

**WRITTEN SUBMISSIONS ON THE
ENVIRONMENTAL AND SOCIAL
IMPACT ASSESSMENT (ESIA) STUDY
REPORT FOR THE PROPOSED
NAIROBI EXPRESSWAY PROJECT**

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Introduction

These written submissions are made in response to the National Environmental Management Authority's (NEMA) invitation for public comment on the ESIA for the proposed Nairobi Expressway Project (the **Expressway Project**). That invitation is set out under Gazette Notice No. 1765, published in the Kenya Gazette of 13 March, 2020.¹

These submissions set out a number of observations on the ESIA Report with the aim of assisting NEMA with the administrative decision on whether or not to issue an Environmental Impact Assessment (EIA) Licence for the project.

Summary of Key Comments

- The ESIA Report does not contain the Terms of Reference that ought to have informed the preparation of the ESIA Report. Nor does it contain a Scoping Report which should have been the basis for the preparation of Terms of Reference for NEMA's approval.
- No Strategic Environmental Assessment has been conducted to assess the viability of the proposed Expressway in the context of the wider integrated plan to address traffic congestion within Nairobi and along the A8 Road.
- The ESIA Report does not include a number of critical baseline studies which ought to inform the assessment of potential environmental impacts and the appropriate mitigation measures.
- The ESIA Report fails to consider the impacts of associated off-site activities such as quarrying, burrow pit development, and materials extraction and processing.
- The ESIA Report does not contain any analysis of alternatives to the Expressway Project – both in terms of alternatives to address the transport problem and design alternatives to avoid or mitigate adverse impacts.
- The ESIA Report does not contain an economic analysis which is of critical importance given that this will be a toll road whose costs will have implications for road users.
- The ESIA Report does not address the cumulative impacts of the project in light of existing and planned infrastructure development within Nairobi City and Machakos Counties.
- The ESIA Report does not contain an Environmental and Social Management and Monitoring Plan despite claiming to have one.
- The ESIA Report does not contain a climate risk and vulnerability assessment in keeping with the *Climate Change Act, 2016*.

These comments are set out in further detail below:

¹ Kenya Gazette Vol. CXXII – NO. 49, Gazette Notice No. 1765 available at http://kenyalaw.org/kenya_gazette/gazette/volume/MjExMA--/Vol.CXXII-No.49/#GAZETTE%20NOTICE%20NO.%201765

Comments

Comment 1: No Strategic Environmental Assessment has been undertaken

Sessional Paper No. 10 of 2014 – the National Environment Policy – requires the government’s implementation of, among other things, Strategic Environmental Assessments (SEA). This policy requirement is also anchored in statute in *Regulation 42 of the Environmental (Impact Assessment and Audit) Regulations, 2003* (the **EIA Regulations**) which requires all public policy plans, programmes to be subjected to a SEA to ensure that projects implemented are the most environmentally friendly and cost effective when considered individually and in combination with others.

At paragraph 1.2 on page xiv, the ESIA Report refers to the Nairobi-Mombasa A8 Road and states that the “Government has developed an integrated plan for this corridor” which includes several different components. It is questionable however, whether this integrated plan has been subjected to a SEA. This issue was raised at the public consultations at the University of Nairobi which are captured in Table 31 of the ESIA Report. The relevant excerpt is below:

Table 31: Summary note Nairobi University organized by CASELAP

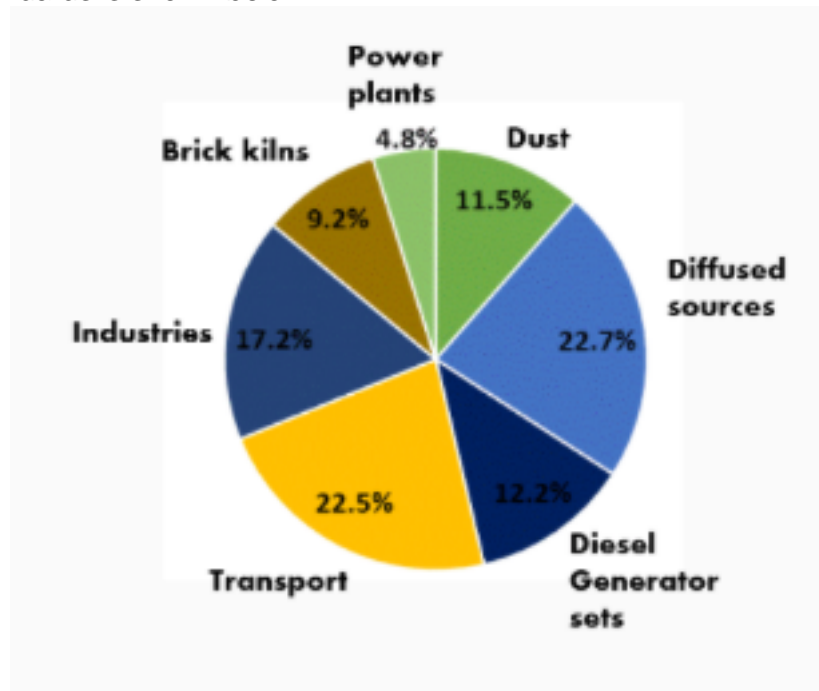
Issue	Response	Comments/Recommendation
Is Public Participation in EIA adequate? as EIA Is just a tool	-EIA is a process, it is not a one stop shop; -It identifies impacts of a project and proposes mitigation measures and once that is done the project is conducted;	Holistic evaluation of projects through SEA should be done more often
Why is EIA done? Is it to balance the environmental? Social and economic concerns?	-EIA is a sustainable development management tool; -EIA is basically doing what it is supposed to do which is to identify and propose mitigation measures; and -It fits the environment into the project	--
If EIA is not working what is going to work?	-Strategic Environmental Assessment (SEA) which fits the project into the environment. This usually starts with what the environment has and what projects can fit into the environment -SEA subjects project plans into the environment -If SEA had been done prior that would have addressed the issue of the Project in relation to the Park. -EIA has its limitation, despite KeNHA doing variations on the design, it will be difficult to assess impacts on the park	--

In response to concerns that the environmental impact assessment might not be sufficient, it is acknowledged above that a SEA would integrate environmental concerns into the project planning process.

The language used is instructive as it is stated that “*if SEA had been done prior that would have addressed the issue of the Project in relation to the Park.*” (emphasis ours) The resounding silence of the proponent and EIA experts to that concern is captured in the ESIA Report. The absence of a SEA however reverberates throughout the ESIA Report in the following ways:

- The absence of any alternatives analysis to address the stated transportation problem and the reason for opting for the expressway.
- The numerous disjointed proposals and EIA licence variations which are described at paragraph 2.3 of the ESIA Report.
- The absence of any design alternatives to address adverse impacts to acknowledged ecologically sensitive areas of great conservation value.
- The lack of detailed analysis of the root of the stated congestion problem along the A8 corridor and whether this might be better and more sustainably resolved through the implementation of multi-modal transport solutions which do not foster automobile dependency.

