

  The terms and conditions, among other things, specify how long the certificate is valid, direct the project proponent to strictly comply with mitigation and monitoring measures identified in the EIA report, and require the project proponent to abide by all laws that apply to the project. Additional conditions may be added on a project-by-project basis. We would suggest that Kenya also follow this same approach. Providing more specificity in environmental licenses will benefit the Authority should it become necessary for it to suspend, revoke, or cancel a license. Moreover, citizens will be able to more easily monitor project implementation in relation to the license and protect their right to a clean and healthy environment. See Environmental Management and Co-ordination Act 1999, sec. 3 (as amended by the Environmental Management and Co-ordination (Amendment) Act, 2015)).

- Terms and conditions attached to a license conditions are often broad, difficult to implement and monitor. It would be helpful for the Authority to increase public participation in this process also by allowing a short-period (e.g. 15 days) in which the public can comment on the license conditions. This would assist the Authority to ensure that the public has a greater

understanding of license conditions and is able to provide additional support to the Authority in monitoring and compliance.

- We recommend that sub-regulation 27 is edited to read as follows:

> *"Where the Authority approves the Integrated Environmental Impact Assessment Study Report under regulation 26, it shall issue an Environmental Impact Assessment license in form 10 set out in the first schedule to these regulations on such terms and conditions as it may deem necessary. Provided that the Authority shall, before approvals:*
> *(1) Publicize the draft terms and conditions for review and comments by the affected people and others;*
> *(2) Receive and review comments from affected persons as to the adequacy of the safeguards."*

Comment 18: *Regulation 28, Variation of license*

- We note that NEMA has a broad authority to modify the terms and conditions without additional environmental impact review or public participation. With such permissive standards, project proponents will be encouraged to seek NEMAs approval to eliminate certain environmental or community safeguards once a project has been approved.

  We recommend that this regulation be amended to include a more objective threshold that clearly indicates when additional environmental review and public participation is necessary to obtain a variance.

- In South Africa, EIA regulations permit routine variations (called "amendments") "if the purpose is to correct an error and the correction does not change the rights and duties of any person materially." Environmental Impact Assessment Regulations, 2014, sec. 27(4) (available at http://www.gov.za/sites/www.gov.za/files/38282_reg10328_gon982.pdf).

- However, South Africa's Regulations require a more extensive review of variation requests:

> *"where such change will result in an increased level or nature of impact where such level or nature of impact was not-*
> *(a) assessed and included in the initial application for environmental authorisation; or*

(b) taken into consideration in the initial environmental authorization; and the change does not, on its own, constitute a listed or specified activity."

- Kenya could incorporate a similar approach in its EIA regulations. Regulation 28(3) should be revised to require a fresh EIA study report if the proposed variance may result in a significant impact to the environment. In instances where it may not be evident whether a proposed variance will increase the nature or level of impact, the regulations could include an option directing project proponents to submit an abridged EIA report similar to the "project report" outlined in Section 10, which would also be subject to public review and comment. Minor variances, without public participation, could be granted to correct licensing errors. In addition, Form 13 should be modified to require NEMA to include an explanation of its reasoning for granting or denying a variance.

Comment 19: *Regulation 29, Transfer of License*

- Similar to Comment 18, it is not satisfactory for a change transfer to be made without the possibility of public notice and comment. Projects may be approved based on the experience and history of the project proponent. This information may also be used to assure affected groups of mitigation measures. Therefore, a transfer could have significant impacts and might require feedback.

  We suggest that the Regulation include a requirement for public notification and comment.

Comment 20: *Regulation 32, Environmental Audit Study*

- Regulation 32 (2): We suggest that any guidelines must be binding and ideally incorporated into these Regulations. There should also be clarity as to when the guidelines will be developed. We recommend that guidelines incorporate involvement of residing close to the project in monitoring.

- Regulation 32 (3): The possibility for self-audits should be removed from the Regulation, given the incredibly high risk of bias. All audits should be carried out by independent, qualified and authorized environmental auditors.

- Regulation 32 (5): This is a positive Regulation and is an important exercise to complete. We would recommend that shorter time-frames be

given for the audits – for example 3 years for low risk and every 2 years for medium risk. This would ensure that appropriate levels of oversight are maintained.

- Further, the Regulation provides no information on a protocol for monitoring the compliance of license conditions. We would suggest that at least 6 monthly compliance reports are completed and reviewed by the Authority. A panel of individuals, including project proponent, NEMA representative (or other environmental expert) and affected community member, could be formed twice a year to monitor each project.

