



OUR REF: NJ/NEMA/Lamu Port Access Road/19/2
YOUR REF: EIA 1553

19th September, 2019

Director General
National Environmental Management Authority
Popo Road, South C, Off Mombasa Road
P.O. Box 67839 - 00200
NAIROBI

Copy sent via dgnema@nema.go.ke

Dear Sir,

**REF: SUBMISSION OF COMMENTS ON THE ENVIRONMENTAL IMPACT
ASSESSMENT (EIA) STUDY REPORT FOR THE PROPOSED LAMU PORT
ACCESS ROAD, IN LAMU COUNTY**

We make reference to the advertisement in the Daily Nation dated 20.08.2019 inviting comments on the EIA study report for the proposed Lamu Port Access Road.

Attached to this letter is a copy of our comments, views and recommendations on the subject matter above which we hope will be insightful as you consider the application for an EIA license by the project proponent.

Sincerely,

Rose Birgen
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COMMENTS ON THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) STUDY REPORT FOR THE PROPOSED LAMU PORT ACCESS ROAD, IN LAMU COUNTY

The Lamu Port Access Road is an initiative of the Kenyan government whose aim is to upgrade the road that will link the port to the Lamu-Witu-Garsen road (A7) to bitumen standards. While we acknowledge the positive impacts that infrastructural projects such as this one can bring to communities in Lamu, we are equally concerned about certain legal substantive and procedural issues which we believe can go a long way towards ensuring that sustainable development is achieved. Below are our detailed submissions in that regard:-

1. Access to Information

We feel aggrieved by the proponent's and the National Environmental Management Authority's (NEMA) failure to provide information on the project to local communities affected by the construction and other interested stakeholders, in a timely and convenient manner. Neither did NEMA make the Environmental Impact Assessment (EIA) study report available on their website, nor did they provide copies of the documents expeditiously upon putting in a formal request for information through our letter dated **23.08.2019** (*attached as 'Annex I*), as obliged by law.

Article 35 of the Constitution of Kenya (CoK), 2010 provides that every citizen has the right to access information held by the state or any other person, that is needed for the exercise of a right or fundamental freedom.¹ Further, access to information by a public entity should be given in an expeditious and at a reasonable cost.² Under the Environmental

¹ Constitution of Kenya, 2010, Article 35(1); Access to Information Act, 2016, Section 4 (1).

² Access to Information Act, 2016, Section 4 (3).

Management and Co-ordination Act³ express provision is made for the right to access environmental information and NEMA has a duty to provide access to any records transmitted under the Act.⁴

The information to be facilitated by the public entity includes publishing all relevant facts involved in the decision making process and communicating to the public or the people likely to be affected thereby and also while relaying the information, to ensure there is reasonable access in the best interests of natural justice and promotion of democratic principles.⁵ In that regard, as per section 59 (3) of EMCA, NEMA is obliged to, among other things, ensure that its website contains a summary of the EIA study report.

Thus, it is our view that the communities' right to information as outlined in the law was violated due to NEMA's failure to publish the EIA Study Report on their website.

The Access to Information Act provides that information should be made available in three ways: first, for inspection by any person without charge; by supplying a copy to any person on request and at a reasonable cost to cover the costs of copying and also on the internet provided that the materials are held by the authority in electronic form.⁶

The National Environmental Tribunal (the Tribunal) spoke to the importance of access to information in the case of *Save Lamu & 5 Others v NEMA & Amu Power*⁷. The Tribunal stated that access to information is a prerequisite for the exercise of the right to public participation. For this reason, the court cited the lack of access to information as one of the grounds for cancelling the EIA license issued to the second respondent.

³ Section 3A.

⁴ Section 123.

⁵ Access to Information Act, 2016, Section (1) (c).

⁶ Access to Information Act, 2016, Section 5 (3).

⁷ NET 196 OF 2016.