- The complete absence of any cumulative impact assessment which acknowledges and addresses planned and existing infrastructure developments in the city and how these might cumulatively contribute to environmental and social impacts.
- The lack of any detailed assessment of how the chosen transport solution might contribute to air quality and climate impacts. This should be of particular concern considering the dire impacts seen in recent years in cities like New Delhi.² Urban Emissions set out clear findings showing how transport, diesel and petrol significantly contribute to air pollution. A summary of the study's findings demonstrating the transport sector's potential to adversely impact air quality standards is shown below:



The vital importance of SEAs has been underscored in two local judicial decisions. In *Petition 22 of 2012 - Mohamed Ali Baadi & Others vs. the Attorney General & Others*, the High Court at paragraph 186 of its Judgment made the following observation when considering the development of the LAPSSET Corridor:

“Given the analysis above, it is our finding and conclusion that the proponent of the LAPSSET Project was duty bound to conduct SEA before the commencement of any of the individual Project's components. Our conclusion is based not only on the text and content of the law but on the nature and magnitude of the LAPSSET Project. This is a necessary reading of the environmental governance principles contained in our Constitution including Articles 10, 69 and 70. These Articles among other things require a proactive approach to integrate environmental considerations into the higher levels of decision making for projects with the potential to have significant inter-linkages between economic and social considerations”.

In *Tribunal Appeal No. NET 196 of 2016 - Save Lamu & 5 Others vs. NEMA & Another*, the Tribunal at paragraph 86 of its Judgment noted that:

² Urban Emissions, What's Polluting Delhi's Air available at <http://www.urbanemissions.info/blog-pieces/whats-polluting-delhis-air/>

“Only a SEA undertaken prior to the expression of interest would have properly considered the location and project alternatives. Accordingly, we find there was a failure to have a proper analysis of the location and project alternatives as these were pre-determined and the exercise thereafter was to merely justify what had already been determined.” (emphasis ours)

In the present instance, we would submit that the proper consideration of some alternatives could only have been done within the scope of a SEA. In the absence of one, certain considerations could not be considered within the scope of the ESIA Report.

Consequently, given the scale of the proposed expressway and the implication of a broader plan for the A8 Corridor, we would submit that constitutional and statutory provisions require the conduct of a SEA before the project is allowed to proceed.

Comment 2: The ESIA Report does not contain the Terms of Reference nor the Scoping Report that should inform the content of the Terms of Reference

Regulation 11 of the EIA Regulations stipulate that “an environmental impact assessment study shall be conducted in accordance with terms of reference developed during the scoping exercise by the proponent and approved by the Authority [NEMA]”

The findings of the scoping exercise should ideally be reduced into a scoping report which will then inform the basis for approval of the terms of reference by NEMA. To be of any use, the NEMA EIA Guidelines, 2002 require that the scoping report address a number of key areas, including: the project background, the justification for the project, existing environmental conditions and a brief history of the project, including the alternative options considered.³

NEMA’s EIA Guidelines are also clear regarding what should go into proposed terms of reference for consideration by the Authority. Some of the information required includes: the potential impacts of the project, proposed mitigation plan and Environmental Management Plan, modalities for monitoring and auditing and sources of baseline information as well as any information gaps.⁴

The scoping report and terms of reference are important components of the impact assessment process. However, both are not included in the ESIA Report despite the report claiming to include both. What is presented at Annexure 6 as Terms of Reference are the following two pages which fall far short of what is prescribed under *the EIA Regulations* and *NEMA Guidelines, 2002*:

³ NEMA EIA Guidelines, 2002, paragraph 2.5.7, pages 10 - 11

⁴ NEMA EIA Guidelines, 2002, paragraph 2.5.8, page 12

NEMA/ EIA/TOR/06

Kenya National Highways Authority
Quality Highways, Better Connections

Project Proponent and Sponsor: **中國路橋工程有限責任公司**
CHINA ROAD AND BRIDGE CORPORATION



PROJECT MODEL: BUILD OPERATE TRANSFER (BOT)

TERMS OF REFERENCE FOR THE ESIA OF THE PROPOSED NAIROBI EXPRESSWAY PROJECT

Date: October, 2019

Report Prepared by: **CENTRIC AFRICA LTD**

Assignment: Terms Of Reference For The Environmental And Social Impact Assessment Of The Proposed Nairobi Expressway Project

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Signature: 
Date: 9/10/2019

Disclaimer:
This Environmental Impact Assessment Terms of Ref is strictly confidential to China Road and Bridge Corporation (Kenya)- CRBC (the Proponent) and any use of the materials thereof should strictly be in accordance with the agreement between the Proponent and Centric Africa Ltd (Firm of experts). It is, however, subject to conditions in the Environmental (Impact Assessment and Audit) Regulations, 2003 under the Kenya Gazette Supplement No. 58 of 13th June 2003

Comment 3: The ESIA Report does not contain an adequate review of alternatives

Regulation 18(1)(i) and (j) of the EIA Regulations stipulate that impact assessment studies should contain alternatives analyses of technologies, project sites, project designs and processes and the reasons for any preferences. NEMA's EIA Guidelines, 2002 require the inclusion an alternative analysis of different iterations in the scale and extent of a proposed project.⁵

According to best practice, sound and sustainable impact assessments should ideally include two type of alternatives:

- (a) an alternative solution to the transportation problem; and
- (b) Alternative designs (site, technology, processes, materials, off-site locations, etc.)⁶

The transportation problem in this instance is stated at paragraph 3.2. of the ESIA Report – traffic congestion on the A8 Road due to rush hour traffic. Quite apart from the expressway, there are a number of solutions which have been proposed to address this problem. They include, the implementation of:

- A Bus Rapid Transit (BRT) Network;
- A Commuter Rail Network; and
- Non-motorised Transport infrastructure.

The implementation of some of these alternative solutions such as the BRT for example is scheduled to coincide with the implementation of the expressway according to Nairobi City County's Integrated Development Plan.⁷ However, the ESIA Report fails to address the viability of this or any other alternative. Consequently, the ESIA Report's assessment of the no-go alternative as expressed in the ESIA Report below is deeply flawed.

⁵ NEMA EIA Guidelines, 2002, paragraph 2.8, page 14

⁶ Tsunokawa Hoji and Hoban Christopher (eds), Roads and the Environment: A Handbook, paragraph 4.4, page 37 available at: <http://documents.worldbank.org/curated/en/904041468766175280/pdf/multi-page.pdf>

⁷ Nairobi City County Integrated Development Plan (2018 – 2022), page 78 available [here](#)

“The congestion problem along the main road artery through Nairobi will remain and the travel demand in and out of the CBD will increase beyond current capacity of the existing highways.”

In the absence of any design alternatives for NEMA to consider, it is equally not possible to objectively consider how the proponent arrived at the proposed project concept as the least environmentally costly option. In our view, an EIA Licence should not be issued until a proper alternatives analysis is done.

Comment 4: The Report fails to address the cumulative impacts of the project

Cumulative impacts refer to those impacts arising from interaction of the construction or operation of a proposed project with other plans, policies and projects, or as a result of the interaction between different components of the proposed development itself. It may also include incremental impacts over a period of time due to a development.⁸

Pursuant to *Regulation 18(1)(h) of the EIA Regulations*, the ESIA Report ought to address the cumulative impacts of the proposed expressway. It does not. As a consequence, the following adverse cumulative impacts are not addressed:

- How might the development of the expressway coupled with existing and planned road construction projects focused on expanding vehicle capacity contribute to automobile dependency within Nairobi?
- How might the development of the project interact with planned and existing road construction and other infrastructure developments within the project area to compound air quality, noise and vibration, geological and hydrological impacts?
- What are the likely cumulative impacts of the expressway and other road projects focused on enhanced vehicle capacity likely to have on greenhouse gas emissions within Nairobi City?
- What is the likely cumulative impact of the ecological impacts of the project to the city's green spaces and their role in climate change mitigation?

