

# **Administering Kenya's Environmental Law Regime**

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## I. Introduction

The primary objective of environmental law is to ensure the sustainable utilization of natural resources. To facilitate the attainment of this objective, a number of environmental governance principles have been developed over the years through national and international initiatives. In this respect, the 1992 United Nations Conference on Environment and Development is a watershed in environmental governance. This conference produced a number of critical instruments, including “Agenda 21” which is the United Nation’s action plan on sustainable development.<sup>1</sup> Although Agenda 21 is not a binding legal instrument, it has been adopted by many states, which have developed plans, policies, laws and programs that seek to further its objectives. One such objective is “to improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated and a broader range of public participation assured.”<sup>2</sup> The idea is that the utilization of natural resources, and the making of decisions that implicate the natural environment, should be informed by the following governance principles: sustainability,<sup>3</sup> intergenerational equity,<sup>4</sup> the principle of prevention,<sup>5</sup> the precautionary principle,<sup>6</sup> the polluter pays principle,<sup>7</sup> and public participation.<sup>8</sup> Agenda 21 thus

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<sup>1</sup> See, e.g., Ken Conca, “Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights?” 1 *Journal of International Law & International Relations* 121 (2005).

<sup>2</sup> *Agenda 21*, para 8.3 (United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 1992).

<sup>3</sup> The principle of sustainability advocates for prudent utilization of natural resources, and strives for equity in the allocation of the benefits of development and decries short-term resource exploitation that does not consider the long-term costs of such exploitation. See, e.g., Goran Hyden & John Mugabe, “Governance and Sustainable Development in Africa,” in *Governing the Environment* 35 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe, eds, ACTS Press, 1999).

<sup>4</sup> The principle of intergenerational equity focuses on future generations as a rightful beneficiary of environmental protection. It advocates fairness, so that present generations do not leave future generations worse off by the choices they make today regarding development. See, e.g., Hunter et al, *International Environmental Law and Policy* 398 (Foundation Press, 2<sup>nd</sup> edition 2001).

<sup>5</sup> The principle of prevention considers that “the protection of the environment is best achieved by *preventing* environmental harm in the first place rather than relying on remedies or compensation for such harm after it has occurred.” *Ibid* at 404 (emphasis in original).

<sup>6</sup> The precautionary principle mandates precaution in the making of environmental decisions where there is scientific uncertainty. *Ibid* at 405.

embraces these principles by calling for public participation and the integration of economic, social and environmental consideration in environmental decision-making.

As Agenda 21 acknowledges, the realization of the above governance principles in day-to-day environmental decision-making requires the integration of social, economic and environmental considerations. To facilitate the attainment of this goal, environmental law regimes need to develop appropriate mechanisms or tools of administration. In many countries, Environmental Impact Assessment (EIA) and Environmental Restoration Orders (ERO) have become critical tools in this endeavor. On the one hand, the objective of the EIA is to assess the impact of proposed development activities and ensure that any likely adverse impacts on the environment can be either be prevented or mitigated. As we will see, the EIA not only facilitates the integration of social, economic and environmental considerations in environmental decision-making, but also enables affected publics to participate in such decision-making. It should be noted that EIA has limitations. Since it targets specific projects, it does not enable the consideration of the potential “cumulative and synergistic impacts of multiple projects,”<sup>9</sup> which may form parts of developmental policies, plans and programs. Put differently, project-level EIA is not sufficient to ensure that a country pursues a sustainable development path. Accordingly, it has been deemed necessary to incorporate environmental and sustainability considerations in the design of developmental policies, plans and programs. This objective is achieved through the tool of Strategic Environmental Assessment (SEA), whose objective is to ensure that the environmental consequences of proposed policies, plans or programs are “fully included and appropriately addressed at the earliest appropriate stage of decision-making on par with economic and social considerations.”<sup>10</sup>

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<sup>7</sup> The polluter pays principle requires that polluters of natural resources should bear the full environmental and social costs of their activities. *Id* at 412.

<sup>8</sup> The principle of public participation requires that the public should participate in the making of decisions concerning the environment. *Ibid* at 435.

<sup>9</sup> Riki Therivel, *Strategic Environmental Assessment in Action 14* (Earthscan, 2004).

<sup>10</sup> *Ibid* at 7.

On the other hand, the objective of the ERO is to assist the recovery of an ecosystem that has been degraded, damaged or destroyed. It therefore seeks to remedy the ecological damage arising from a violation of environmental law.<sup>11</sup>

As can be expected, the manner in which these tools of environmental governance are administered will impact the liberties and livelihoods of both developers and the public. The environmental governance regime therefore needs to be administered in a way that is lawful, fair, takes into account the views of both developers and the public, and above all furthers the fundamental objective of environmental conservation. This chapter therefore examines Kenya's environmental law regime from the perspective of administrative law. It seeks to determine how the National Environmental Management Authority (NEMA), which is the principal agency responsible for administering the environmental law regime, makes and applies rules, and adjudicates the disputes arising from the exercise of its powers. In particular, the chapter seeks to make this determination with respect to how NEMA applies the tools of EIA and ERO. In doing so, the chapter's overall concerns are three-fold. First, the chapter seeks to establish whether and the extent to which NEMA's administrative practices adhere to the principles of administrative law. Second, it seeks to establish whether and the extent to which the public participate in NEMA's decision-making processes. Finally, it seeks to establish the role and impact of judicial review on NEMA's decision-making.

The remainder of the chapter is organized as follows. Part II provides a conceptual framework and discusses the norms of effective environmental governance. Part III analyzes the administration of Kenya's environmental law regime, focusing on public participation in rule making, the administration of the tools of environmental impact assessment and environmental restoration orders, and the resolution of environmental disputes. Part IV concludes.

## **II. The Norms of Effective Environmental Governance**

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<sup>11</sup> Susan Verdicchio, "Environmental Restoration Orders," 12 *Boston College Environmental Affairs Law Review* 171 at 173 (1985).

Environmental governance has been defined as “the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.”<sup>12</sup> Essentially, environmental governance is the manner in which power is exercised in the management of a country’s natural resources. The objective of environmental governance is to ensure that a country’s natural resources are managed in a sustainable manner. From this perspective, the regulatory processes, mechanisms and organizations of environmental governance seek to ensure that developmental activities meet “the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>13</sup> That is, natural resources should, on the one hand, be exploited in a prudent and fair manner, and preserved for the benefit of future generations, on the other hand.

As in other contexts, environmental governance needs to be limited by law, if it is to protect individuals and groups against the abuse of power, which would compromise the objectives of prudent and fair use, and intergenerational equity. It therefore becomes necessary to subject environmental governance to the rule of law and the norms of democracy, by making it participatory and accountable. This need arises in two related contexts, namely meeting the needs of the present (or ensuring intra-generational equity), and enabling future generations to meet their own needs (inter-generational equity). In other words, decisions on developmental activities that impact, or are likely to impact, the environment should be made in a democratic manner, meaning that the views of present and future generations should be considered. From the perspective of present generations, democratic governance requires the participation of all persons in the making of environmental decisions that are likely to affect them. In particular, this entails ensuring environmental justice, whose premise is that all human beings are equal and should be treated as such.<sup>14</sup> Further, environmental justice recognizes prevailing disparities among people in the distribution of environmental benefits and burdens, and proclaims that minorities and the poor

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<sup>12</sup> Maria Carmen Lemos & Arun Agrawal, “Environmental Governance,” 31 *Annual Review of Environmental Resources* 297 at 298 (2006).

<sup>13</sup> World Commission on Environment and Development, *Our Common Future* 16 (1987).

<sup>14</sup> Marina de Oliveira Finger & Felipe Bortoncello Zorzi, “Environmental Justice,” 1 *UFRGS Model United Nations Journal* 222 at 225 (2013).

“should not be disproportionately exposed to environmental and public health hazards and they should share in making the decisions that affect their environment.”<sup>15</sup> In other words, there should be fair distribution of environmental benefits and burdens within the current generations.<sup>16</sup> Public participation in the administration of the tools of EIA and ERO therefore becomes important for realizing environmental justice. These tools should not only create opportunities for the public “to be informed of and participate in decisions that will have environmental impacts or create risks of environmental harm,” but also “take action in the event that someone breaches the environmental law, causing harm or a risk of harm to the environment.”<sup>17</sup>

EIA “is the evaluation of the effects likely to arise from a major project (or other action) significantly affecting the environment.”<sup>18</sup> Its purpose is to consider, through a participatory process, possible impacts prior to a decision being taken on whether or not a proposal should be approved.<sup>19</sup> EIA has therefore been described as “an anticipatory, participatory environmental management tool.”<sup>20</sup> The primary focus of EIA is on how possible harmful environmental impacts can be mitigated, although it may lead to the abandonment of some proposals.<sup>21</sup> It should be noted, however, that the methodology of EIA has been criticized on the ground that although it only apply to significant development projects, many ecological problems arise from the cumulative effect of small scale activities that do not undergo assessment.<sup>22</sup> In practice, environmental laws typically require public participation during both the assessment of projects and the decision-making stage.<sup>23</sup>

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<sup>15</sup> Patricia Salkin & John C. Dernbach, “Sustainability as a Means of Improving Environmental Justice,” 19 *Journal of Sustainability and Environmental Law* 1 at 14 (2012).

<sup>16</sup> See Clifford Rechtschaffen et al, *Environmental Justice: Law, Policy and Regulation* (Carolina Academic Press, 2009).

<sup>17</sup> Felicity Millner, “Access to Environmental Justice,” 16 *Deakin Law Review* 189 at 191 (2011).

<sup>18</sup> Stephen Jay et al, “Environmental Impact Assessment: Retrospect and Prospect,” 27 *Environmental Impact Assessment Review* 287 (2007).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at 288.

<sup>21</sup> *Ibid.*

<sup>22</sup> Eckersley, *supra* note \_\_ at 7.

<sup>23</sup> Angus Morrison-Saunders & Gerard Early, “What is Necessary to Ensure Natural Justice in Environmental Impact Assessment Decision-Making?,” 26 *Impact Assessment and Project Appraisal* 29 at 39 (2008).

The procedures for public participation need to meet a number of requirements if they are to be meaningful. First, the public should have access to information concerning the environment and should be notified of development applications through notices that are “clear and easy to understand and contain sufficient information about the application for the members of the public to be able to understand the implications of the application.”<sup>24</sup> Second, the public should be “meaningfully consulted, meaning that it should “be provided with sufficient information, presented in a sufficiently clear manner, to be able to understand the environmental decision to be made and the risks that would flow from that decision.”<sup>25</sup> This requirement is not always easy to achieve, given that the complexity of many environmental problems requires specialized knowledge, which tends to disenfranchise the lay public from informed political debate.<sup>26</sup> Further, consultation should “involve meaningful exchanges between the decision-maker and the public, with the possibility that the input of the public can influence the ultimate decision.”<sup>27</sup> And the decision-maker should make genuine efforts to address public concerns, by giving appropriate weight to these concerns in its decisions.<sup>28</sup> Third, the public should have access to merits review and judicial review. While merits review is concerned with assessing the substance of environmental decisions, judicial review is concerned with ensuring that meaningful public participation (that is, notice and consultation) occurs.<sup>29</sup> Last but not least, the public should have a right to bring enforcement proceedings in case of breaches of environmental laws. Through such action, those affected, or likely to be affected, by breaches of environmental laws can “do something about the breach and minimize the damage done to their environment, health and community in the event that regulatory agencies do not properly enforce the laws.”<sup>30</sup>

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<sup>24</sup> Millner, *supra* note \_\_ at 195.