It is worth noting that, in this instance, NEMA published a notice on **20.08.2019** inviting the public to submit written comments on the EIA study report within **30 days**. This means that the deadline for submission was **19.09.2019**. Regrettably, the EIA Study Report was not available on NEMA's website until **13.09.2019**, a week to the deadline for the submission of comments. This then beats the purpose of the right to information since information ought to be made accessible expeditiously so as to ensure that ample time is given to communities to interact with the technical documents and participate effectively by providing constructive feedback. This will ensure that the project does not in any way have loopholes.

Based on our observations concerning this issue, we recommend that the Authority exercises the powers granted to it under section 59 (2) of EMCA and extend the period allowed for the submission of oral or written comments to the EIA.

2. Inadequacy of the EIA Study Report.

We are particularly concerned with the simplistic and generic approach adopted in assessing the impacts of this project on climate and the issue of solid and liquid waste.

A. Lack of an adequate and scientific Climate Change Impact Assessment

The Climate Change Act requires the authority to integrate climate risk and vulnerability assessment, and for that purpose liaise with relevant lead agencies for their technical advice.⁸ Climate change is a complex issue hence the need to undertake climate change assessments to provide complete, adequate and sufficient scientific information of the impacts of the project to aid in proper and informed decision-making.

The Study report is inadequate in terms of the Climate Change aspect since it simply limits itself to describing the weather conditions ordinarily experienced within the project area.

⁸ Climate Change Act, 2016, Section 20.

While analyzing the climate change aspect, the study report simply states the humidity of the project area that is semi-humid to semi-arid, semi-arid or arid in the agricultural zones.⁹ Further, the report states that the rainfall distribution is bimodal with the long rainy season occurring between the months of March to May with a peak in April, while the short rainy season is from the month of October to December with a peak in November.¹⁰ It also states that the relative humidity is high in the coastal area but rather low in the mainland.¹¹

The report further states that the only impacts on climate would result from the use of fossil energy such as diesel, which will increase the rate of greenhouse gas emissions causing global warming.¹² This assessment, from our perspective, does not detail in a scientific and accurate way, all possible factors that can affect climate due to the construction activities such as the destruction of wetlands which are very important carbon sinks.

The EIA study fails to acknowledge the Climate Change Act, 2016 as one of guiding regulatory frameworks.¹³ Further the proponent fails to consider the Climate Change Act's requirement for a climate change assessment in the EIA thus failing to provide NEMA with an understanding of how the proposed project will, if at all, exacerbate the effects of climate change to enable NEMA mainstream this element in its decision making.

We therefore request that NEMA instructs the project proponent to undertake a climate change risk and vulnerability assessment as provided under Section 20 of the Climate Change Act, a mandatory prerequisite for grant of an environmental license.

B. Solid and Liquid Wastes

⁹ Environmental Impact Assessment Study Report, Section 5.2.3, Page 36.

¹⁰ Ibid n 9 above.

¹¹ Ibid n 9 above.

¹² See page 54 of the EIA Study Report.

¹³ Environmental Impact Assessment Study Report, Section 4.1.1, Page 11-31.

The Study Report is inadequate in providing for the mitigation measures that would help mitigate potential impacts resulting from the solid and liquid wastes. The project proponent simply states that they will apply waste management hierarchy and that they would also manage wastes in line with the provisions that have been given in the Waste Management Regulation, 2006.¹⁴ Instead, the proponent takes an ambiguous approach thus failing to identify the categories of wastes resulting from the proposed project and suggesting mitigation measures to address each category of waste.

While considering this application, we invite the Authority to consider these issues as weighty since they can result in far reaching consequences on communities and their environment if not mitigated adequately.

3. Lack of public participation during the process of conducting the EIA Study.

The EIA study report was formulated without involving the public, contrary to the provisions of the CoK, EMCA and the Environmental (Impact Assessment and Audit) Regulations, 2003 which strongly promotes the participation of people.