It is important that impact assessments adequately address potential cumulative impacts to capture the additive, multiplicative and synergistic interactions between developments which may irreparably damage ecosystems, affect health and impair the climate resilience of the city. In our view, the omission of such an assessment is fatal and ought to be undertaken before any consideration is given to issuing an EIA Licence.

Comment 5: The ESIA Report does not contain an economic analysis of the proposed expressway

Pursuant to *Regulation 18(1)(o) of the EIA Regulations*, ESIA Reports ought to include an economic analysis of the proposed development. The ESIA Report includes a section that addresses the socio-economic impacts that is largely focused on the positive impacts.

⁸ Tsunokawa Hoji and Hoban Christopher (eds), *Roads and the Environment: A Handbook*, paragraph 6.1.3, page 62 available at: <http://documents.worldbank.org/curated/en/904041468766175280/pdf/multi-page.pdf>

What is not discussed is the potential impacts of the toll system or justifications for the proposed toll rates. The ESIA Report at page 229 for example states that while a transport funding policy from 2015 recommended a rate of KShs. 6/pcu/Km, it would adopt a rate of KShs. 11.24/pcu/Km (subject to inflation). No reasons are given for how this adjusted figure has been arrived at, how it might change over the life of the road and how that is likely to impact its use. The claim is also made that the cost would be a saving in terms of vehicle operations. However, the objective basis for this assertion is not given.

The limitations of such an inadequate analysis is unacceptable given the public transport challenges faced within the city and media reports about the terms of the contractual agreement entered into with the China Road and Bridge Corporation. The terms of this agreement have not been disclosed publicly despite formal information requests by civil society organizations. In particular, there are concerns regarding:

- (a) The economic implications of moving utility systems for the proposed project which are projected at KShs. 8 Billion and to be borne by tax payers.⁹
- (b) The economic implications of repaying the cost of construction plus interest (estimated at KShs. 92 Billion)¹⁰
- (c) The economic implications of operations and maintenance of the road (estimated at KShs. 40 Billion)¹¹
- (d) The cost benefit analysis of developing the expressway as a traffic decongestion measure as opposed to the cost of implementing bus rapid transit and non-motorised transport systems.
- (e) The economic implications of the non-competition clause in the contract with China Road and Bridge Corporation which proscribes any competitive projects for a specific period after the implementation of the project.¹²

As part of the economic analysis, the ESIA Report should also have included an analysis of the external costs of the proposed expressway. This reflects part of the legal requirements of the constitutional and statutory provisions to guarantee sustainable development and the right to a clean and healthy environment. In *Petition 22 of 2012 - Mohamed Ali Baadi & Others versus the AG & Others* the High Court made the following observation on this point at paragraph 196 of its Judgment:¹³

“NEMA and other decision-makers are duty-bound to require proponents of projects, policies, plans and programs of such magnitude to credibly assess and report on the external costs of the projects as part of their ESIA and SEA in order to provide the decision makers with sufficient materials to make decisions that are in line with the constitutional rights of those who will be affected by those decisions.”

⁹ Wambui Waweru, Motorists to Pay KShs. 300 to Use Nairobi Expressway available at <https://www.capitalfm.co.ke/business/2019/12/motorists-to-pay-sh300-to-use-nairobi-expressway/>

¹⁰ Ibid

¹¹ Ibid.

¹² Amos Kareithi and Jacob Ngetich, New wave of payouts as expressway tears through Uhuru Park available at <https://www.standardmedia.co.ke/article/2001346110/new-wave-of-payouts-as-expressway-tears-through-uhuru-park>

¹³ *Petition 22 of 2012 - Mohamed Ali Baadi & Others versus the AG & Others*, paragraph 196 available at <http://kenyalaw.org/caselaw/cases/export/156405/pdf>

In the absence of an economic analysis as required under the EIA Regulations, the ESIA Report is in our view deficient and should not form the basis of any licensing decision by NEMA.

Comment 6: The ESIA Report lacks adequate baseline information on the environment

Proper baseline studies are essential in assessing the significance of potential impacts. In their absence, the ESIA Report does not provide NEMA with a fair assessment of the implications of stated impacts, or the adequacy of proposed mitigation measures.

NEMA's EIA Guidelines are clear that baseline data should be collected before any activity related to the project is undertaken. In this case, the proponent has already commenced what are referred to as "Early Works" on a 260m trail between JKIA and Cabanas. (See paragraph 1.3 of the ESIA Report)

Even more problematic is the fact that the proponent intends to obtain an EIA licence to commence construction without having completed critical baseline studies including hydrology and air quality baseline studies.

The baseline information that has been presented is in many cases very brief and in our view inadequate to form the basis for any proper impact assessment. These gaps are set out below:

Land Cover and Land Use Classification

The ESIA Report at paragraph 7.2 relies on the following source for baseline information; "*Land Use Survey for Nairobi City conducted by the Centre of Sustainable Urban Development (CSUD) of Colombia University in collaboration with Nairobi University 2005 and 2010.*" This is flawed for the following reasons

- a) The analysis of land cover and use is based on single-sourced, relatively old data (2005, 2010), yet land cover and use changes have become more prevalent in the recent past due to urban sprawl and re-densification of the areas within the project area.¹⁴ Therefore, the land cover and use scenario presented may not be accurate. More recent data that could satisfactorily inform this study; for instance, Oyugi (2017)¹⁵ could be cited.
- b) The implications of the LCLU dynamics on environmental quality along the project area is not sufficiently explored so as to accurately postulate the environmental implications of the project.
- c) Additionally, the LCLU data provided does not offer a concise picture of the area within the project area since it is drawn from an analysis of a relatively vast area (Nairobi County).

Climate

The importance of baseline data on climate and climate impacts ought to be undertaken bearing in mind that the transport sector is the fastest growing contributor to climate change. These impacts are compounded by the fact that energy use for the transport sector is higher than any other

¹⁴ Oyugi, Maurice. (2017). The Implications of Land Use and Land Cover Dynamics on the Environmental Quality of Nairobi City, Kenya. American Journal of Geographic Information System. 6 [DOI: 10.5923/j.ajgis.20170603.04](https://doi.org/10.5923/j.ajgis.20170603.04)

¹⁵ Ibid

sector.¹⁶ According to the Intergovernmental Panel on Climate Change, transport accounts for 40% of end-use energy consumption.

Despite this, the report adopts a very clipped analysis of the prevailing climatic conditions and their relation to the existing transport infrastructure:

“The proposed Nairobi Expressway Project traverses the following two distinct climatic zones based primarily on topography (altitude): the Central Highlands and Rift Valley- which includes the Nairobi County’s JKIA- James Gichuru Section; and Eastern Kenya - which includes the Machakos County’s Mlolongo – JKIA Section of the Nairobi Expressway Project.”

This climatic overview of the project area lacks a concise description of the current climatic conditions of these distinct climatic zones and the potential variability and change (exacerbated by the project) to satisfactorily inform a climate-smart planning process in the mitigation plan.