<sup>25</sup> *Ibid.*

<sup>26</sup> Robyn Eckersley, “The State and Access to Environmental Justice: From Liberal Democracy to Ecological Democracy,” Keynote Address, Access to Environmental Justice Conference, Environmental Defender’s Office, Western Australia, 20 February 2004 at 5.

<sup>27</sup> Millner, *supra* note \_\_ at 195.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at 196-197.

<sup>30</sup> *Ibid* at 197.

Since future generations are voiceless, it becomes necessary to establish principles and mechanisms that would ensure the anticipation of their needs in day-to-day decision-making. The precautionary principle and the mechanism of EIA are critical in this respect. The precautionary principle “requires public decision-makers to take scientific uncertainty seriously in the pursuit of the regulatory goals of environmental and public health protection.”<sup>31</sup> According to this principle, lack of full scientific certainty should not be used as a reason not to take preventive measures.<sup>32</sup> In practical terms, the principle requires a departure from the norm of public decision-making, namely “that a good decision is made on fully ‘proven’ facts and is as objective as possible.”<sup>33</sup> This norm is premised on “the belief that such objectivity will restrain discretion and ensure decision-makers are held to account.”<sup>34</sup> But how exactly does society restrain discretion and ensure decision-makers are held to account in light of potential environmental hazards that should not be ignored yet there is no conclusive scientific evidence that such hazards will materialize? Addressing this dilemma requires democratization of the decision-making process, so that there is “a deliberative process that will draw on a range of views due to the diverse range of issues that need to be considered and actors that need to be consulted.”<sup>35</sup> In other words, in the face of scientific uncertainty, environmental decision-making should not merely be left to the experts, but should instead involve a wide range of actors, including the public.<sup>36</sup> Among other things, broadening the range of participants enhances the effectiveness of the decision-making process by promoting deliberation.<sup>37</sup> In addition, the decision-making process should be transparent.

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<sup>31</sup> Elizabeth Fisher & Ronnie Harding, “The Precautionary Principle and Administrative Constitutionalism: The Development of Frameworks for Applying the Precautionary Principle,” University of Oxford, Faculty of Law, Legal Studies Research Paper Series, Working Paper No. 31/2006 at 6 (2006).

<sup>32</sup> See United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 15 (Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.)

<sup>33</sup> Fisher & Harding, *supra* note \_\_ at 6.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at 13.

<sup>36</sup> *Ibid* at 16.

<sup>37</sup> *Ibid* at 23.

Above all, the environmental law regime embodying the mechanisms of EIA and ERO should be enforced in a manner that furthers the rule of law. In other words, the regime should be enforced in a manner that is lawful, procedurally fair, reasonable, transparent, and non-discriminatory. In addition, decision makers should be accountable for their decisions, and dispute resolution procedures should be fair and responsive.

Let us now examine whether and the extent to which Kenya's administrative law regime has embraced the foregoing norms of effective environmental governance.

### **III. Environmental Governance in Kenya**

Kenya only established a comprehensive legal framework for environmental governance in 1999, when it enacted the Environmental Management and Coordination Act (EMCA). Prior to that, the law governing the environment was found in the common law and various statutes regulating sectors of the environment such as water, health, forests, agriculture and industry. Indeed, the EMCA does not repeal these sectoral laws, but merely seeks to coordinate the activities of the various agencies tasked with administering these laws. In addition, the common law remains a useful resource for environmental governance. The main reason behind the enactment of EMCA was the need for a coordinated approach to environmental governance, which the sectoral laws impeded.<sup>38</sup>

EMCA establishes two principal management organs: the National Environmental Council (NEC) and the National Environment Management Authority (NEMA). The NEC is responsible for policy formulation, establishing national goals and objectives, establishing priorities for environmental protection, and promoting cooperation among public and private organizations engaged in environmental protection programs.<sup>39</sup> Government actors dominate

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<sup>38</sup> See Environmental Management and Coordination Act, Chapter 387, Laws of Kenya, Preamble (stating that "it is recognized that improved legal and administrative coordination of the diverse sectoral initiatives is necessary in order to improve the national capacity for the management of the environment.")

<sup>39</sup> Ibid, section 4.

the membership of NEC, although EMCA makes an effort to ensure representation of public universities, specialized research institutions, the business community, and non-governmental organizations by empowering the Minister to appoint the representatives of these entities.<sup>40</sup>

NEMA is the main administrative organ. Its main function is to “exercise general supervision and coordination over all matters relating to the environment.”<sup>41</sup> In specific terms, NEMA’s functions include coordinating the activities of “lead agencies,”<sup>42</sup> and promoting the integration of environmental considerations into development policies, plans, programs and projects with a view to ensuring the proper management and rational utilization of environmental resources.<sup>43</sup> It is also tasked with identifying projects, programs, plans and policies that require environmental audit or environmental monitoring<sup>44</sup>; and monitoring and assessing activities to ensure that they do not degrade the environment and adhere to environmental management objectives.<sup>45</sup> In order to enable NEMA to perform these functions, EMCA empowers the Minister to make any “regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.”<sup>46</sup> The Act requires the Minister to make such regulations upon the recommendation of NEMA, and consultation with the relevant lead agencies.<sup>47</sup> Accordingly, EMCA does not provide for public participation in this rule-making process.

In terms of rule application, NEMA’s work has revolved around four primary tools, namely EIA, environmental audits, environmental quality standards, and EROs. An EIA is required where NEMA determines that the intended project may or is likely to have or will have a significant impact on the environment.<sup>48</sup> As we

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid, section 9(1).

<sup>42</sup> EMCA defined a lead agency as “any Government ministry, department, parastatal, state corporation or local authority, in which the law vests functions of control or management or any element of the environment or natural resource.” Ibid, section 2.

<sup>43</sup> Ibid, section 9(2)(a).

<sup>44</sup> Ibid, section 9(2)(j).

<sup>45</sup> Ibid, section 9(2)(l).

<sup>46</sup> Ibid, section 147.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid, section 58.

shall see, EMCA requires public participation in NEMA's decision-making process in the case of such projects. It should be noted that NEMA has now begun to deploy SEA as a tool for environmental governance.<sup>49</sup> Second, EMCA empowers NEMA to carry out environmental audits of all activities that are likely to have significant impacts on the environment.<sup>50</sup> The idea is that once an EIA license has been granted for an activity that is likely to have a significant impact on the environment, NEMA sends "environmental inspectors" to establish whether and how far the project's activities conform with the statements made in the EIA study report issued in respect of that project.<sup>51</sup> In this respect, the EIA is an important tool since it generates baseline data for monitoring and evaluating how well mitigation measures are being implemented during the project cycle.<sup>52</sup> NEMA is also empowered to monitor "the operation of any industry, project or activity with a view to determining its effects on the environment."<sup>53</sup> Third, EMCA empowers NEMA to establish and regulate environmental quality standards. For this purpose, it establishes a Standards and Enforcement Review Committee, as a committee of NEMA.<sup>54</sup> Among other things, the expectation is that development activities will adhere to the environmental quality standards established by this body. These standards should also inform the EIA process. Finally, EMCA grants NEMA a broad power to issue an environmental restoration order to any person "in respect of any matter relating to the management of the environment."<sup>55</sup>

As can be expected, the administration of these tools of environmental governance is bound to generate disputes. EMCA establishes two mechanisms for dealing with such disputes. First, it establishes a Public Complaints Committee (PCC) and gives it broad powers to investigate "Any allegations or complaints against any person or against [NEMA] in relation to the condition of

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<sup>49</sup> See National Environment Management Authority, National Guidelines for Strategic Environmental Assessment in Kenya (2011).

<sup>50</sup> EMCA, section 68(1).

<sup>51</sup> *Ibid*, section 68(2).

<sup>52</sup> National Environment Management Authority, Environment Impact Assessment Guidelines and Administrative Procedures 6 (2002) (Hereinafter EIA Guidelines and Administrative Procedures).

<sup>53</sup> EMCA, *supra* note \_\_ section 69(2).

<sup>54</sup> *Ibid*, section 70.

<sup>55</sup> *Ibid*, section 108.

the environment.”<sup>56</sup> The PCC can also investigate any suspected case of environmental degradation on its own motion.<sup>57</sup> But the PCC merely reports its findings to the NEC.

Second, EMCA establishes a National Environment Tribunal (NET), whose function is to review NEMA’s administrative decisions.<sup>58</sup> NET handles appeals from persons aggrieved by refusals of NEMA to grant licences or to transfer licences, the imposition of terms and conditions on licences, the revocation, suspension or variation of licences, and the imposition of environmental restoration or improvement orders.<sup>59</sup> NET consists of a chair person nominated by the Judicial Service Commission and who must be a person who qualifies for appointment as a judge of the High Court, an advocate of the High Court nominated by the Law Society of Kenya, a lawyer with professional qualifications in environmental law appointed by the Minister responsible for matters relating to the environment, and two persons who have demonstrated exemplary academic competence in the field of environmental management, also appointed by this Minister.<sup>60</sup> In general, its proceedings are open to the public.<sup>61</sup>

NET has established various procedures in an effort to ensure that its determinations are procedurally fair. First, its rules of procedure stipulate that each party appearing before it must be given a notice of the hearing of not less than twenty-one days, including a statement of the purpose of the hearing and a “reasonably precise statement of the issues involved.”<sup>62</sup> Second, it is not bound by the rules of evidence,<sup>63</sup> and therefore seeks to avoid legal technicality and formality in its proceedings.<sup>64</sup> Third, its rules of procedure require the tribunal to grant every party a reasonable opportunity to be heard, to submit evidence and make representations, and to cross-examine witnesses.<sup>65</sup> And the rules

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<sup>56</sup> *Ibid*, section 32(a)(i).

<sup>57</sup> *Ibid*, section 32(a)(ii).

<sup>58</sup> *Ibid*, section 125.

<sup>59</sup> *Ibid*, section 129.

<sup>60</sup> *Ibid*, section 125.

<sup>61</sup> *Ibid*.

<sup>62</sup> National Environment Tribunal Procedure Rules 2003, Rule 22(2)(a).

<sup>63</sup> EMCA, *supra* note \_\_, section 126.

<sup>64</sup> National Environment Tribunal Procedure Rules, *supra* note \_\_, Rule 26(2).