Public participation, as outlined in the Constitution, is one of the national values and principles of governance that binds all State organs, State officers, public officers and all persons.¹⁵ Article 69 (1) (d) of the Constitution also encourages public participation in the management, protection and conservation of the environment. Accordingly, the EMCA as read together with the EIA Regulations, place project proponents under a mandatory obligation to engage persons to be affected by a project by seeking their views following the approval of the report and while conducting the EIA study. So vital is the concept of public participation that the court, in the case of *Save Lamu and 5 Others v National Environmental Management Authority (NEMA) & Amu Power*¹⁶ stated that “public

¹⁴ Environmental Impact Assessment Study Report, Section 6.2.2.9, Page 57.

¹⁵ Article 10 of the CoK, 2010.

¹⁶ NET 196 of 2016.

participation in an EIA study process is the oxygen by which the EIA study and the report are given life”.

For there to be effective public participation, the EIA Regulations provide that the proponent shall:-

- (a) Publicise the project and its anticipated effects and benefits by:-
 - (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
 - (iii) 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;
- (b) Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
- (c) Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and other concerned parties; and
- (d) Ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during public meetings for onward transmission to the Authority.

After a thorough consideration of the EIA study report, we note with great concern that the project proponent failed to conduct adequate public consultations as required under the EIA Regulations based on the following grounds:-

A. *Failing to consult community members who are most affected by the project.*

The **subsidiarity principle** as was espoused in the case of *Mui Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*¹⁷, provides that those most affected by a policy, legislation or action **must have a bigger say** in that policy, legislation or action and their views must be more deliberately sought and taken into account. Contrary to the provisions outlined above and the principle of subsidiarity, the project proponent failed to consult those most impacted by the project such as Kililana Farmers and pastoralists living close to the project site. Instead, the proponent simply cherry picked participants from government entities and private companies to attend the public consultation meetings and fill in questionnaires as a matter of formality.

From reading the EIA study report, it is clear from the list of participants, that the people who were involved in the stakeholder consultation were the Deputy County Commissioner of Lamu West Sub-County, the Assistant County Commissioner for Hindi Division and boda boda riders plying the proposed route.¹⁸ Employees of Gulf Energy Petrol Station and INTEROS were also involved. The report is, however, not explicit on the methodology and criteria used to choose the interviewees and the exact number of community members involved.

The study report recognizes the negative impacts that will arise from the project among them being soil erosion, noise pollution, interference with the indigenous cultures and air pollution.¹⁹ This is an indication that the local communities would face the negative impacts of this project and the failure to consult them is a threat to their right to a clean and healthy environment.

¹⁷ Constitution Petition No. 305 of 2012.

¹⁸ Environmental Impact Assessment Study Report, Section 7.0, Page 59.

¹⁹ Environmental Impact Assessment Study Report, Executive Summary.

B. Failing to publish information about the project and its anticipated effects and benefits as required under the EIA Regulations.

No evidence has been attached to the EIA study report to show that the project proponent published posters within the vicinity of the project site, informing community members about the intended road construction. The proponent has not also referred to any dates or instances where they have made announcements of the notice in official and local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks. In addition, no evidence has been attached as proof of having published a notice on the proposed project in a newspaper with nationwide circulation. All these requirements are mandatory in order to create awareness as much as possible on the project and how it will impact the lives of communities living around the project site. This way, communities will be able to participate more effectively in decision-making processes.

C. Failing to hold at least three public meetings with the affected parties and communities.

The number of public meetings to be held, as stipulated in the law is at the very least, three. Prior to the consultation meetings, the proponent must send out notices at least one week in advance and identify a venue and time for meeting that is convenient for affected communities and other concerned parties. During these meetings, the proponent may receive oral or written comments from the affected communities.

It is unfortunate that no notice was given prior to convening the meetings that were allegedly held. As per the EIA study report, the proponent only held two meetings on **3.09.2018** and **10.09.2018**. It is not clear from the report itself and the annexed minutes, whether the consultation meetings were held during the scoping phase or the EIA study phase.