Given the current climate crisis and targets in response (e.g. Nationally Determined Contributions-NDCs), no reference is made to how this may be impacted by the project. No alternative modes/designs/routes to mitigate climate impacts or shore resistance are also addressed.

Wind

Paragraph 7.5.2 of the ESIA Report addresses the wind conditions in the project areas.

“Air quality impacts from the project will therefore be expected to predominantly be experienced in South West of the project site for both short term and annual project average concentrations.”

There is a need for a more objective and extensive assessment to determine the health-based air quality situation and possible impacts in the anticipated affected area (South-West Region)

Ambient Air Quality

Paragraph 7.6.1 of the ESIA Report is quite clear that the “[b]aseline Air Quality for the corridor has not been carried out and the proponent (CRBC) will undertake a baseline survey and air quality modelling in order to develop Air Quality Management Plan before during the detailed design.”

This is a gaping omission and without this crucial data, appropriate emissions limits to keep within EMCA’s Air Quality Regulations, 2014 cannot be established. While it is recorded that the proposed Expressway will improve air quality through reduced traffic on Mombasa Road, no objective basis for that analysis has been provided. It is in any event equally probable that the ease of travel may encourage more vehicles on the road, hence more vehicle emissions and potentially poorer air quality.

Noise

Paragraph 7.7 of the ESIA Report sets out the following information on noise:

“Baseline Noise measurement for the corridor has not been carried out and the proponent (CRBC) will undertake a baseline survey during the detailed design.”

The absence of baseline studies to form the basis of the analysis is in our view serious oversight by the proponent. In addition, the data provided in the report on noise measurement is from a

¹⁶ WHO, Health and Sustainable Development: Climate Impacts available at <https://www.who.int/sustainable-development/transport/health-risks/climate-impacts/en/>

constrained study that was not necessarily conducted in the specific areas of the corridor, but around the Nairobi CBD generally. It therefore says very little regarding the impacts of the road and the appropriate mitigation measures to safeguard the sensitive receptors along the proposed road corridor which include residential areas.

Biodiversity

At paragraph 7.10, the ESIA Report states that:

“While the study encompassed assessing the site soil types and conditions, water resources, flora and fauna of the entire area, specific attention was given to the floral species.”

First, the assessment gives a lesser focus on fauna yet there is a strong interdependence between the two. The big trees along the corridor act as habitats for species of such as marabou storks and crows for example. More holistic biodiversity assessments would therefore be required.

Second, the biodiversity assessment focuses on a 20-metre perimeter (particularly the Mid-section and the immediate Left- and Right-Hand Side) stretching from the existing A8 road. However, some impacts could extend beyond this restricted area.

Flora

To the extent that the ESIA Report addresses the baseline on flora, the following statement is made at paragraph 7.10.3:

“The road section between Mlolongo to Syokimau has the least vegetation cover while the sections between Nyayo Stadium and Haile Selassie where the road project borders a Golf Club and Uhuru Park, both on the LHS and the section between Nairobi University and James Gichuru have the highest tree density cover.”

It is clear that some areas of the traverse have least vegetation cover and others have very high tree density cover (important zones for carbon sequestration). The baseline on information ought to have been better presented with GIS maps to give a more accurate picture of the extent of impacts. Similarly, the baseline information should set just how vital these high-density areas are relative to the city's total green cover.

Regrettably, the ESIA Report does not contain this information. As a result, there is insufficient baseline information on which to properly assess the potential impacts of the projects or prescribe appropriate mitigation measures.

Ecologically Sensitive Areas (ESA)

The ESIA Report's consideration of the ecologically sensitive areas at paragraph 7.10.4 is equally lacking.

“The proposed road alignment will cross areas that are considered of environmental importance due to their ecological functions and because they act as local biodiversity hotspots with regard to bird species, green cover and recreation. These areas include Railway Golf Club, Uhuru Park, Trees at Nyayo Stadium roundabout, Nairobi River, Thika road interchange and Trees at Westland roundabout.”

As far as baseline analyses go, this is not adequate as it fails to give any precise information regarding the magnitude and nature of the sensitive areas. This would be crucial information to assess the design alternatives that could be taken to either avoid or mitigate any destruction to these

ecologically sensitive areas. It would also inform the scale of required off-site mitigation measures proposed in the report.

Comment 7: The Social Baseline information in the ESIA Report is inadequate

Population

At paragraph 8.4, an overview of the population in Nairobi is given. This is based on the Kenya Population and Housing Census (2014). However, this does not provide a clear description of the numbers of people using the road network, the nature of vehicles plying the road or the project beneficiaries/ affected persons living around the earmarked areas.

Land Tenure

The exposition at paragraph 8.6 is problematic for a number of reasons:

First, there is an acknowledgment that “[t]here are no clear-cut zones for specific land uses in the county. This is because all the existing physical development plans except Machakos New Town Local Physical Development Plan are outdated (not in force).”

Consequently, the report relies on physical planning development plans that do not provide a well-defined zoning policy, causing an overlap and mixing of incompatible land uses.

The ESIA Report is also based on secondary data yet land ownership and land rights in Kenya are complex with a variety of players and sometimes competing and fast-changing ownership rights.

Sewerage System & Water Supply

Paragraph 8.7.2 of the report other than explaining the current situation in the area, does not describe the scale and extent of sewerage systems and how they could potentially be affected.

Waste Management

In a city whose population is fast growing waste management is a key area whose consideration ought to have been subjected to a more rigorous baseline assessment. However, the report only gives a general overview at paragraph 8.13.

Comment 8: The ESIA Report does not adequately assess the environmental impacts and as a consequence poses inadequate mitigation measures

In many important respects, the ESIA Report fails to sufficiently assess potential impacts. As a consequence, the proposed mitigation measures are equally inadequate. This problem likely flows from the fact that impact assessments are based on scant or no baseline studies. This is obviously problematic given that accurate impact analysis and mitigation lies at the heart of the impact assessment process. The important gaps are discussed below:

Impacts on geological processes

At paragraph 10.2.1, the ESIA Report generically sets out possible impacts like the removal of top soils and identifies potential vulnerable spots like the interchanges, construction sites and bridge crossings. However, having identified the potential areas of particular vulnerability and acknowledged the impacts as moderate to major, the ESIA Report does not consider how the potential impacts might affect the vulnerable areas identified, or how the assessment of the impact as moderate to major is arrived at.

This is however unsurprising given that the ESIA Report at paragraph 10.2.1.1 acknowledges that the requirements related to seismic design and risk assessment and geological/geotechnical investigation studies have not been undertaken.

It is further problematic that the embedded mitigation measures proposed are geared towards protecting the roadbed and not the potentially affected areas in the vicinity. (See paragraph 10.2.1.1 of the ESIA Report)

Soil Erosion Impacts

The scale of the soil erosion risks requires geological studies which have not been undertaken. While certain mitigation measures have been proposed to stem these risks, it is impossible to tell whether the proposed designs for culverts will be adequate at this stage as they are not informed by any appropriate study. (See paragraph 10.2.5.2 of the ESIA Report)

In addition, some of the proposed mitigation measures are too vaguely defined to enable an assessment of their adequacy. For example, it is proposed to construct *“appropriate drainage trenches along the entire section of the Project Road.”* Some of the obvious questions one is left with reading this are: What is to be size of these trenches? What will inform this in the absence of any studies? How will these trenches interact with existing infrastructure?