<sup>65</sup> *Ibid*, Rule 30.

require the tribunal to give reasons for all its decisions.<sup>66</sup> A person aggrieved by such a decision can appeal to the High Court.<sup>67</sup>

The Constitution of 2010 has not altered this statutory framework. Instead, it has reinforced it by making the right to a clean and healthy environment part of the bill of rights,<sup>68</sup> and giving everyone the right to apply to court for redress where he or she alleges that the right to a healthy and clean environment “has been, is being or is likely to be, denied, violated, infringed or threatened.”<sup>69</sup> It also requires the State to “encourage public participation in the management, protection and conservation of the environment.”<sup>70</sup>

Let us now see how this regime works in practice.

### *A. Public Participation in Environmental Governance*

Agenda 21 provides useful parameters for assessing the nature of public participation in environmental governance. According to Agenda 21, public participation is to be assessed by reference to the following three parameters: (1) access to information concerning the environment; (2) opportunity to participate in decision-making processes; and (3) access to administrative and judicial proceedings.

With respect to access to information, although the Constitution of 2010 gives every citizen the right of access to information,<sup>71</sup> there is yet no legislative framework for the realization of this right. Citizens therefore continue to face considerable obstacles in accessing information held by the state and its organs. In the area of environmental governance, NEMA declares that it has made various efforts to facilitate public participation in its decision-making processes.<sup>72</sup> As far as rule making is concerned, NEMA uses three procedures: it can act on the basis of requests from lead agencies (for example, the Water Resources Management Authority requesting NEMA to harmonize water

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<sup>66</sup> Ibid, Rule 38.

<sup>67</sup> EMCA, supra note \_\_, section 130(1).

<sup>68</sup> Constitution of Kenya 2010, Article 42.

<sup>69</sup> Ibid, Article 70(1).

<sup>70</sup> Ibid, Article 69(1)(d).

<sup>71</sup> Constitution of Kenya 2010, Article 35.

<sup>72</sup> Interview with NEMA officers, 18 November 2014, Nairobi.

regulations), or requests from stakeholders (for example, requesting NEMA to review EIA fees), or on its own motion (for example, NEMA is currently reviewing the EIA regulations).<sup>73</sup> Depending on the nature of the rules, it then procures a consultant to develop draft rules, or constitutes a task force (in which stakeholders are represented) to develop the draft rules.<sup>74</sup>

In all these cases, NEMA's policy is to invite the public to participate in the rule making process through newspaper advertisements, and writes to the stakeholders likely to be affected by the rules in question, forwarding the rules and requesting for their comments. Thereafter, NEMA should hold two public hearings on the proposed rules. It should then input the comments from the public and stakeholders, following which the rules are validated. Before they can take effect, the rules must be approved by Parliament (in accordance with the Statutory Instruments Act<sup>75</sup>), and gazetted by the Cabinet Secretary.

In order to approve the rules, Parliament must establish that the rule making authority, NEMA in this case, undertook "appropriate consultations" with persons likely to be affected by the rules before making the rules.<sup>76</sup> Further, in determining whether the consultations were appropriate, this law requires Parliament to consider two factors, namely the extent to which the consultations drew on the knowledge of experts in the fields relevant to the proposed rules, and the extent to which the consultations ensured that persons likely to be affected by the proposed rules had an adequate opportunity to comment on them.<sup>77</sup> In addition, the Act stipulates that consultations must either involve notification (directly or by advertisement) of persons that are likely to be affected by the proposed rules, or invite submissions to be made by a specified date, or invite participation in public hearings to be held on the proposed rules.<sup>78</sup> In case Parliament approves the rules, NEMA states that its practice is to

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<sup>73</sup> Ibid.

<sup>74</sup> See NEMA, Procedure for Amending, Reviewing and Drafting Environmental Laws, Regulations, Guidelines and/or Standards, NEMA/ SOP/ LEG/02

<sup>75</sup> Statutory Instruments Act No. 23 of 2012.

<sup>76</sup> Ibid, section 4.

<sup>77</sup> Ibid, section 5(2).

<sup>78</sup> Ibid, section 5(3).

sensitize the public on the new rules over a period of six months, after which it begins to apply them.<sup>79</sup>

Given the complexity of environmental governance, NEMA acknowledges that ordinary citizens may not effectively participate in these forums,<sup>80</sup> which are dominated by organizations likely to be affected by the rules under consideration and interested non-governmental organizations. Because NEMA forwards its draft rules to the public, it is therefore arguable that it grants the public access to information concerning the environment. Indeed, as our opinion survey indicates, the public is increasingly aware of NEMA and its processes: 41% of the respondents indicated they were aware of NEMA. However, it is debatable whether the public understands the information it receives from NEMA, given the technicality of the subject matter it relates to. Given the rule making process described above, NEMA can also contend that it gives the public opportunities to participate in its rule making processes. As we shall see below, the public also has some access to administrative and judicial proceedings to contest NEMA's decisions, or stop activities that are, or may be, harmful to the environment.

### *B. EIA Procedures*

The following procedures apply to the EIA licensing process. The project proponent first submits a project report to NEMA.<sup>81</sup> A licensed EIA expert should prepare this report,<sup>82</sup> and consider specified ecological, social, landscape, land use, and water considerations.<sup>83</sup> NEMA guidelines envisage that the views of the

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<sup>79</sup> Interview with NEMA officers, 18 November 2014, Nairobi.

<sup>80</sup> *Ibid.*

<sup>81</sup> EMCA, *supra* note \_\_, section 58. This report should, among other things, provide the following information: the nature of the project, the location of the project, including the physical area that may be affected by the project's activities, the project activities, the design of the project, the materials to be used, the potential environmental impacts of the project and the mitigation measures to be taken during and after the implementation of the project, an action plan to ensure the health and safety of the workers and the neighboring communities, the economic and socio-cultural impacts of the project, the project budget, and an environmental management plan for the entire project cycle. Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101, Regulation 7; EIA Guidelines and Administrative Procedures, *supra* note \_\_ at 8.

<sup>82</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, *supra* note \_\_, Regulation 7(3).

<sup>83</sup> *Ibid.*, Second Schedule.

public should be incorporated in the project report.<sup>84</sup> NEMA envisages that a project proponent will first introduce the project to the local community, and get their views.<sup>85</sup> It then requires the proponent to prepare a questionnaire and distribute it to the local community, so that its members can express their views on the proposed project.<sup>86</sup> NEMA considers this questionnaire as evidence of public participation.<sup>87</sup> Within seven days of receiving the project report, NEMA submits a copy of the report to each of the relevant lead agencies, the relevant District Environment Committee, and, where more than one district is involved, the relevant Provincial Environment Committee, for their written comments.<sup>88</sup> These Committees have seven days (in practice twenty one days<sup>89</sup>), from the date of receipt of the project report, to submit their written comments to NEMA, which is required to take this information into account in making its decision. Once it receives comments from the lead agencies, or in the absence of such comments, NEMA's officers will review the project report to determine whether it addresses pertinent issues such as key environmental impacts (for example, addressing the concerns of the local community), adequacy of proposed mitigation measures, adequacy of the proposed environmental management plan, who will be responsible for implementing this plan, and compliance with relevant legislation.<sup>90</sup>

At this stage, at least two officers review the project report.<sup>91</sup> These reviewers seek to determine whether the project report is adequate in terms of the identification and mitigation of environmental impact, consultation of the local community, and compliance with relevant legislation.<sup>92</sup> They would only approve the report if they were satisfied that these issues were addressed. In other words, NEMA would issue an EIA license if it were satisfied that the project would have no significant impact on the environment, or that the project report

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<sup>84</sup> NEMA, EIA Guidelines and Administrative Procedures, *supra* note \_\_ at 8.

<sup>85</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Environmental (Impact Assessment and Audit) Regulations, *supra* note \_\_, Regulation 9.

<sup>89</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>90</sup> *See, e.g.*, Richard Evans & 6 others v NEMA & 2 others, NET/27/2008 at para 54.

<sup>91</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>92</sup> *Ibid.*

discloses sufficient mitigation measures.<sup>93</sup> Essentially, therefore, the reviewers base their determinations on their expertise and the evidence available in the project report. It should be noted that at this stage, the EIA regulations do not provide for public participation, meaning that NEMA can issue an EIA license without seeking the views of potentially affected persons.<sup>94</sup> In other words, although NEMA's EIA Guidelines and Administrative Procedures require the incorporation of the views of the public in the project report, the questionnaire that NEMA requires project proponent to administer to affected communities is the only procedure deployed in obtaining these views. In practice, the questionnaire is considered to fulfill the public participation requirement at this stage of the EIA licensing process.<sup>95</sup> It should also be noted that where it approves a project, NEMA could attach conditions to the approval. In such a case, it would require the developer to indicate its acceptance of the approval conditions. On the other hand, it could require the proponent to undertake an EIA study if the reviewers find that the project will have a significant impact on the environment, *and* that the project does not disclose sufficient mitigation measures. At this point, if the reviewers are not able to make a decision (for example, because the comments received from the public are controversial or they raise complex issues), NEMA would organize a public hearing, so that the local community, key lead agencies, the EIA expert and the project proponent can discuss the project in its locality.<sup>96</sup> Thus the decision to hold a public hearing is discretionary. Further, NEMA could make either decision without visiting the site of the proposed project.<sup>97</sup>

NEMA has three months to make either decision,<sup>98</sup> and a proponent who is dissatisfied with its decision may appeal to the NET within sixty days of the decision.<sup>99</sup> It should also be noted that NEMA's regulations prohibit licensing authorities (Such as County Governments with respect to development control licences) from issuing licences for any projects for which an EIA is required

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<sup>93</sup> NEMA, EIA Guidelines and Administrative Procedures, *supra* note \_\_, Regulation 10.

<sup>94</sup> *See* Beth Mugo & 7 others v Director General NEMA & Silver Crest Enterprises Limited, NET/23/2007 at 5.

<sup>95</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>96</sup> *Ibid.*

<sup>97</sup> *See, e.g.*, Richard Evans & 6 others v NEMA & 2 others, *supra* note \_\_ at para 54.

<sup>98</sup> EMCA, section 58(8).

<sup>99</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, *supra* note \_\_, Regulation 46.

under EMCA, unless the applicant produces to the licensing authority an EIA licence issued by NEMA.<sup>100</sup>

Where NEMA requires a project proponent to undertake an EIA study, the proponent must first carry out a scoping study.<sup>101</sup> The purpose of this study is to determine the terms of reference for the EIA study. That is, it determines the range of issues to be addressed in the EIA study and identifies the significant issues, with a view to ensuring that the study focuses on the key concerns.<sup>102</sup> Scoping also provides an opportunity for consultation and public participation.<sup>103</sup> During scoping, “Affected persons should [therefore] be consulted, involved and made to understand all the issues of concern relating to the project.”<sup>104</sup> NEMA’s guidelines suggest the following methods for involving the public: securing written submissions, holding public hearings, conducting preliminary site visits, and conducting workshops.<sup>105</sup> Where NEMA approves a scoping study, the project proponent can then hire an EIA expert approved by NEMA to conduct the EIA study. This study must take into account environmental, social, cultural, economic, and legal considerations.<sup>106</sup> In particular, it “shall (a) identify the anticipated environmental impacts of the project and the scale of the impacts; (b) identify and analyze alternatives to the proposed project; (c) propose mitigation measures to be taken during and after the implementation of the project; and (d) develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.”<sup>107</sup>

When conducting the EIA study, the project proponent must seek the views of the persons who may be affected by the project, this time in consultation with NEMA.<sup>108</sup> In doing so, the regulations require the proponent to publicize the project using the following procedures: (a) posting posters in strategic public

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<sup>100</sup> Ibid, Regulation 4(2).