Based on the findings above, we recommend the immediate halting of the on-going constructions and denial of an EIA licence until the proponent complies with the legal requirements on public participation. In addition, NEMA should demand that the project proponent submits a comprehensive public participation plan that will ensure the widespread and effective consultation of the most affected communities residing close to the project site and who bear the greatest burden as a result of violations.

4. Failure to publish the EIA study report in the *Gazette* Notice as required under EMCA.

Upon receipt of an EIA study report from any proponent under section 58 (2), the Authority shall cause to be published for two successive weeks in the *Gazette* and a newspaper circulating in the area or proposed area of the project a notice which shall state a summary description of the project, the place where the project is carried out, a place where the EIA study, evaluation or review report may be inspected, and a time limit not exceeding sixty days for the submission of oral and written comments on the EIA study, evaluation or review report.²⁰ More so, a lead agency shall, upon the written request of the Director General submit written comments on an EIA study, evaluation or review report within thirty days from the date of the written request.²¹

The call for submission of comments has never been made on the *Kenya Gazette* but was only made on the daily nation on the **20th August, 2019**. This illustrates the insufficiency in the relaying of information as per the EMCA provisions which can affect the effectiveness of the public participation process.

NEMA and the project proponent have a duty to adhere to a set of constitutional and statutory substantive and procedural rules, and these cannot be waived at any point. We

²⁰ Environmental Management and Co-ordination Act, 1999, Section 59 (1).

²¹ Environmental Management and Co-ordination Act, 1999, Section 60.

therefore recommend the full adherence to the public participation procedures laid down in law by seeing to it that the proponent facilitates the publication of the invitation in the Gazette Notice.

5. Construction of the link road to the Port from Lamu-Garsen (A7) without and EIA Licence

Every proponent is required under the law to procure an EIA licence prior to the commencement of a project. At Article 69 (1) (f) of the Constitution, the State is obliged to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. The requirement is further expressly provided for at section 58 and 63 of EMCA, with detailed provisions on how to conduct a full EIA contained in the EIA Regulations.

The link road was commissioned in March 2019 jointly by LAPSSET Corridor Development Authority (LCDA) and the Kenya National Highways Authority (KeNHA) pursuant to a presidential directive to ensure infrastructure is in place for early cargo evacuation from the port as indicated by LCDA on their social media page (*See figure 1*) .