The risk of flooding and soil erosion is likely to extend for the life of the proposed expressway. Despite this, as mitigation, the proponent vaguely proposes that *“[e]rosion, sediment and pollution control, management of upper soil, as well as storm water run-off”* Similarly, the proponent vaguely proposes to identify *“appropriate areas away from water courses for the dumping of spoil material.”*

It is not clear from any of these statements what specific measures will be taken, the entity that will bear responsibility for this and whether costing for this has been done.

In the absence of hydrological and geological studies and more specificity, the ESIA Report is therefore deficient. In its current state the ESIA Report does not contain adequate information to enable NEMA make an appropriate decision to mitigate the acknowledged risk of soil erosion and flooding due to increase run-off.

The IFC's Environmental Health and Safety Guidelines for Toll Roads, set out detailed and specific measures which ought to be adopted:¹⁷

“Storm water

Construction or widening of sealed roads increases the amount of impermeable surface area, which increases the rate of surface water runoff. High storm water flow rates can lead to stream erosion and flooding. Storm water may be contaminated with oil and grease, metals (e.g. lead, zinc, copper, cadmium, chromium, and nickel), particulate matter and other pollutants released by vehicles on the roadway, in addition to deicing salts (e.g. sodium chloride and magnesium chloride) and their substitutes (e.g. calcium magnesium acetate and potassium acetate) from road maintenance facilities in colder climates. Storm water may also contain nutrients and herbicides used for management of vegetation in the rights-of-way.

¹⁷ IFC's Environmental Health and Safety Guidelines for Toll Roads, pp. 4-5 available at

In addition to the management practices for storm water during construction and operations presented in the General EHS Guidelines, practices applicable to roadways include the following:

General Storm water Management

- 1. Use of storm water management practices that slow peak runoff flow, reduce sediment load, and increase infiltration, including vegetated swales (planted with salt-resistant vegetation); filter strips; terracing; check dams; detention ponds or basins; infiltration trenches; infiltration basins; and constructed wetlands;*
- 2. Where significant oil and grease is expected, using oil / water separators in the treatment activities;*
- 3. Regular inspection and maintenance of permanent erosion and runoff control features.*

Road Paving

- 1. Paving in dry weather to prevent runoff of asphalt or cement materials;*
- 2. Use of proper staging techniques to reduce the spillage of paving materials during the repair of potholes and worn pavement. This may include covering storm drain inlets and manholes during paving operations; using erosion and sediment control measures to decrease runoff from repair sites; and utilizing pollution prevention materials (e.g. drip pans and absorbent material on paving machines) to limit leaks and spills of paving materials and fluids;*
- 3. Reducing the amount of water used to control dust, and using sweeping practices rather than washing. Collecting and returning swept material to aggregate base or disposing as solid waste, as described in the General EHS Guidelines;*
- 4. Avoiding the generation of contaminated runoff from cleaning of asphalt equipment by substituting diesel with vegetable oil as a release and cleaning agent; containing cleaning products and contaminated asphalt residues; scraping before cleaning; and conducting cleaning activities away from surface water features or drainage structures”*

Hydrogeology and Groundwater Impacts

The ESIA acknowledges at paragraph 10.3.1 that there will be intensification of waterlogging due to construction activities. There are also likely to be impacts to ground water sources. The assumption is made that these impacts will be local and, on this basis the impacts are assessed as minor to moderate with minor residual impact.

In our submission, the characterization of the impacts as minor to moderate in the face of increasing population pressure and climate change is likely to be inaccurate. In any event, these conclusions can only be definitively established through hydrogeological studies which have not been done by the proponent.

While the ESIA Report acknowledges the “significant impacts” of large construction projects to ground water quality, the proposed response to this is “*subsequent monitoring of water quality at the construction stage*” It is not clear who will carry out the monitoring, at which places the water testing will be done and whether the results will be provided to the relevant regulator – the Water Resources Authority for independent assessment.

The risk of aquifer contamination from the concrete plant and construction camp is also acknowledged at paragraph 10.3.2 of the ESIA Report. However, the location of these two risk sites is not disclosed. The sensitivity of the locations to ground water contamination is also not known so that the proposed mitigation is too vague to be helpful. It is also not clear what criteria will be used

to determine the necessity of equipping a well as a mitigation measures since the risk parameters have not been provided in the ESIA Report.

In the absence of proper hydrogeological studies, the adequate identification of sensitivities and location of proposed off-site activities, the impact assessment and proposed mitigation measures are fatally deficient. As it is, the ESIA Report does not present sufficient information to enable NEMA make an appropriate decision regarding the adequacy of proposed mitigation measures, let alone prescribe appropriate licence conditions to ensure adequate mitigation of impacts.

Biodiversity Impacts

The ESIA Report acknowledges that biodiversity within the CBD in areas such as Golf Club, Chiromo and Uhuru Park will be impacted.

First, this contradicts information shared during public consultations at which KeNHA informed the public that Uhuru Park would not be affected. At Table 27 of the ESIA Report on page 82 assurances were given to the public that *"[t]he expressway will be constructed between the existing roads hence it will not include acquisition of Uhuru park in its design"*

At Table 28 on page 99 further assurances are given to the public that *"the road does not touch Uhuru Park; the ramps are shifted backwards"*

Elsewhere, in response to concerns raised by Architects Association of Kenya the impacts are described as *"minimal"*. (See paragraph 6.8.1 of the ESIA Report)

However, the information disclosed in the course of public participation is contradicted in the observation at Table 56 of the ESIA Report on page 177 that there will be *"significant threat [of habitat modification] across the alignment, particularly along Golf Club, Uhuru Park, Chiromo and Thika Interchanges."* The affected areas are also described as being *"of great conservation value as they contain species of special concern, or have other conservation features such as water storage and providing habitats to animals."* (emphasis ours)

To this extent, it is clear that there was misrepresentation regarding the negative impacts of the project on conservation areas of value during the course of public participation. More importantly, given the acknowledged conservation value of the green spaces likely to be impacted, the characterization of the impact as **low** at Table 55 is patently misleading. Particularly when one considers that according to the same ESIA Report:

- modification of habitats is described as being "irreversible";
- the loss of habitat for Marabou stork will be "significant"; and that
- the loss of genetic integrity will be "partially irreversible"

Elsewhere, while the ESIA Report acknowledges the threat to plant endemism within the section that will be greatly affected, it does not particularize the extent of the impact. Moreover, the remedy proposed is only partial and seems to addresses the trees planted for ornamental purposes only. The offsite mitigation measures are equally not detailed so that one cannot assess whether they would be adequate. Where, for example will tree replantation be done? Will this adequately mitigate the loss of conservation features such as water storage?

As with most of the ESIA Report, it is clear that the assessment of impacts and the proposed mitigation measures are not informed by any adequate ecological study. (See 10.5.1.11)

Air Quality

The air quality impact assessment in the ESIA Report suffers from two major significant flaws. First, the ESIA Report acknowledges at paragraph 10.6.2 on page 183 that “workers accommodation camps and associated facilities are significant sources of air emissions.” However, it is proposed that the proponent will develop appropriate mitigation measures at a later date. Second, the assessment of air quality impacts has been conducted in the absence of any air quality baseline studies or air quality modelling as stated at paragraph 10.6.2 on page 183.