<sup>101</sup> Ibid, Regulation 11(1).

<sup>102</sup> EIA Assessment Guidelines and Administrative Procedures, *supra* note \_\_ at 9.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid at 10.

<sup>105</sup> Ibid.

<sup>106</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, *supra* note \_\_, Regulation 16.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid, Regulation 17.

places in the vicinity of the site of the proposed project informing the affected parties of the proposed project; (b) publishing a notice of the proposed project for two successive weeks in a newspaper that has nation-wide circulation; (c) making an announcement of the notice in both official and local languages in a radio with nation-wide coverage for at least once a week for two consecutive weeks; and, (d) holding at least three public meetings with the affected parties to explain the project and its effects, and to receive their oral or written comments.<sup>109</sup> To facilitate this public participation exercise, the regulations require the project proponent to send out appropriate notices at least one week prior to the meeting, and ensure the venue and times of the meeting are convenient for the affected parties.<sup>110</sup> Further, the regulations require the proponent to ensure, in consultation with NEMA, that a “suitably qualified” coordinator is appointed to receive and record both oral and written comments during the public meeting for onward transmission to NEMA.<sup>111</sup>

The EIA study report is submitted to NEMA, which then has fourteen days to submit copies of the report to any relevant lead agencies for their comments, and to invite the public to make oral or written comments on the report.<sup>112</sup> In turn, the lead agencies have thirty days to study the report and give their comments thereon to NEMA.<sup>113</sup> Once again, the regulations require NEMA to invite public comments by publishing a notice once a week for two successive weeks in the Gazette and a newspaper with wide circulation in the area of the proposed project, and making an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with nation-wide coverage.<sup>114</sup> In particular, the invitation should indicate the times and place where the full report can be inspected.<sup>115</sup> Once NEMA receives comments from the public, it *may* hold a public hearing.<sup>116</sup> Again, the regulations require the date and venue of the public hearing to be publicized at least one week prior to the

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid, Regulations 20 & 21.

<sup>113</sup> Ibid, Regulation 20.

<sup>114</sup> Ibid, Regulation 21.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid, Regulation 22.

meeting.<sup>117</sup> Further, the hearing is to be held at a venue convenient and accessible to the affected parties.<sup>118</sup> The County Commissioner, as the representative of the Government and the people, chairs the hearing.<sup>119</sup> At this hearing, the proponent should also be given an opportunity to make a presentation and respond to the representations of the affected parties.<sup>120</sup> The report of this meeting, which is to be compiled by the presiding officer, forms part of the information that NEMA considers in deciding whether or not to issue an EIA licence.<sup>121</sup> Again, NEMA's decision is essentially made by two reviewers, who consider the issues raised at the hearing alongside the EIA study report.<sup>122</sup> But where the reviewers are not able to make a decision, NEMA's Director General would constitute a technical advisory committee to advise him or her.<sup>123</sup> NEMA's decision must be in writing, contain reasons for the decision, and be issued within three months of receiving the EIA study report.<sup>124</sup>

At this stage, NEMA can either issue, or decline to issue, an EIA licence. Further, it can subject the grant of an EIA licence to such terms and conditions as it may deem necessary.<sup>125</sup> In the latter case, the licensee may apply to NEMA for a variation of such terms and conditions.<sup>126</sup> Subsequently, NEMA may revoke, cancel or suspend an EIA license on the advise of the Standards Enforcement and Review Committee.<sup>127</sup> It may take such action where: (a) the licensee contravenes the conditions of the licence; or (b) there is a substantial change or modification in the project or in the manner in which the project is being implemented; or the project poses an environmental threat which could not be

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>120</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, supra note \_\_, Regulation 22.

<sup>121</sup> Ibid, Regulation 23(3), stating that "In making a decision regarding an [EIA] licence under these Regulations, the Authority shall take into account: (a) the validity of the [EIA] study report... with emphasis on the economic, social and cultural impacts of the project; (b) the comments made by a lead agency and other interested parties...; (c) the report of the presiding officer compiled after a public hearing...; and (d) other factors which the Authority may consider crucial in the implementation of the project.

<sup>122</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>123</sup> Ibid.

<sup>124</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, supra note \_\_, Regulation 23.

<sup>125</sup> Ibid, Regulation 24.

<sup>126</sup> Ibid, Regulation 25.

<sup>127</sup> EMCA, section 67; Environmental (Impact Assessment and Audit) Regulations, 2003, supra note \_\_, Regulation 28.

reasonably foreseen before the licence was issued; or (d) it is established that the information the proponent gave in support of his or her application for the licence was false, incorrect, or intended to mislead.<sup>128</sup> NEMA may also require an EIA licensee to submit a fresh EIA study in scenarios (b), (c) and (d).<sup>129</sup>

Once a project has undergone an EIA study, the regulations require the proponent to take all practical measures to ensure the implementation of the environmental management plan by undertaking regular self-auditing studies, preparing environmental audit reports after such studies, and submitting them to NEMA annually, or as NEMA may prescribe.<sup>130</sup> Equally, NEMA can undertake control audits where it deems it necessary to confirm that the environmental management plan is being adhered to, and that it is adequate in mitigating the negative impacts of a project.<sup>131</sup> Where a developer is not adhering to the environmental management plan or observing the license conditions, NEMA can issue a stop order.<sup>132</sup>

### *B. EIA in Practice*

To what extent are the foregoing procedures followed in practice? As we have seen, EMCA establishes the NET to review NEMA's administrative decisions, including those relating to the administration of the EIA procedures. Further, a person who is dissatisfied with a decision of NET can apply for judicial review in the High Court. An analysis of the decisions of NET and the High Court can therefore indicate whether, and the extent to which, the EIA procedures are followed in practice. NEMA's decision-making has also been evaluated in governmental management audits, academic literature, and press reports on controversial projects.

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<sup>128</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, supra note \_\_, Regulation 28(2).

<sup>129</sup> EMCA, section 64.

<sup>130</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, supra note \_\_, Regulation 34.

<sup>131</sup> Ibid, Regulation 33.

<sup>132</sup> EMCA, supra note \_\_, section 67(1) (which provides that "The Authority shall, on the advice of the Standards and Enforcement Review Committee, cancel, revoke or suspend any environmental impact assessment licence for such time not exceeding twenty-four months where the licensee contravenes the conditions of the licence.")

What, then, do the decisions of NET and the High Court tell us about adherence to the principles of administrative law in the administration of EIA licensing? A number of NET's determinations concern public participation in the EIA licensing process. For example, in *A. Abdallah, Chairman, Donholm Phase 5 Residents' Association & another v Director General NEMA & another*,<sup>133</sup> the appellants had, among other things, complained that NEMA had issued an EIA licence without consulting the affected parties. The project proponent had put up a five-storey high-rise building, thereby blocking the complainants' access to sunlight and air. The complainants were also concerned that this project would increase vehicular traffic in the area, and overload the water and sewer systems. The tribunal found that the project proponent had "failed to properly conduct stakeholder consultation and thereby denied the stakeholders public participation."<sup>134</sup>

A second example is *New Muthaiga Residents' Association v Director General NEMA & Gemini Properties Limited*,<sup>135</sup> where the appellants appealed against NEMA's approval and licensing of the construction of a shopping complex. The appellants opposed this development on the ground that the site on which it would be built was in a residential area and therefore inappropriate. Further, the appellants contended that NEMA had not taken their views into account in making the decision to license the development. The Tribunal found that the EIA process in respect of the development was "fundamentally flawed."<sup>136</sup> It established that the local community was neither given an opportunity to be heard nor consulted before NEMA issued an EIA license. Although NEMA had published a newspaper advertisement asking for comments, and even received the appellants' comments, it did not hold a public hearing. Instead, it licensed the development without notifying the local residents. It only informed the appellants of its decision two months after it had issued the license. In addition, the developer's EIA expert had purported to collect the views of the local residents some four months before NEMA had issued notices of the proposed

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<sup>133</sup> Tribunal Appeal No. NET/38/2009.

<sup>134</sup> *Ibid* at 7.

<sup>135</sup> Tribunal Appeal No. NET/24/2007

<sup>136</sup> *Ibid* at 22.

development.<sup>137</sup> And it was not clear whether the residents had been asked to present their views in response to the EIA Project Report or as part of the full EIA process that NEMA had directed subsequently.<sup>138</sup> The NEMA officers responsible for this decision thought that a public hearing was not necessary since “it would be the same people coming to tell them what they already said in their letters of objection.”<sup>139</sup> Further, the EIA expert took the view that a public hearing was not mandatory, and that it only applied where some issues were not clear and the community could not grasp some issues, and was not literate.<sup>140</sup> In his opinion, however, the residents of New Muthaiga estate were literate and did not need a public hearing. In any case, he thought that the public participation requirement had been met by giving the residents questionnaires to indicate their objections or support for the project.<sup>141</sup>

In a number of decisions, the Tribunal has also faulted the EIA regulations for failing to provide for public participation where NEMA opts to make a licensing decision on the basis of a project report. According to the Tribunal, this procedure is contrary to the requirements of EMCA, since it precludes the publicization of a project prior to the issuance of an EIA license, with the result that the persons and communities likely to be affected by the project do not participate in the decision-making.<sup>142</sup> For example, in *Beth Mugo & 7 others v Director General NEMA & Silver Crest Enterprises Limited*, NET observed that where a proposed project could jeopardize the entitlement of potentially affected members of the public the right to a clean and healthy environment, such persons have a right to be informed of the application for an EIA license in a timely manner, and to have their comments considered in determining the

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<sup>137</sup> Ibid at 25

<sup>138</sup> Ibid.

<sup>139</sup> Ibid at 11.

<sup>140</sup> Ibid at 18.

<sup>141</sup> Ibid.