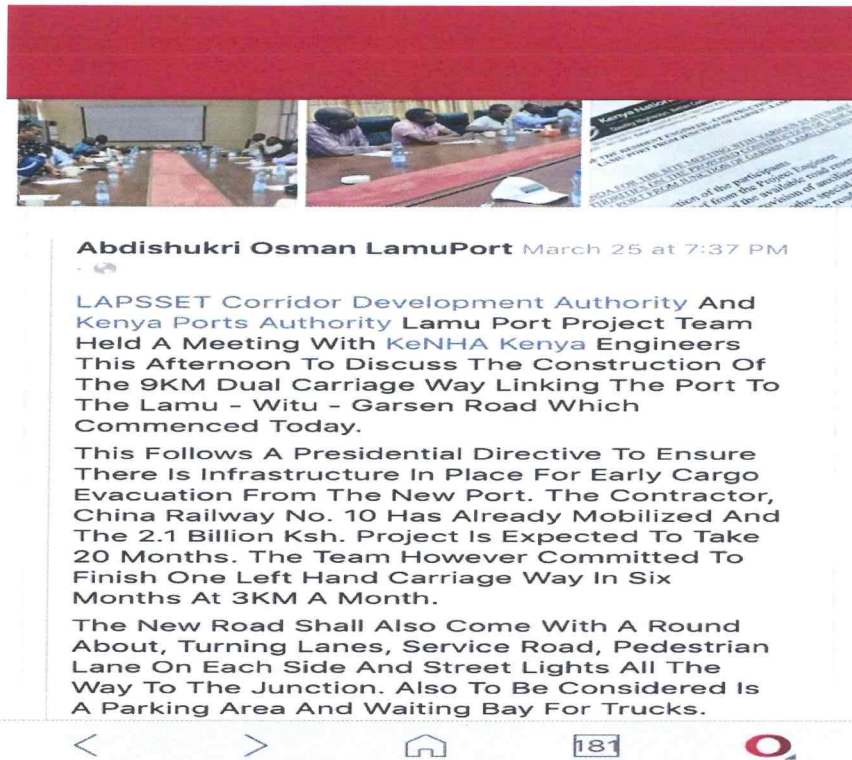


Figure 1: Screenshot of LCDA's facebook page

On 9 July 2019 Kililana Farmers submitted a complaint letter to the Lamu NEMA County Director of Environment (CDE) regarding the link road (See figure 2). The CDE orally responded that the project proponent undertook and prepared an EIA report for the road and submitted it to NEMA's office in Lamu in March 2019. On the contrary, we established that the project began before an EIA license was issued.

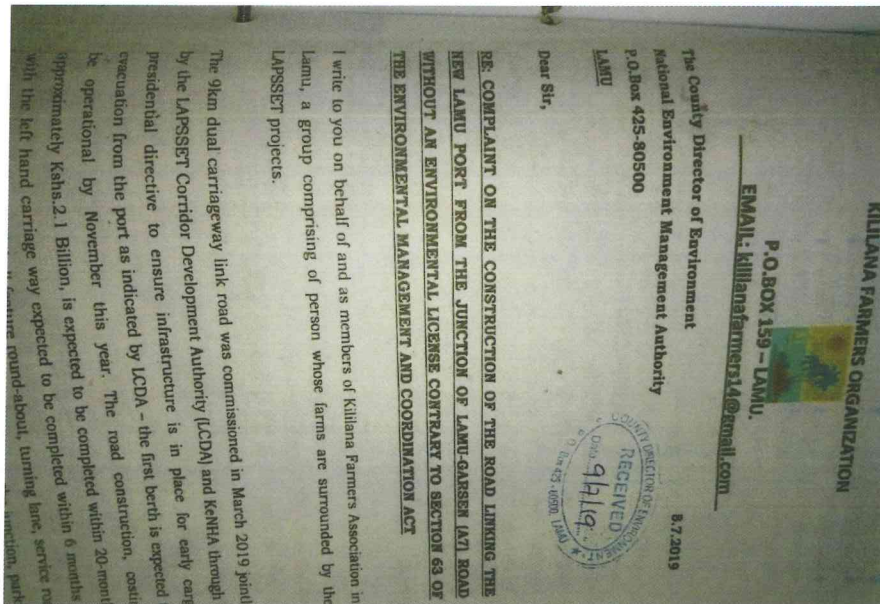


Figure 2: Image of the received complaint letter to the NEMA office in Lamu

Up until now, the project proponent is still operating without an environmental license. Figures 3 and 4 below are photos showing the construction activities along the project site. A lack of grant of an EIA license means that the EIA study report is yet to be approved. True to this testament, the EIA study is still undergoing public participation as seen through the advertisement posted on the Daily Nation on **20.08.2019**, inviting the public to submit comments on the EIA study report. This in itself amounts to a gross violation of the rule of law to which the regulator cannot afford to turn a blind eye.



Figure 3: Photo of a portion of the road that has already been tamarked



Figure 4: Photo showing the on-going road construction at the project site

6. Negative environmental impacts from the on-going illegal construction of the road.

The importance of an EIA study in the realization of the right to a clean and healthy environment cannot be overemphasized. The right to a clean and healthy environment is protected under the Bill of Rights and EMCA. As such, every person has the right to seek remedies for any violations or threats to the enjoyment of this right as stated in Article 70 of the CoK. Courts have also emphasized over and over again, that the right to a clean and healthy environment is necessary for the realization of other human rights including the right to life.

In the case of *Ken Kasing'a v Daniel Kiplagat Kirui & 5 Others*²², the court stated that where a procedure for the protection of the environment is provided by law and is not followed, then **an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment**. In the court's view, this presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment and to people.