This is especially disturbing given that these impacts will affect sensitive receptors such as residential areas and National Parks. It also means that the ESIA Report is deficient to the extent that it does not present an accurate, evidence-based evaluation of the likely air quality impacts, which inevitably impairs the adequacy of the proposed mitigation measures. It also makes it impossible for the proponent to formulate a clear Air Quality Management Plan.

The ESIA Report has therefore not provided sufficient information on which a reasonable decision could be made on the issuance of an EIA Licence or what appropriate mitigation measures could be placed as licence conditions.

Comment 9: The Report does not adequately address off-site impacts of the proposed road construction

In addition to impacts from the site of actual construction, road construction projects carry with them a number of off-site impacts. Some of the sources of these impacts include:

- Quarries
- Burrow Pits
- Concrete mixing stations
- Waste disposal sites
- Water wells
- Asphalt plants
- Beam fields
- Material & machine storage sites
- Staff camps

The presence of these sources is partly acknowledged at paragraphs 3.7.7 – 3.7.13 and 10.1 of the EIA Report. However, the proponent has failed to provide the scale of these off-site activities and the specific impacts which might arise from each of these activities.

The EIA Report acknowledges at paragraph 10.6.2 that:

“...[t]he locations of the camp sites, construction facilities, concrete and asphalt plants and crushing units are not known at this point in time and will only be determined by CRBC after which associated risks and mitigation measures will be determined prior to construction works.”

This approach by which the proponent seems intent on being left to their own devices in assessing potential risks and mitigation measures outside the impact assessment process is clearly in violation of the letter and spirit of EMCA and its regulations.

The location of other sites is given in generic terms. As an example, at paragraph 3.7.11, the description of the beam field is as follows:

“Two equal-scale beam field will be set near K7 and K26, single precast beam field covers 25000 m² area, the size is about 564×44.3 m, and a reinforcement processing field will be build (sic) for each beam field.”

The generic description makes it impossible to assess the state of the environment in the proposed location and therefore the likely impacts and the mitigation measures which may be required.

Impacts of construction materials extraction

The absence of off-site impacts is especially problematic in relation to construction material extraction given that the demand for construction material will be massive as can be seen from Tables 12 and 13 of the ESIA Report:

Table 12: Material Demand for section 1 (Mlolongo To Southern Bypass Interchange)

Material	Quantity
Bitumen-coated	1931t
Natural sand	30000t
Sand and gravel mix	200000m ³
Gravel	150000m ³
Heavy-weight concrete	116000m ³
Bitumen	14000t
Soil	1900000m ³
Vegetable soil	700000m ³

Table 13: Material Demand for section 2 (Southern Bypass To James Gichuru)

Material	Quantity
Bitumen-coated	94,400 m ³
Natural sand	258 kiloton
Sand and gravel mix	126 kiloton
Gravel	504 kiloton
Heavy-weight concrete	483 kilostere
Heavy-weight premixed brick mortar	2137 m ³
Bitumen	39 kilostere
Soil	310 kilostere
Vegetable soil	30 kilostere
Water	486 kilostere

These materials are to be sourced locally however, the material extraction sites are yet to be identified. The ESIA contains no further detail on the impacts of extraction of these materials from the unknown sites yet to be identified.

Yet, quarrying, as an example, poses significant environmental impacts as summarized from a 2010 study published in the African Journal of Environmental Studies and Technology:¹⁸

Dust

“Dust from quarry sites is a major source of air pollution, although the severity will depend on factors like the local microclimate conditions, the concentration of dust particles in the ambient air, the size of the dust particles and their chemistry, for example limestone quarries produce highly alkaline (and reactive) dusts, whereas coal mines produce acidic dust. The air pollution is not only a nuisance (in terms of deposition on surfaces) and possible effects on health, in particular for those with respiratory

¹⁸ G.A. Lameed and A.E. Ayodele, “Effect of quarrying activity on biodiversity: Case Study of Ogbere site, Ogun State Nigeria, African Journal of Environmental Science and Technology Vol. 4(11), pp. 740-750, November, 2010 Available online at <http://www.academicjournals.org/AJEST>

problems but dust can also have physical effects on the surrounding plants, such as blocking and damaging their internal structures and abrasion of leaves and cuticles, as well as chemical effects which may affect long-term survival (Guach, 2001)."

Biodiversity loss

"One of the biggest negative impacts of quarrying on the environment is the damage to biodiversity (Anand, 2006). Biodiversity essentially refers to the range of living species, including fish, insects, invertebrates, reptiles, birds, mammals, plants, fungi and even micro-organisms. Biodiversity conservation is important as all species are interlinked, even if this is not immediately visible or even known, and our survival depends on this fine balance that exists within nature. Both positive and adverse societal impacts of modern manufacturing technologies have great consequences on economics, health, safety and environment in general (Anand, 2006).

Quarrying carries the potential of destroying habitats and the species they support (Mabogunje, 2008). Even if the habitats are not directly removed by excavation, they can be indirectly affected and damaged by environmental impacts – such as changes to ground water or surface water that causes some habitats to dry out or others to become flooded. Even noise pollution can have a significant impact on some species and affect their successful reproduction."

The IFC Environmental, Health and Safety Guidelines for Construction Materials Extraction set out wide environmental impacts of construction materials extraction in terms of air emissions, noise and vibrations, water, waste and land conversion.¹⁹ It also prescribes specific mitigation measures to curb each impact.

In our submission, the project should at a minimum incorporate the IFC Guidelines. More specifically, the ESIA should also clearly set out:

- The off-site activities, the sites and scale of these activities, describe the state of the environment within which these activities will be carried out and the site-specific mitigation measures proposed to avoid or mitigate the impacts.
- The Environmental and Social Management and Monitoring Plan should address off-site mitigation measures with details of the measures, the responsible entity, when the measures will be taken, the cost implication and the monitoring indicators and schedules.

Comment 10: The ESIA Report contains an inadequate analysis of social impacts and adequate mitigation measures for those impacts

Education

While a number of learning institutions are likely to be affected,²⁰ the report fails to map out specific impacts of the project on the different institutions and the specific mitigation measures that will be implemented to mitigate these impacts.

¹⁹ IFC Environmental, Health and Safety Guidelines for Construction Materials available at: <https://www.ifc.org/wps/wcm/connect/dad17995-66be-4280-86da-b438cf9fbefc/Final%2B-%2BConstruction%2BMaterials%2BExtraction.pdf?MOD=AJPERES&CVID=jkC-EN.&id=1323162191491>

²⁰ See paragraph 8.8 of the ESIA Report

Road Safety along the Existing Mombasa Road A8

Quite accurately, the report indicates that Mombasa Road is ranked amongst the deadliest roads in Kenya due to human-related factors.²¹ The need to develop the Expressway as a solution/ measure to address the challenge is not clearly articulated.

Gender and Transport in Nairobi and Its Environs

The report pays lip service in its consideration of women's vulnerability in the transport sector.²² This is because it only generically addresses the issues of employment and livelihoods without specifically analysing how women's' livelihoods and wellbeing is linked to the infrastructure; and potential impacts of the proposed project.