<sup>142</sup> See, e.g., *Beth Mugo & 7 others v Director General NEMA & Silver Crest Enterprises Limited*, supra note \_\_; *James Mahinda Gatigi & 3 others v NEMA & Universal Corporation Limited*, NET/15/2007 (holding that a procedure that “allows a determination to be made by NEMA on an EIA application without taking into account the views of potentially affected members of the public goes against the provisions of EMCA in particular section 3(5) which enshrines the concept of public participation in the EIA and other decision making processes.”); *Francis Munene Hiram & 93 others v Director General NEMA & 3 others*, NET/28/2008.

application.<sup>143</sup> Consequently, the Tribunal has ruled that NEMA has an obligation “to publicize any EIA license application in all cases where it is minded to grant an EIA licence, on the basis of a project report alone, without the requirement of a full EIA study.”<sup>144</sup>

The decisions of NET also address failures of project proponents and NEMA to adhere to the stipulated EIA procedures. For example, in *A. Abdallah, Chairman, Donholm Phase 5 Residents’ Association & another v Director General NEMA & another*,<sup>145</sup> the project proponent had commenced the construction of a five-storied apartment building without bothering to obtain an EIA licence, on the basis that she was not aware of the EIA requirements. Even though the proponent later applied for the license, the tribunal found this unacceptable since work on the project had commenced, with the effect that “pertinent matters concerning appropriate mitigation measures and alternative project location that ought to form part of preliminary considerations of approval of a project came to the attention of NEMA after the fact and without giving NEMA adequate chance to fully regulate the development.”<sup>146</sup> Nevertheless, NEMA issued an EIA license, on the condition that she would construct a three-storied building containing sixteen units. But the proponent did not adhere to this condition, and instead constructed a five-storied building containing twenty-four units. The tribunal held that the proponent’s actions were contrary to the express provisions of the law regarding EIA, and ordered the proponent to demolish two of the five floors of the building.

In *We Care About Nairobi Do it & another v NEMA & another*,<sup>147</sup> the tribunal faulted NEMA for failing to follow its decision-making procedures. The appellants had challenged NEMA’s initial approval of an EIA report for the proposed construction of twenty-three houses on the basis that NEMA had approved the report yet there were no approved architectural and structural plans. On the basis of this approval, the project proponents proceeded with construction of the houses. NEMA had approved the IEA report with conditions,

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<sup>143</sup> Beth Mugo & 7 others v Director General NEMA & Silver Crest Enterprises Limited, *supra* note \_\_ at 5.

<sup>144</sup> *Ibid* at 6.

<sup>145</sup> Tribunal Appeal No. NET/38/2009.

<sup>146</sup> *Ibid* at 6.

<sup>147</sup> Tribunal Appeal No. NET/09/2006.

and required the proponent to confirm in writing that it would comply with the conditions of approval to enable NEMA to process the EIA license. The proponent did not supply this confirmation. About a year later, NEMA cancelled the approval of the EIA project report, on the basis that the proponent had violated the conditions set out in the approval letter. Throughout this period, NEMA had not issued an IEA license. The issue before the tribunal was whether it was procedural for NEMA to cancel the approval of the IEA report. The tribunal held that having become aware that the proponent had made substantive changes to the project, NEMA ought to have asked the proponent to submit a new EIA report in accordance with section 64 of EMCA. The tribunal thought that the cancellation of the approval was neither justified nor lawful, NEMA having taken this action after nearly a year of actual work on the project had been undertaken. The Tribunal also issued the proponent with an EIA license.

In this case, NEMA clearly violated its own procedures, given that the applicable law and regulations do not provide for the issuance of a letter of approval pending the issuance of an EIA license. Indeed, it seems that NEMA has adopted this practice of issuing letters of approval pending the issuance of EIA licenses in other cases.<sup>148</sup> Typically, NEMA issues a conditional approval, which it submits to the project proponent for perusal and concurrence to abide by the conditions.<sup>149</sup> NEMA then issues an EIA license once the proponent has indicated that it will abide by the approval conditions.<sup>150</sup> In yet other cases, NEMA issues letters of approval and EIA licenses contemporaneously. This can lead to confusion, leaving project proponents not knowing which conditions they should comply with before and which conditions they should comply with after the commencement of projects. This was the case in *New Muthaiga Residents Association*,<sup>151</sup> for example, where the Tribunal faulted this practice, observing that “If developers are to be guided by NEMA’s approval and licensing conditions

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<sup>148</sup> See, e.g., Peter A. Mugoya & another v National Environment Management Authority & 2 others NET Tribunal Appeal No. 99 of 2012; Strathmore Education Trust & others v Director General, National Environment Management Authority & another, Tribunal Appeal No. NET/48/Dec/2009 at 7 (observing that “The Appellant’s bundle of appeal does include NEMA’s approval letter... However, there is nothing to show that an EIA licence was issued subsequent to the letter.”)

<sup>149</sup> Efficiency Monitoring Unit, Management Audit Report for the National Environment Management Authority (NEMA), February 2010, 6-7.

<sup>150</sup> Ibid.

<sup>151</sup> *New Muthaiga Residents Association*, supra note \_\_

on measures to be taken to safeguard the environment, then the timing of compliance with approval conditions ought to be clearly specified.”<sup>152</sup>

As we have seen above, it is not clear from the regulations how NEMA is supposed to determine whether or not a project will have a significant impact on the environment. Nevertheless, NEMA has issued EIA licenses on the basis of project reports that did not contain sufficient information on the likely impact of the concerned projects on the environment. In *New Muthaiga Residents Association*,<sup>153</sup> for example, the Tribunal noted that the project report had failed to disclose the exact nature of the proposed development,<sup>154</sup> as a result of which NEMA “did not have all the information necessary for it to determine whether the proposed development, in totality, would have adverse impacts on the environment and should be properly mitigated with appropriate mitigation measures, or prohibited.”<sup>155</sup> In any case, the Tribunal established that the EIA Project Report and the EIA Study Report were essentially the same, yet an EIA Study report should be more elaborate, and include detailed mitigation measures and an appropriate environmental management plan, which were lacking in this case.<sup>156</sup> Third, the Tribunal established that NEMA had violated its internal review process.<sup>157</sup> Once received, the stipulated procedure is that EIA reports should be reviewed by a group of NEMA officers. But in this case, a single officer reviewed the reports. In any case, this officer raised substantive environmental issues regarding the project, but which NEMA ignored.<sup>158</sup> Further, in the case of major development projects, the EIA regulations require NEMA to seek the views of a technical advisory committee.<sup>159</sup> Again, this procedure was violated in this instance.<sup>160</sup> Fourth, NEMA ignored the recommendations of the District Environment Committee, which had opposed the grant of an EIA license on the ground that the project proponent’s environmental management plan had not

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<sup>152</sup> Ibid at 27.

<sup>153</sup> Ibid.

<sup>154</sup> See EIA Regulations, Regulation 7.

<sup>155</sup> *New Muthaiga Residents Association*, supra note \_\_ at 19.

<sup>156</sup> Ibid at 23 (observing that “NEMA having accepted an EIA Project Report, it should not have accepted the same report as an EIA Study Report.”)

<sup>157</sup> Ibid at 25.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid at 27.

<sup>160</sup> Ibid (Observing that “a one-man review of an EIA Project and EIA Study reports of such a major development project, without NEMA constituting a technical advisory committee which is provided for under Rule 5 of the EIA Regulations is, to say the least, disastrous.”)

addressed all potential impacts of the proposed project.<sup>161</sup> The Tribunal also established that NEMA had failed to consult relevant lead agencies.<sup>162</sup>

A second illustration is *Narok County Council & another v NEMA & another*.<sup>163</sup> The developer had proposed to construct a lodge/camp in the environs of the Maasai Mara Game Reserve. Here as well, NEMA had issued an EIA license on the basis of a project report. Although this license was subject to conditions – including establishing measures to prevent pollution and ecological deterioration – the appellants thought that NEMA ought to have considered the likely impact of the project on the “environmentally very fragile Maasai Mara ecosystem” much more carefully before approving the project.<sup>164</sup> In their view, NEMA should have sought and considered the views of major stakeholders. Indeed, NEMA had earlier acknowledged in a letter to the developer that “public participation was not adequate as major stakeholders such as [the Kenya Tourism Federation], the Narok County Council and [the Kenya Wildlife Service] were not consulted.”<sup>165</sup>

The Tribunal agreed with the appellants, and also faulted NEMA’s decision-making process. NEMA had initially rejected the developer’s project report for failing to adhere to the EIA regulations. But instead of rejecting the report, NEMA wrote to the developer seeking a response on the shortcomings of the report. The developer then prepared and sent to NEMA a report on the project’s cumulative environmental impact. Although this report was “simply a summary of what the EIA report contained,”<sup>166</sup> NEMA accepted it. According to the Tribunal, however, this report “did not properly constitute a report on the cumulative environmental impacts.”<sup>167</sup> Even more significantly, the Tribunal reasoned that once NEMA found the project report wanting, it ought to have

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<sup>161</sup> Ibid at 28.

<sup>162</sup> Ibid at 26. This is not unusual. In *Phenom Limited v NEMA & another*, NET/04/06/2005, NEMA also issued an EIA license without prior consultation with lead agencies, and without consideration of applicable zoning regulations of the Nairobi City Council.

<sup>163</sup> *Narok County Council & another v NEMA & another* NET 07/2006.

<sup>164</sup> Ibid, para 8.

<sup>165</sup> Ibid, para 21.

<sup>166</sup> Ibid, para 32.

<sup>167</sup> Ibid.

rejected the application, in which case the developer would have lodged an appeal under the regulations.<sup>168</sup>

This case also illustrates that the EIA Regulations fail to circumscribe NEMA's decision-making powers where it is approving projects on the basis of project reports. As a result NEMA can make any decision it desires to make, and it is not obliged to explain any such decision. First, all parties, including NEMA, acknowledged that the ecosystem in question was "ecologically sensitive, fragile and unique."<sup>169</sup> Yet NEMA accepted a project report that was prepared by a food technologist, who was not even versed in the Mara ecosystem.<sup>170</sup> This EIA expert admitted at the hearing that this was the first report he had prepared on wildlife ecology, and that he "had not in fact toured around" the Mara ecosystem. Second, at some point NEMA had sent a technical team to the project site, which had, in its recommendations, opposed the project on the basis that the Mara was a sensitive wildlife habitat and "should not be disturbed in any way."<sup>171</sup> Again, NEMA ignored this recommendation, reasoning that the technical committee was merely advisory and its recommendations were accordingly not binding. For NEMA to have persuaded all the parties concerned, it ought to have explained its decision, and indicated how it considered this recommendation. In these circumstances, the Tribunal revoked the license, and ordered the developer to prepare a full EIA study report.

Another illustrative case is *Richard Evans & six others v NEMA & 2 others*, where NEMA had also issued an EIA license for a proposed development near the Marine National Park on the strength of a project report.<sup>172</sup> NEMA contended that there was no need to conduct an EIA study because the concerned lead agencies had approved proposed project, and the developer had also agreed to comply with the license conditions. However, the appellants argued that the project report was inadequate and had not considered the likely environmental impacts of the project. Further, the appellants contended that the project report

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<sup>168</sup> Ibid (Noting that "the option of the letter by NEMA to Wasafiri Ltd., the 2<sup>nd</sup> Respondent on 31 January 2006 requiring a response on the shortcomings of the project report was not any longer open to NEMA, and Wasafiri Ltd., aware of this situation should, rather, have lodged an appeal as per Regulations 10(4) and 46, which, unfortunately, it did not.")

<sup>169</sup> Ibid, para 31.

<sup>170</sup> Ibid, para 24.

<sup>171</sup> Ibid, para 25.