In the same way, failure by the project proponent to comply with the law, has resulted in the gross violation of the resident's environmental rights. Some of the negative impacts that communities are currently experiencing as a consequence of the illegal constructions include:-

A. Dust pollution

Dust pollution is a major impact of the road construction activities as pointed out in the EIA study report. Prolonged exposure to dust can lead to severe health impacts especially due to respiratory diseases. Contrary to the mitigation measures proposed in the EIA study report²³, the project proponent has failed to put in place measures to mitigate the effects from dust pollution such as sprinkling water (*See figure 5*). Owing to the long hours of work dedicated to the construction, residents living around the area and community members using the road continue being exposed to illnesses as a result of inhaling large quantities of dust.

²² [2012] eKLR.

²³ At page 54.



Figure 5: Photo of a tracks transporting construction materials without sprinkling water

- B. *Destruction of wetlands contrary to the provisions of the section 42 of EMCA and the EMCA (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009.*

Wetlands are important natural resources protected under section 42 of the EMCA. It prohibits any of the following activities when done without approval of NEMA after the conduct of an EIA study:-

- a. Erection, reconstruction, placement, alteration, extension, removal or demolition of any structure or part of any structure in or under a river, lake, sea or wetland;
- b. Excavation, drilling, tunneling or disturbance of the river, lake or wetland;
- c. Introduction of any animal in any lake, river, sea or wetland;
- d. Introduction or planting of any plant specimen in any lake, river, sea or wetland;
- e. Deposition of any substance, river or wetland.

- f. Direct blocking of any river, sea or wetland from its natural and normal course;
- g. Draining of any lake, river, sea or wetland or
- h. Any other manner prescribed by the Cabinet Secretary on the advise of the Authority.

Wetlands provide several ecosystem services which are important for different species of flora and fauna within the environment including man. Besides acting as carbon sinks, wetlands act as habitats for certain species of animals. Pastoralists living around the site also depend on wetlands as a source of freshwater for their cattle. Wetlands are also instrumental in controlling flooding and soil erosion.

Currently, the contractor has constructed culverts which are draining water from one wetland to another, leading to the destruction of the wetlands and the adjacent landscape without a permit from NEMA as required by law (see *figure 6*). Dust generated from the road construction project is also deposited into the wetlands which could result in negative impacts in the long run. This violation is aggravated by the fact that the EIA study report fails to include an assessment of the potential impacts of the project on the wetlands. Equally concerning is the absence of a clear plan within the Environmental Management Plan (EMP) on how to conserve the wetlands and ensure as minimal impact as possible.



Figure 5: Photo of a destroyed wetland

C. Borrow pits

According to the EIA study report, the proponent will dig borrow pits to enable them obtain materials for construction. However, evidence collected from the ground shows that the proponent has also dug several borrow pits being used as a point for accessing water (see *figure 6*).



Figure 6: Photo of borrow pit filled with water

By failing to secure the borrow pits this project poses a danger to community members living around the project site and their animals. This will potentially increase the number of accidents occurring in the area.

We submit that the concerns raised above are issues that NEMA cannot overlook when considering whether to grant the proponent an EIA license or not. Had they followed the rule of law none of the violations would have occurred since preventive measures would have been put in place to avert any negative impacts. In our considered opinion, these

alone are sufficient grounds for denying the proponent a licence pending compliance with procedures laid down in the Constitution and environmental laws.

7. Failure to conduct a cumulative impact assessment contrary to section 57A of EMCA.

Section 57A of EMCA states that all policies, plans and programmes for implementation shall be subject to a Strategic Environmental Assessment (SEA). One of the requirements of conducting a SEA is to assess the cumulative impacts of all projects put together. The LAPSSET project is therefore among the projects that must undergo a SEA before implementation.

Although we are aware that a LAPSSET SEA was undertaken and approval conditions granted in January 2018, we note that the Lamu-Garsen (A7) link road, an ancillary project to the Lamu Port construction and also a component of the LAPSSET project, was not considered in the LAPSSET SEA.