Health Profile

The report contains a generalise health profile at paragraph 8.14. however, it then fails to show the vulnerability caused by such projects to the human community and what measures will be taken to mitigate these impacts.

Comment 11: The Report does not contain an Environmental and Social Management and Monitoring Plan

Regulation 18(1)(k) of the EIA Regulations require that an EIA Report contain "an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment including the cost, time frame and responsibility to implement the measures."²³

The Environmental Management Plan (EMP) is critical as a tool for the effective integration of all the avoidance and mitigation measures identified in the EIA Report into the project life cycle. It is within the EMP that the proponent should set out when in the project cycle proposed avoidance and mitigation measures are to be taken, which party is to be responsible for implementation, the time frame for implementation and critically, the cost and the source of funding for the proposed measure.

The EMP should also have built into it, a monitoring plan for how the adequacy of proposed mitigation measures is to be periodically assessed, the indicators for monitoring, funding sources for monitoring and schedules for periodic monitoring and audits.

It is equally fundamental that any EMP be informed by baseline data contained in the ESIA Report as prescribed at paragraph 2.6.5, page 13 of NEMA's EIA Guidelines, 2002.

The proponent has in this case failed to provide an EMP which meets the regulatory requirements set out above. In our submission, this is a fatal omission given that in the absence of a detailed EMP, NEMA has no objective basis to assess the practicability and adequacy of the proposed mitigation measures against criteria such as the financial allocation for each and the stage at which the measure is to be integrated into the project life cycle. Additionally, the EMP forms an essential component of the subsequent audit processes also provided for under the EIA Regulations.

²¹ See paragraph 8.12.2 of the ESIA Report

²² See paragraph 8.12.3 of the ESIA Report

²³ NEMA's EIA Guidelines, 2002 specifically stipulate that any proposed protection measures should be costed and that the technical capacity of the entity responsible for implementation also be addressed as part of the Plan. See paragraph 2.7, page 14 of the Guidelines.

Comment 12: No Climate risk and vulnerability assessment has been included in the ESIA Report

Under EMCA and its regulations, climate constitutes a component of the environment. Climate implications of proposed developments should therefore be addressed within ESIA Reports. This obligation is re-enforced by *Section 20 of the Climate Change Act, 2016* which requires the integration of climate risk and vulnerability assessments in all forms of assessment. For NEMA to be able to fulfil this obligation, it is imperative that project proponents include a climate impact component within their impact assessments.

In this case, the ESIA Report does not contain any climate impact assessment, even though some cursory references are made to climate implications at Table 56. The International Association for Impact Assessment sets out a number of best practice principles which, at a minimum, ought to have been incorporated in the ESIA Report. This includes reference to how the proposed project might impact any national or sectoral climate change plans. The ESIA Report regrettably makes no mention of the National Climate Change Action Plan, 2018 – 2022 which makes specific provision for the transport sector in Nairobi.²⁴

Equally missing is how the proposed expressway might impact Kenya's Nationally Appropriate Mitigation Action Plan for Bus Rapid Transit sent to the UNFCCC, which specifically seeks to establish a reduction of 2 MtCO₂e by 2030 for the Nairobi Metropolitan Region.²⁵

These analyses should be underpinned by objective baseline information given the national commitments Kenya has made as part of its Nationally Determined Contributions. They are particularly critical given the planetary climate crisis and the major contribution of the transport to greenhouse gas emissions.²⁶

A detailed climate impact assessment is also fundamental given the importance of analyzing the alternatives to the proposed expressway, including multi-modal transport alternatives such as bus rapid transit systems and non-motorised transport (NMT) systems; both of which are expressed as policy priorities for Nairobi County within the City's Integrated Development Plan and Non-Motorised Transport Policy, 2015.

The International Association for Impact Assessment has detailed guideline for what components should go into a climate impact assessment which we submit should be incorporated into the ESIA Report as a minimum. In the absence of the assessments proposed in these best practice guidelines, the ESIA Report falls short of the requirements of the *Climate Change Act, 2016*.

²⁴ Kenya National Climate Change Action Plan, 2018 – 2022, Vol. I, page 65 available at <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/10/8737.pdf>

²⁵ Bus Rapid Rapid Transit (BRT) Plus System for the Nairobi Metropolitan Region available at https://unfccc.int/files/focus/mitigation/application/pdf/nama_proposal_poster_kenya_brt_cop2.pdf

²⁶ Wang and Mengpin, Everything you Need to Know About the Fastest Growing Source of Global Emissions – Transport (2019) available at <https://www.wri.org/blog/2019/10/everything-you-need-know-about-fastest-growing-source-global-emissions-transport>

Comment 13: Inadequate Public Participation

Failure to publicize the project in both official and local languages in a radio station with nationwide coverage contrary to the provisions of Regulation 17 (2) of the EIA Regulations.

A clear structure of how public participation ought to be conducted during an EIA study is spelt out in the EMCA and the EIA Regulations. *Regulation 17(2) of the EIA Regulations* requires the project proponent to publish information about the project and its potential impacts by: -

- a) Posting posters with information on the proposed project in strategic public places in the vicinity of the site; and
- b) Publishing a notice on the proposed project for two successive weeks in a newspaper with nation-wide circulation; and
- c) Making an announcement of the notice in both official and local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks.

The wording of *Regulation 17 (2)* imposes a mandatory obligation on project proponents to strictly comply with all these requirements. It therefore leaves no room for manipulation or alteration of the procedure. Courts have equally reiterated that where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat.²⁷

In this instance, the project proponent failed to comply with the requirement to make announcements about the project in both official and local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks. In the event that the proponent claims to have done so, no evidence has been attached to prove compliance with this provision in the ESIA Report and its annexures.

The danger of failing to provide as much publicity as possible about the project is that we risk locking out and excluding the wider public who have an interest in the matter and may be affected directly or indirectly by the project. It is no wonder then that two concerned members of the public have filed a Petition challenging the development of the project on, among other things, inadequate public participation.²⁸

In the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*²⁹ the National Environmental Tribunal (NET) stated that the emphasis on nation-wide publication/ announcement was because the impact of such projects, in many instances, were of national interest.

Whereas the project proponent sites lack of public interest or public apathy as a limitation to public consultation,³⁰ this could largely be attributed to factors such as lack of wide spread awareness about the project or information on the public consultations. As an example, the following written notice was circulated for meetings in Mlolongo and Syokimau:

²⁷ See the case of John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR, paragraph 60 available at <http://kenyalaw.org/caselaw/cases/view/128276>

²⁸ Annete Wambulwa, Activists Petition Court to Stop JKIA-Westlands Expressway, the Star, 28 January, 2020 available at <https://www.the-star.co.ke/news/2020-01-28-activists-petition-court-to-stop-jkia-westlands-expressway/>

²⁹ [2019] eKLR.

³⁰ See page 117 of Vol. I of the ESIA Report.



THE PRESIDENCY
MINISTRY OF INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT

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REF: PW/8/1 VOL.1/170

DEPUTY COUNTY COMMISSIONER
ATHI RIVER SUB-COUNTY
P.O. BOX 555-00204
ATHI RIVER

Date: 13TH November, 2019

ALL SYOKIMAU
RESIDENTS.