- Regulation 31 (6) (f): An environmental management plan plays an important role in so far as a project proponents responsibility and commitment proposed to minimize environmental impacts. We therefore recommend that sub-regulation 32(6)(f) be edited to read as follows:

> *"Compliance of the proponent with existing national environmental regulations and standards prescribed by the Authority and other relevant international standards and the project's environmental management plan"*

Comment 21: *Regulation 33, Control Auditing*

- Regulation 33 (1): Non-compliance with license conditions leads to significant impacts the public closest to the project. We have witnessed numerous examples of non-compliance leading to impacts over the previous 12 months.

  Such a wide discretion given to the Authority does not provide any certainty to the public that compliance will be monitored. We strongly recommend compliance reporting every 6 months, at least (refer to Comment 20).

Comment 22: *Regulation 34, Self auditing*

- We note that the regulation does not provide a timeline for this type of audit. The discretion granted to the project proponent is prone to abuse.

  We recommend that sub-regulation 34(b)(iv) be edited to read as follows:

> *"(iv) preparing and submitting the self-audit reports to the Authority annually or as may be prescribed."*

Comment 23: ***Regulation 35, Conducting of environmental audits***

- We note that the function of an initial environmental audit, for projects, which commenced prior to EMCA, includes the provision of baseline information as well as preparation of an environmental management plan. We recommend that this function be standardized across the draft regulation to ensure uniformity with Regulation 32(4)(a)(i).

- Given that environmental management plans were not developed by projects which commenced prior to EMCA, we recommend the following amendments to sub-regulation 35(2)(d):

> *"(d) assess the level of compliance by the proponent with ~~the conditions of the environmental management plan and of~~ all relevant national and international laws on matters of the environment"*
> *"(m) prepare an environmental management plan, which shall be used as a criteria for subsequent audits."*

Comment 24: ***Regulation 36, The environmental audit report***

- Regulation 36 (4): We suggest that persons or groups affected by the project also be provided the audit report or at the very least be notified and provided an opportunity to copy the document.

Comment 25: ***Regulation 39, Monitoring by the Authority and Lead Agencies***

- Regulation 39(1): We recommend that sub-regulation 39(1) fails to encourage public participation in the protection, management and conservation of the environment.

  We therefore recommend that this sub-regulation be edited to read as follows:

> *"(1) The Authority shall in consultation with lead agencies and affected people"*

Comment 25: ***Regulation 41, Strategic Environmental Assessment***

- The Regulations should address the sequencing of Strategic Environmental Assessments (SEAs) and Integrated Environmental Impact

Assessments (IEIA) when an IEIA is required for a development that is a component of a policy, programme or plan that should be subject to an SEA. It makes common sense that an SEA for the broader programme should be completed before an individual development that is part of that program is studied under an IEIA.

Federal EIA regulations in the U.S. would allow for the "tiering" of a site-specific IEIA and an SEA. "Tiering" refers to the coverage of general matters in broader environmental impact assessments (such as national program or policy statements) with subsequent narrower statements or environmental analysis (such as regional or basin wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. sec.1508.28.

Regulation 41(2)(i) appears to suggest that tiering is possible with SEAs and IEIAs as well. We suggest that the language be strengthened to make it explicit that tiering is allowed.

If a specific development requires an IEIA and is part of a broad programme that should have been subjected to an SEA, but the SEA has not been done, then the components of an SEA that are not part of a regular IEIA should be required as part of the IEIA. For example, when looking at the cumulative impacts or analyzing the economic impact – the entire programme should be studied, not just the individual component. Otherwise, individual developments could go forward without studying their true impact.

Comment 26: ***Regulation 47, Incorporation of comments in the draft Strategic Environmental Assessment report***

- We recommend that sub-regulation 47(5) be edited to read as follows:

> "*Upon verification of the revised Strategic Environmental Assessment report by the Authority, the Policy, Plan and Programme owner in consultation with the Authority shall hold ~~a~~ validation workshop<u>s</u> to engage the stakeholders and the public in reviewing and validating the revised Strategic Environmental Assessment report."*

Conclusion

We hope our comments will assist the Authority assess and improve the draft Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017, which must be addressed. We remain at your disposal for any further guidance and would gladly invite any opportunity to make oral submissions.

Regards,

Natural Justice
East Africa Wildlife Society
Community Action for Nature Conservation (CANCO)
Friends of Lake Turkana
Environmental Law Alliance Worldwide (ELAW)

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