<sup>172</sup> *Richard Evans & 6 others v NEMA & 2 others*, NET/27/2008.

was based on material misstatements, misrepresentations, non-disclosure and concealment of material facts. The Tribunal agreed with the appellants. First, it found that the project report was inadequate in several respects: the developer had failed to fully and accurately disclose the project and concealed material facts about the project which was variously described as a hotel and as a set of apartments, villas, restaurant and supermarket. Second, the Tribunal established that the developer had failed to disclose in the project report that it planned to eliminate some forty trees on the project site. Third, it established that the project report was deficient due to inadequate baseline information, mitigation measures, and the proposed environmental management plan. Fourth, the Tribunal found that the public consultation process for the project had been faulty. Not only did a person who was not a qualified EIA expert conduct the public consultation, but the process was “riddled with concealment of information, disclosure of half truths and untruthful statements,”<sup>173</sup> as a result of which there was no meaningful participation by the potentially affected persons. Further, the consultation with the lead agencies was also flawed, given that the Kenya Wildlife Service was not contacted through proper channels, and was thereby denied a chance to participate in the approval process. The Tribunal thought that the participation of KWS in the approval would have been necessary, given that it was the agency responsible for the management of wildlife. Evidently, NEMA had approved the project without critical information about its exact nature and magnitude. Further, the Tribunal established that although NEMA had issued an EIA license subject to the condition that the developer would maintain a beach access, the developer had rejected this condition in its acceptance letter. According to the Tribunal, this should have occasioned the immediate cancellation of the license.

In the Tribunal’s view, although the developer had not disclosed material aspects of the project, “there was no doubt that the project would have adverse negative impacts on the environment, including the ocean and biodiversity therein: burning of cleared materials on site raises the risk of fire hazard, massive stripping of soil on site raises the threat of pollution of the marine environment and construction of toilets and other sanitary facilities in the

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<sup>173</sup> Ibid, para 78.

riparian reserve as proposed raises the risk of contamination of the ocean and death of marine organisms.”<sup>174</sup> In these circumstances, it is evident that NEMA ought to have required the developer to conduct an EIA study, which is what the Tribunal subsequently ordered the developer to do. It is therefore difficult to explain why NEMA had decided that the EIA report was sufficient.

An extremely similar scenario played out in *Gaetano Grasso & 4 others v NEMA & another*.<sup>175</sup> The developer here had sought to construct holiday apartments and villas on a peninsular that borders a marine park in the Kenyan coast, known as the Watamu Marine Park. This peninsular serves as a viewpoint for the rescue of fishermen in distress because it is the only raised ground in the area where local residents could have a view of incoming vessels. It is also used for cultural and recreational functions. The developer had submitted a project report, and NEMA had given it an EIA license, subject to a number of conditions, critical among which was that the developer had to ensure that it established a thirty-meter riparian reserve from the high ocean watermark and constructed no structure within this reserve. A second condition was that the developer could not construct storied structures on the project site. Subsequently, however, the developer violated these license conditions, at which point NEMA issued a stop order. But NEMA lifted the stop order, now claiming that the thirty-meter riparian rule did not apply to the project site. It is at this point that the appellant sought the Tribunal’s intervention.

The Tribunal found that the developer had failed to fully disclose to NEMA critical information about the project, and rejected/and or failed to comply with the EIA license condition that no storied structures would be constructed on the site. It also found the project report deficient since it lacked baseline information about the project site and the surrounding environment, and did not have sufficient mitigation measures or a detailed environmental management plan. Accordingly, there was no evidence on the basis of which NEMA could determine that the project would have no significant impacts on the environment. Clearly, this was yet another case in which NEMA ought to have required the developer to conduct an EIA study but instead chose to proceed on the strength of a faulty

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<sup>174</sup> Ibid, para 88.

<sup>175</sup> *Gaetano Grasso & 4 others v NEMA & another*, NET/25/2008.

project report. The Tribunal also found NEMA's lifting of the stop order "premature, irregular, and unlawful,"<sup>176</sup> particularly because NEMA took this decision before constituting a Technical Advisory Committee that could evaluate the developer's revised plans and the circumstances of the project, including determining the suitability of the peninsular for this kind of project. According to the Tribunal, NEMA did not give sufficient and lawful reasons for lifting the stop order, and NEMA's claim that the thirty-meter rule did not apply to the project was baseless. In its view, this rule was necessary to protect the terrestrial environment of the peninsular and the surrounding marine environment, in keeping with the precautionary principle.<sup>177</sup> The Tribunal therefore cancelled the EIA license, and directed the developer to conduct a comprehensive EIA study.

A similar scenario unfolded in *Tourism Promotion Services (Kenya) Limited v NEMA & 2 others*.<sup>178</sup> At issue was the developer's proposal to build luxury tourist cottages in the famous Maasai Mara National Reserve. Again, NEMA issued an EIA license on the basis of a faulty project report. Among other things, the Tribunal found that the report did not adequately address all pertinent issues concerning the likely impacts of the proposed project on wildlife in the locality of the project and the Mara ecosystem. Second, it found that the mitigation measures proposed in the report were "grossly inadequate."<sup>179</sup> In the absence of sufficient mitigation measures, the Tribunal reasoned that NEMA ought to have required the developer to undertake a full EIA study. Third, NEMA did not consult the Kenya Wildlife Service (the governmental agency responsible for wildlife management), or the appellant, a key stakeholder, before approving the development. Again, the Tribunal faulted NEMA's decision-making process, reasoning that "NEMA is obliged to publicize any EIA application in all cases where it is minded to grant an EIA licence on the basis of a project report alone without the requirement of a full EIA study and to take the views of potentially affected persons into consideration."<sup>180</sup> It would also appear that NEMA was in a

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<sup>176</sup> Ibid at para 79.

<sup>177</sup> Ibid, para 84.

<sup>178</sup> *Tourism Promotion Services (Kenya) Limited v NEMA & 2 others*, NET/34/2008.

<sup>179</sup> Ibid, para 35.

<sup>180</sup> Ibid, para 40.

great hurry to issue the EIA license in this case: it issued the license on the same day that it wrote to the developer to confirm, within thirty days, that it would comply with the license conditions. The effect of NEMA's action was that the developer could "proceed with the development in question in whatever manner, without adhering to any environmental safeguards at all and without due regard to the ecological sensitivity of the area in question."<sup>181</sup> On the basis of these findings, the Tribunal once again cancelled the EIA license and directed the developer to conduct a full EIA study for project.

It would therefore seem from these cases that NEMA has on several instances determined that proposed projects would have no significant impacts on the environment despite the failure of the concerned project reports to provide the information that would support such determinations. Further, NEMA has not given the reasons for its decisions in any of these cases. How can this anomaly be explained? It could be the case that due to personnel and financial constraints, NEMA does not have the requisite resources to oversee the conduct of comprehensive EIA studies, which are clearly necessary in many of these projects. It could also be the case that some of NEMA's EIA licensing decisions are influenced by extraneous factors, such as politics. A disturbing case in this regard is *Peter A. Mugoya & another v National Environment Management Authority & 2 others*.<sup>182</sup> The applicants here had challenged NEMA's highly irregular approval of the construction of a building within a community forest that also serves as a water catchment area and contains cultural sites. The approval was irregular because a NEMA office that did not have jurisdiction made the decision, the project report was inadequate (for example, public consultation was woefully inadequate and there were no mitigation measures), NEMA did not consult critical lead agencies, there was no change of user approval from the County Government, NEMA ignored the recommendations of the Public Complaints Committee, the development commenced without an EIA licence, and NEMA issued a conditional approval and only issued an EIA license after an appeal against the project was filed in the Tribunal.

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<sup>181</sup> Ibid, para 44.

<sup>182</sup> Peter A. Mugoya & another v National Environment Authority & 2 others, NET Appeal No. 99 of 2012.

The decision-making procedures governing the issuance of EIA licenses on the basis of project reports alone therefore need to be tightened. For example, these procedures should require NEMA to give reasons for its decisions. Further, as the Tribunal has pointed out on numerous occasions, NEMA should take the views of potentially affected persons into consideration in such cases. These reforms are necessary given the fact that NEMA issues most EIA licenses on the basis of project reports.<sup>183</sup> In other words, there will be little or no administrative justice in the EIA licensing process unless NEMA embraces such reforms.

A number of NET's decisions have been appealed to the courts. Many of these decisions deal with the question of exhaustion of remedies. As is the case with development planning, it seems that many litigants are either ignorant of the procedures for contesting NEMA's decisions, or prefer taking their cases to the courts. In all these cases, the courts have consistently held that where parliament has provided alternative dispute resolution processes and remedies, litigants must exhaust such mechanisms; courts can only dispense with such processes and grant orders of judicial review in exceptional circumstances.<sup>184</sup> And in determining what constitutes an exceptional circumstance, the court would consider whether the statutory appeal procedure is suitable in the context of the particular case, and only grant an order of judicial review where it determines that the procedure is not suitable. According to the courts, therefore, where there is a clear constitutional or statutory procedure for the redress of any particular grievance, that procedure should, as a general rule, be strictly followed.<sup>185</sup>

Another issue that is often litigated in the courts, which implicates public participation in environmental governance, is whether persons who have not participated in the EIA licensing process can appeal against the decisions of NEMA where they feel aggrieved. This issue has arisen because EMCA appears to permit virtually any person to contest an EIA licensing decision or condition, or

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<sup>183</sup> Interview with NEMA Officer, Mombasa County, 27 June 2014 (Noting that NEMA holds public hearings only for controversial projects).

<sup>184</sup> *See, e.g.*, Republic v National Environment Management Authority [2011] eKLR; Okiya Omtatah & 2 others v Attorney General [2014] eKLR; Republic v National Environment Management Authority ex parte Sound Equipment [2011] eKLR; Wainaina Kenyanjui & 2 others v Andrew Ng'ang'a [2013] eKLR; Ben Kipeno & 6 others v Attorney General [2007] eKLR.

<sup>185</sup> *See, e.g.*, Republic v National Environment Tribunal & 2 others [2010] eKLR.

the revocation, suspension or variation of an EIA license, or the imposition of an ERO.<sup>186</sup> NET has taken the approach that it will entertain appeals from any party who has environmental concerns arising out of a decision of NEMA.<sup>187</sup> But the courts have again been consistent in holding that a person who did not participate in the EIA licensing process cannot be said to be a person aggrieved by that process, and that NET would be acting ultra vires if it entertained a complaint from such a party.<sup>188</sup> Given that the EIA regulations do not provide for public participation where NEMA chooses to make EIA licensing decisions on the basis of project reports, and given that NEMA predominantly grants licenses on the basis of project reports, the net result of the courts' approach is to limit public access to environmental justice. A need therefore arises to review EMCA and the EIA regulations so that the public can be granted better standing to challenge NEMA's EIA decisions.