RE: PUBLIC CONSULTATION MEETING FOR THE PROPOSED NAIROBI EXPRESSWAY PROJECT

The Kenya National Highways Authority intends to implement Nairobi Expressway Project which will start from Mlolongo- JKIA- James Gichuru round about. KeNHA has contracted the China Roads and Bridges Corporation Kenya (CRBC) for the construction of the expressway.

Centric Africa, a firm of experts registered by the National Environment Management Authority is the consultant carrying out the Environmental and Social Impact Assessment Study and the Resettlement Action Plan.

This is to invite you to the public consultation meetings to give your views and recommendations for the proposed project. The meetings are scheduled as follows:

- a) Katani/Mlolongo public meeting on 19th November, 2019 at 10.00 am
- b) Syokimau public meeting on 20th November, 2019 at 10.00 am

VENUE = SYOKIMAU KATANI ROAD BELOW EPREN CENTRE.
(SEE TENTS).

DAVID O. JUMA
DEPUTY COUNTY COMMISSIONER
ATHI RIVER SUB-COUNTY

N/B A MUST ATTEND.

First, the mode of communication was outside the scope provided in the EIA Regulations. Secondly, the information provided was unclear. It is not clear from the notice whether the venue for both meetings was to be in Syokimau or whether this was only the venue for the second public meeting. More disconcertingly, the actual venue for the second public meeting was not in fact held at Epren Centre but was instead held several meters from Epren Centre just off Mombasa Road. The change in venue for which no notice was provided to the public is acknowledged at Table 26 on page 79 of

the ESIA Report. Lastly, the communication does not contain any information on the nature of the project and the likely impacts for the affected community which would enable their effective engagement in the public engagement. In our view, more detailed information should have been provided on the nature of the project and how the project might impact those living in Katani, Mlolongo and Syokimau.

This being the first Build Operate Transfer (BOT) model road project in Kenya, extensive consultation with the wider public is vital. As such, the project proponent should work towards ensuring that details about this project is better publicised and that public views and comments are taken into consideration.

Our recommendation is that NEMA requires the project proponent to conduct further consultations with the public and most importantly, strictly comply with all the laid down procedures for conducting public participation as required by the law. More detailed information on how the project is likely to impact specific areas should also be provided to enable better understanding of those who are likely to be impacted.

Lack of inclusiveness of the public participation process

In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*³¹ a three-judge bench set out the minimum basis for adequate public participation. One of the principles of public participation as set out in this judgement is that there must be **intentional inclusivity and diversity in the process**. Any clear and intentional attempts to keep out a bona fide stakeholder would therefore render the public participation process ineffective and illegal by definition. Ensuring that every person is included would mean taking deliberate actions aimed at creating an enabling environment for people to participate including choosing a convenient location for holding meetings, selecting an appropriate time for holding consultations and holding sufficient number of meetings to allow for wider consultations.

We are of the view that the public participation process in this project was not inclusive in the following ways:

a) Identification of stakeholders after the submission of the EIA study report

The project proponent states that as the proposed expressway project progresses, ongoing stakeholder identification, mapping and analysis will be conducted.³² The proponent provides a list of stakeholders who were consulted and goes on to state that this list will be updated prior to the commencement of and during every phase of the project.³³

Our concern about mapping relevant stakeholders **after** the submissions of the ESIA study report is that, it is not only contrary to the law, but also fails to clarify how the proponent intends to ensure that the views of stakeholders identified at later stages of the project will be considered in the decision-making process.

EMCA and the EIA Regulations create various opportunities for public consultation and assigns specific roles to the project proponent and the environmental regulator ensure there is adequate public consultation depending on the stage of the EIA process. The project proponent's obligation

³¹ Constitutional Petition No. 305 of 2012.

³² See Section 6.3 at Page 71 of Vol. I of the ESIA Report.

³³ Ibid.

is to ensure that they consult the public throughout the EIA study process and **before** submitting the final report to NEMA.

Although Section 59 of EMCA and Regulation 21 (2) (a) of the EIA Regulations requires NEMA to invite oral and written comments or hold public hearings after the submission of the EIA study report, this cannot be used to justify the proponent's failure to exhaustively consult all affected persons and communities comprehensively during the EIA study process.

In the *Save Lamu case*³⁴ where the project proponent held stakeholder consultation meetings after submitting the EIA study report, the Tribunal had the following to say:

*"It is important to note that **after** the submission of the ESIA study report to NEMA, the regulations oblige the 1st Respondent (at the cost of the 2nd Respondent) to carry out the public consultation exercise. **There is no requirement for the 2nd Respondent at this stage to call for any further meetings or consultations- this was the 1st Respondent's role** [Emphasis Added]. In allowing the 2nd Respondent to act like it was still in charge of the process at this stage, the 1st Respondent appeared to have taken a back seat and abdicated its role to the 2nd Respondent. The 2nd Respondent in rolling out its stakeholder consultation of August 2016 was **engaged in something over and above what was legally required of them**. The stakeholder engagement, after the report had been presented to the 1st Respondent, was not a requirement of the regulations, at this stage of the process."*

Based on this analysis, it is incumbent upon NEMA to demand that the project proponent continues with the consultation process until a point where they are certain that every possible stakeholder is consulted and their views incorporated into the study report prior to its submission.

- b) The number of meetings held with communities was inadequate to guarantee the representation and inclusion of all views of the larger public

The proponent conducted six (6) consultative meetings with communities along the project road corridor between 19.11.2019 and 27.11.2019.³⁶ The communities consulted comprise residents in only six (6) administrative locations including Mlolongo, Syokimau/Katani, Nairobi West (South C & Nairobi West), Mukuru Nyayo (South B & Landi Mawe), Imara Daima (Hazina to JKIA) and Westlands (U.O.N TO James Gichuru).³⁷

We note that the general rule is in favour of the **subsidiarity principle** which provides that those most affected by a project must have a bigger say in the decision-making process and their views must be deliberately sought and considered. However, where the project is of a great magnitude and is likely to impact people beyond the persons located closer to the project site, views from the wider public beyond the project area should be considered.

The project proponent appears to rely on previous stakeholder engagements to propagate the idea that extensive consultations have been done to-date.³⁸ They further allude to the fact that various engagements were done prior to the launch of this project which has been in existence since the

³⁴ [2019] eKLR.

³⁵ See paragraph 55 of the Judgement.

³⁶ Page 78 of Vol. I of the ESIA Report.

³⁷ See Table 26.

³⁸ Section 6.4 at page 71 of the ESIA Report.

90's. The initial proposal was to have a super express way with no exits from JKIA to James Gichuru. This was highlighted during the engagement process and the project was put on pause to redesign it and have the exits incorporated.³⁹

Given the magnitude of this project, its novelty in the Kenyan context and the potential impacts it may have on the wider Nairobi population, the narrow scope of consultation adopted by the proponent is in our view inadequate to represent and address all the concerns of the general public that may be impacted directly or indirectly by the project.

We therefore advocate for a wider consultation approach where people beyond the geographical location of the project who may be potentially affected by the project are given an opportunity to participate.

Conclusion

For all these reasons, we are of the view that the impact assessment process for the proposed project is so flawed that could not form a reasonable basis for NEMA to take an administrative decision on whether or not to issue an EIA Licence. The lawful course in our view would be for the proponent to re-evaluate the impact of the project in a manner that is sufficiently rigorous and in keeping with the procedural and substantive legal requirements.

³⁹ Page 101 of the ESIA Report.