The courts have also addressed the failure of NEMA to respond to an applicant who has submitted an EIA study report, as illustrated by *Bogonko v National Environment Authority*.<sup>189</sup> The applicant had intended to construct a petrol station, and had submitted an EIA report to NEMA. However, NEMA had failed to respond to the said report within three months, contrary to the requirements of EMCA.<sup>190</sup> In the absence of the response, the applicant had then proceeded with the project, as permitted by EMCA.<sup>191</sup> Subsequently, NEMA notified the applicant that it had rejected his proposal and stopped the project. The issue before the court was whether NEMA's delay prevented it from enforcing its statutory duties. The court reasoned that a statutory body could perform its duties after the expiry of any stipulated time limits, provided it acts within a reasonable time. It therefore held that NEMA's delay of one month was reasonable in the circumstances, and did not prevent it from enforcing its statutory duties.

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<sup>186</sup> EMCA, supra note \_\_, section 129(1).

<sup>187</sup> See, e.g., *Kenya Tourism Federation v National Environment Management Authority & 2 others*, NET/30/2008.

<sup>188</sup> See, e.g., *Republic v National Environment Tribunal ex parte Ol Keju Ronkai Limited & another* [2010] eKLR; *Republic v National Environment Tribunal & 2 others ex parte Abdulhafidh Sheikh Ahmed Zubeidi* [2013] eKLR; *Joseph Owino Muchesia & another v National Environment Management Authority & 2 others* [2014] eKLR; *Republic v National Environment Tribunal ex parte National Housing Corporation* [2012] eKLR; *Republic v National Environment Tribunal & 2 others* [2010] eKLR.

<sup>189</sup> *Bogonko v National Environment Management Authority* (2006) 1 KLR. (E&L).

<sup>190</sup> EMCA, supra note \_\_, section 58(8).

<sup>191</sup> *Ibid*, section 58(9).

Governmental management audits, academic literature, and press reports on mega development projects also offer useful perspectives on the practice of EIA in Kenya.

In 2010, the Government audited NEMA, following numerous anonymous complaints about corruption. This audit unearthed a number of malpractices in EIA licensing. First, NEMA's Director General had issued a number of EIA licenses irregularly, in some cases even disregarding the advice of lead agencies and threatening to take disciplinary action against officers involved in the processing of EIA licenses following such irregular approvals.<sup>192</sup> Second, NEMA did not act independently since some of its EIA licensing decisions were influenced by politics.<sup>193</sup> Such irregularities undermine the integrity of the EIA decision-making process.<sup>194</sup>

A number of studies have also evaluated the practice of EIA licensing, making various observations and suggestions for its improvement. First, local communities do not usually get the information they require if they are to make informed decisions.<sup>195</sup> As we have seen, most projects are approved on the basis of project reports, the effect of which is that public participation is precluded. But even in the few cases where NEMA requires project proponents to undertake full EIA study reports, the paucity and complexity of the available information considerably limits the effectiveness of public participation. In many of these cases, the public hearings tend to be dominated by economic considerations, and environmental issues receive little ventilation.<sup>196</sup> This was the case, for example, with the public hearing for the proposed construction of a new sugar mill in Kisumu County, which we observed.<sup>197</sup> The local community's predominant concern was with their children getting employment at the proposed sugar mill,

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<sup>192</sup> Efficiency Monitoring Unit, *supra* note \_\_ at 7-8.

<sup>193</sup> *Ibid* at 44.

<sup>194</sup> See Robert Kibugi, "Development and the Balancing of Interests in Kenya," in *The Balancing of Interests in Environmental Law in Africa* 167 at 188-189 (Willemien Du Plessis, ed, Pretoria University Press, 2012).

<sup>195</sup> See, e.g., Patricia Kameri-Mbote, Strategic Planning and Implementation of Public Involvement in Environmental Decision-Making as they Relate to Environmental Impact Assessment in Kenya, International Environmental Law Research Centre, Working Paper 2000-3 at 11. Available at <<http://www.ielrc.org/content/w0003.pdf>>

<sup>196</sup> *Ibid* at 10.

<sup>197</sup> National Environment Management Authority, Proceedings of the Public Hearing Meeting for the Proposed Construction of a New Sugar Mill at Miwani, NEMA/EIA/5/2/614, 9 April 2014.

and the environmental issues were ignored entirely.<sup>198</sup> The local community was not even aware of the EIA study report, and which could only be accessed from NEMA's office in the county headquarters. Further, both the expert who prepared the EIA study report and the project proponent were absent, yet the hearing proceeded.<sup>199</sup> According to NEMA, environmental issues receive little ventilation in the public hearings because many people do not understand the purpose of these hearings.<sup>200</sup> In fact, the lead agencies do not always give NEMA feedback on EIA reports, and sometimes even lack capacity to assess these reports.<sup>201</sup> In either case, NEMA still has to make a decision, even if these procedures do not yield much about the environmental issues.<sup>202</sup> The professionalism and integrity of NEMA officers therefore becomes crucial.

Second, commentators find some EIA reports to be of "very low quality" and to "be excessively long and hard to understand regardless of the reader's level of education or expertise."<sup>203</sup> Such reports are therefore "way beyond the comprehension" of local communities, and considerably undermine their participation in the EIA decision-making processes. This partly explains why public participation in EIA decision-making has "remained relatively low."<sup>204</sup> A need therefore arises to enhance the quality of EIA reports and simplify their language so that local communities can comprehend them. According to some studies, there is no effective public participation in the public hearings since the "public participation events were insufficiently accommodating, credible, open or transparent."<sup>205</sup> As a result, "even when the public are involved, they either play a passive role, are not given adequate chance to participate, or are unaware of what is happening."<sup>206</sup> Further, public participation exercises do not seem to

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<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>201</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, *supra* note \_\_,

<sup>202</sup> Ibid.

<sup>203</sup> John Kakonge, "Improving Environmental Impact Assessment (EIA) Effectiveness: Some Reflections," *Global Policy* 2013. Available at <  
<http://www.globalpolicyjournal.com/blog/05/03/2013/improving-environmental-impact-assessment-eia-effectiveness-some-reflections>>

<sup>204</sup> Angela N. Mwenda et al, "Trends in Consultation and Public Participation within Environmental Impact Assessment in Kenya," *Impact Assessment and Project Appraisal* 1 at 3 (2012).

<sup>205</sup> Nick Okello et al, "The Doing and Un-doing of Public Participation During Environmental Impact Assessments in Kenya," 27 *Impact Assessment and Project Appraisal* 217 at 223 (2009).

<sup>206</sup> Ibid.

inform EIA licensing decisions. For example, it has been observed that EIA study reports do not indicate how the public hearings impact the findings of these reports.<sup>207</sup>

Third, commentators have decried the neglect of environmental considerations in the implementation of major developmental projects. Often, environmental regulation is seen as secondary to economic growth.<sup>208</sup> This has been the case with projects such as the mining of titanium along the coast (the titanium-mining project), and the Lamu Port – South Sudan – Ethiopia Transport Corridor (LAPSSET) project. The titanium-mining project was approved even though it failed to address important environmental issues, and despite the inadequacies of the environmental management plan.<sup>209</sup> The government also adopted an “authoritative and delegative approach” to public participation, by which its local administrative officer (District Officer) essentially communicated the project as part of the Government’s development agenda, leaving virtually no room for debate.<sup>210</sup>

Conversely, the LAPSSET project seeks to build a multipurpose transport and communication corridor, and will consist of a standard gauge railway line, a port, a super highway, a regional international airport, an ultra-modern tourist resort, an oil pipeline, and a fiber-optic cable. The government approved this massive project without undertaking environmental impact assessments, without consulting local communities, and despite concerns that the project might have adverse impacts on the affected environment.<sup>211</sup> For example, there are widespread fears that the port component of this project will degrade marine

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<sup>207</sup> See Elphas Victor Ojiambo, “Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya,” Paper Presented at the Institute of Development Studies, University of Sussex Seminar on Linking Rights and Participation: Sharing Experiences and Opportunities, 29 May 2002 at 21.

<sup>208</sup> See, e.g., Benjamin Barczewski, “How Well Do Environmental Regulations Work in Kenya?: A Case Study of the Thika Highway Improvement Project,” Department of Geography and Environmental Studies, University of Nairobi and Center for Sustainable Urban Development, Columbia University, 2013 at 4.

<sup>209</sup> See, e.g., J. O. Z. Abuodha, “Protracted Environmental Issues on a Proposed Titanium Minerals Development in Kenya’s South Coast,” *24 Marine Georesources and Geotechnology* 63 (2006).

<sup>210</sup> Ibid at 71.

<sup>211</sup> See, e.g., Hadija Ernst, “Kenyan Paradise at Risk Over Government Oil Port Plans,” <available at <http://www.cnn.com/2012/07/13/opinion/lamu-kenya-port-oil/index.html>>; “Disquiet Over Lamu Port” <available at <http://www.irinnews.org/report/96675/kenya-disquiet-over-lamu-port-project>>; Ridwan Laher, “Resisting Development in Kenya’s Lamu District: A Postcolonial Reading,” Africa Institute of South Africa, Briefing No. 48, 2011.

environments essential to local livelihoods, including mangrove forests that are highly susceptible to environmental stress and coral reefs that are a major tourist attraction. Although an EIA study report was subsequently submitted to NEMA, the local community complained that this report was neither publicized nor the public invited to comment on the report.<sup>212</sup>

As NEMA sees it, the essential problem in such cases is the failure to integrate EIA processes with governmental planning.<sup>213</sup> Because there strategic environmental assessments are lacking, environmental concerns are not incorporated in development policies, plans and programs.<sup>214</sup> And so environmental concerns only emerge long after development projects are conceived.<sup>215</sup>

Fourth, commentators have faulted the EIA Regulations for creating a conflict of interest by requiring project proponents to employ their own EIA experts, albeit licensed by NEMA, to conduct EIA studies on the proponents' behalf.<sup>216</sup> In particular, this requirement creates "a situation in which the [EIA] expert has an economic incentive to write an EIA report that minimizes the environmental impact of the proposed project."<sup>217</sup> Indeed, EIA experts are reported to have "felt pressured to downplay some of the environmental impacts that a project would have or face non-payment" of their fees."<sup>218</sup> It has therefore been suggested that independent experts should conduct EIA studies.<sup>219</sup> In the titanium-mining project for example, it was suggested that an independent expert would have produced a more valid EIA study report.<sup>220</sup>

Fifth, it is claimed that the EIA licensing process "can easily be derailed by corruption."<sup>221</sup> In this respect, it has been noted that NEMA often sends its officers, known as District Environmental Officers, to proposed project sites to

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<sup>212</sup> Letter by Lawyers for Communities and the Environment to the Director General of NEMA, 15 March 2013, <available at [www.naturaljustice.org.za](http://www.naturaljustice.org.za)>; Letter by Save Lamu to the Director General of NEMA, 15 April 2013, <available at [www.savelamu.org](http://www.savelamu.org)>

<sup>213</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> Barczewski at 5.

<sup>217</sup> *Ibid* at 6.

<sup>218</sup> *Ibid.*

<sup>219</sup> *See, e.g.*, J. O. Z. Aboudha, "Environmental Impact Assessment of the Proposed Titanium Mining Project in Kwale District, Kenya," 20 *Marine Georesources and Geotechnology* 199 (2002).

<sup>220</sup> Ojiambo, *supra* note \_\_ at 21.

<sup>221</sup> Barczewski, *supra* note \_\_ at 7.

confirm the information provided in project reports.<sup>222</sup> It is alleged “small bribes or just a lunch can often sway the DEO to give a favorable report to NEMA.” Further, it is alleged that officers of the lead agencies can similarly be compromised to provide positive feedback on the project reports.<sup>223</sup> These allegations have some measure of credibility, given the irregularities that have come to light in cases before NET, including *Mugoya, Tourism Promotion Service (Kenya) Limited, Gaetano Grasso, Richard Evans, and Narok County Council*, all discussed above. It has therefore been suggested that teams of experts, as opposed to individual experts, should undertake the EIA studies.<sup>224</sup>

### *C. EROs Procedures and Practice*

NEMA has power to issue an ERO to any person “to restore the environment as near as it may be to the state in which it was before the taking of the action [that] is the subject of the order,” or to prevent the person to whom it is addressed from taking any action that “would or is reasonably likely to cause harm to the environment.”<sup>225</sup> EMCA also empowers courts to issue EROs.<sup>226</sup> In either case, an ERO may contain such terms and conditions, and impose such obligations on the addressee as will, in the opinion of NEMA or the court, enable it to achieve its purposes.<sup>227</sup> In making the decision whether or not to issue an ERO, EMCA requires NEMA to “be guided by the principles of good environmental management.”<sup>228</sup> It may also “seek and take into account any technical professional and scientific advice that it considers to be desirable.”<sup>229</sup> Further, EMCA envisages that an inspection of the affected environment may be useful in making this decision. In this respect, it empowers NEMA to inspect any activity to determine whether it is harmful to the environment, and consider the

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<sup>222</sup> Ibid at 7-8. (Noting that “NEMA rarely visits projects in isolated and hard to reach areas due to resource limitations.” Ibid at 9.

<sup>223</sup> Ibid at 8.

<sup>224</sup> Evaristus Irandu & John Malii, “Nairobi – Thika Highway Improvement Project: An Environmental Assessment,” Department of Geography and Environmental Studies, University of Nairobi, and Center for Sustainable Urban Development, Columbia University, 2013 at 24.

<sup>225</sup> EMCA, *supra* note \_\_section 108(2).

<sup>226</sup> Ibid, section 111.

<sup>227</sup> Ibid, section 108(3).

<sup>228</sup> Ibid, section 108(5)(a).

<sup>229</sup> Ibid, section 109(3).

evidence obtained from that inspection in deciding whether or not to issue an ERO.<sup>230</sup> In such a case, NEMA is not obliged to give the person carrying out the activity an opportunity to be heard or make representations.<sup>231</sup> The addressee of an ERO may request NEMA to reconsider the order at any time within twenty-one days after it has been served with the order.<sup>232</sup> Further, the addressee of an ERO has a right to appeal to NET if dissatisfied with NEMA's decision.<sup>233</sup>

NEMA has not established guidelines for the administration of EROs.<sup>234</sup> However, its practice is to perform routine inspections of projects in respect of which it has issued EIA licenses, and to issue EROs where such inspections reveal that there are activities that are, or may be, harmful to the environment.<sup>235</sup> In many cases, such inspections are triggered by complaints from the public.<sup>236</sup> Once it has issued an ERO, NEMA typically gives the addressee seven days to remedy the situation, failure to which it initiates criminal prosecution against the addressee.<sup>237</sup> It is not clear at what point the process of criminal prosecution commences, given the right of an addressee to seek a reconsideration of the order, and the right to appeal to NET. However, NEMA has realized that the process of criminal prosecution is lengthy, and often allows the addressees of EROs to continue with the offending activities while the criminal cases are pending in courts.<sup>238</sup> It has now opted to seek EROs, including demolition orders, from the recently established Environment & Land Court, whose processes are faster.<sup>239</sup> The effective administration of the EROs is also hindered by capacity constraints, given the inadequate number of compliance and enforcement officers.<sup>240</sup>

NEMA's administration of EROs has been the subject of a few court cases. In a number of these cases, the complainants have bypassed NET, and the courts have decided that they ought to have appealed to NET before seeking judicial

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<sup>230</sup> Ibid, section 109(2).

<sup>231</sup> Ibid, section 109(6).

<sup>232</sup> Ibid, section 110.

<sup>233</sup> Ibid, section 108(5)(b).

<sup>234</sup> Interview with NEMA officers, 18 November 2014.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid (Noting that NEMA has only about ten police officers and 21 compliance and enforcement officers for the whole country.)

remedies.<sup>241</sup> Nevertheless, there are a few judicial decisions that have interrogated NEMA's administration of EROs. One such case is *Republic v National Environmental Management Authority ex parte Hakika Transport Services Limited*.<sup>242</sup> NEMA had issued the applicant here with an EIA license, subject to certain conditions, to carry on quarrying activities. Following complaints about the quarrying activities by various individuals and public institution, NEMA carried out an inspection, and thereafter served the applicant with a restoration and cessation order, requiring the applicant to stop the quarrying activities immediately. However, NEMA later lifted this order, before reinstating it on the ground that the applicant had failed to address the environmental issues raised in the order. The applicant appealed to the High Court, on the ground that NEMA should have notified it and served it with an improvement notice before reinstating the ERO. The court reasoned that the issuance of an ERO constitutes administrative action, and that NEMA must therefore observe the provisions of Article 47 of the Constitution on fair administrative action in issuing such orders, even if EMCA does not prescribe procedures for issuing a restoration order.<sup>243</sup> In other words, the court thought that NEMA has a duty to act fairly in issuing EROs. In this case, the court found that NEMA had performed this duty, because it had held consultative meetings with the applicant to address the environmental challenges caused by the quarrying activity, it had given the applicant a fair hearing, and it had given it an opportunity to remedy the situation.<sup>244</sup> Thus, where its inspections reveal that there are activities that are, or may be, harmful to the environment, NEMA must give the person carrying out such activities a fair hearing before issuing an ERO.

The administration of EROs is also undermined by the inadequacy of mechanisms and personnel<sup>245</sup> for monitoring compliance with EIA licensing

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<sup>241</sup> See, e.g., *Republic v National Environmental Management Authority ex parte Hakika Transport Services Limited* [2012] eKLR; *Republic v National Environment Management Authority* [2011] eKLR.

<sup>242</sup> *Republic v National Environmental Management Authority ex parte Hakika Transport Services Limited* [2012] eKLR.

<sup>243</sup> *Ibid*, para 24.

<sup>244</sup> *Ibid*, para. 30.

<sup>245</sup> In Mombasa County, for example, NEMA receives about 1500 annually. However, it does not have the capacity to visit all the project sites. Interview with NEMA officer, Mombasa County, 27 June 2014.

conditions.<sup>246</sup> As we have seen, for example, every EIA application must include an environmental management plan. However, such plans are often not implemented partly because NEMA does not have sufficient enforcement personnel.<sup>247</sup> In addition, the public is often not involved in monitoring and evaluating post-EIA license activities.<sup>248</sup> Indeed, project proponents often think that the EIA licensing process is over once they have obtained licenses, and therefore give little attention to the environmental mitigation measures they proposed in their applications.<sup>249</sup> A need therefore arises to enhance public participation in the implementation of environmental management plans. Nevertheless, it should be noted that NEMA requires licensees to maintain their EIA licenses on the project site, so that any person who wishes to do so can see the licensing conditions and report to NEMA through what it calls “incidents management.”<sup>250</sup> NEMA receives many such reports on a daily basis, and they are therefore a useful mechanism for monitoring compliance with licensing conditions.<sup>251</sup> For example, where NEMA establishes non-compliance with licensing conditions through this mechanism, it would raise a restoration order.<sup>252</sup>

## IV. Conclusion

Although NEMA has made some efforts to ensure public participation in its decision-making processes, the public participation that takes place remains ineffective due to various factors. First, the public does not usually understand the information it receives from NEMA and project proponents, given the technicality of the subject matter such information relates to. The paucity and complexity of the available information considerably limits the effectiveness of public participation. In any case, public hearings tend to be dominated by economic considerations, with the effect that environmental issues receive little

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<sup>246</sup> Kakonge, *supra* note \_\_.

<sup>247</sup> *Ibid.*

<sup>248</sup> Okello et al, *supra* note \_\_ at 223.

<sup>249</sup> Barczewski, *supra* note \_\_ at 11.

<sup>250</sup> Interview with NEMA Officers, Nairobi, 18 November 2014.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

or no ventilation. Second, existing procedures do not facilitate meaningful public participation in EIA licensing decision-making. Save for requiring a project proponent to administer a questionnaire to affected communities, the existing regulations do not require public participation whenever NEMA decides to issue a license on the strength of a project report. As we have seen from the decided court cases, the said questionnaire is not administered with requisite seriousness in many cases. Furthermore, following the submission of an EIA study report, a public hearing may not be held should NEMA consider it unnecessary. In many cases, the public is also ignorant of its environmental rights, including the procedures for contesting NEMA's decisions. This also limits the extent and effectiveness of public participation in environmental decision-making.

It is also not clear whether public participation informs EIA licensing decisions, given that NEMA does not usually indicate how the public hearings impact the findings of EIA reports or NEMA's licensing decisions. Public participation, and environmental considerations in general, is also often neglected in the implementation of major development projects. Further, affected publics have not been involved in the implementation of environmental management plans. A need therefore arises to address these failures, if public participation is to enhance the quality of environmental decision-making.

Further, we have established that NEMA does not always adhere to the principles of administrative law, such as legality and reasonableness, as numerous decisions of the NET and the courts attest. For example, NEMA has failed to hold public hearings, issued EIA licenses after the commencement of projects, issued letters of approval pending the issuance of EIA licenses, issued letters of approval and EIA licenses contemporaneously, issued EIA licenses on the basis of project reports that were faulty or did not contain sufficient information on likely environmental impacts, and disregarded the advice of lead agencies. NEMA has also made EIA licensing decisions on the basis of project reports only, contrary to the requirements of EMCA. For this reason, the NET has rightly ruled that NEMA has a duty to publicize all applications where it is minded to issue an EIA license on the basis of a project report alone. These anomalies have been attributed to various factors that ought to be addressed if

there is to be lawful and fair decision-making, including resource constraints and political interference.

Finally, this chapter has established that judicial review has been a limited tool for regulating NEMA's decision making in two respects. First, the courts have insisted that litigants must exhaust the procedures established by EMCA, and will therefore only entertain judicial review applications in exceptional circumstances. Second, the courts have consistently declined to entertain judicial review applications from persons who have not participated in the EIA licensing process. Since the EIA regulations do not provide for public participation where NEMA chooses to make EIA licensing decisions on the basis of project reports alone, and given that NEMA predominantly grants licenses on the basis of project reports, the effect of the courts' approach is to limit public access to environmental justice. A need therefore arises to review EMCA and the EIA regulations so that the public can have better standing to challenge NEMA's EIA decisions. Nevertheless, the courts have offered useful oversight in the administration of EROs, insisting that NEMA must observe the provisions of Article 47 of the Constitution in issuing such orders.