

**UNIVERSITY OF NAIROBI**

**THE IMPLEMENTATION OF ENVIROMENTAL POLLUTION  
CONTROL LAW IN KENYA**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
REQUIREMENTS FOR THE MASTERS OF LAWS DEGREE IN  
THE UNIVERSITY OF NAIROBI  
KENYA**

**JANE A. MORAA**

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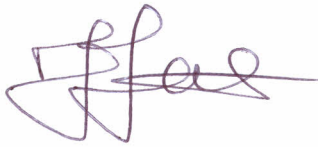
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**NOVEMBER 2005**

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**I CERTIFY** that this is my original work done according to requirements and regulations of the university of Nairobi for the degree of masters of laws, LLM.

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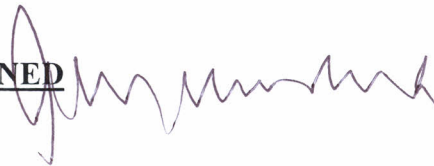


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**PROFESSOR ALBERT MUMMA LLB LLM, PhD**

**FACULTY OF LAW**

**UNIVERSITY OF NAIROBI P.O BOX 30197**

**Nairobi, Kenya**

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## **DEDICATIONS**

This dissertation is dedicated to my parents. To my loving mother Rabbecca Rabera for the encouragement to go back to study, and to my wise and wonderful father, Mr. Nelson Nyanchoka, for urging me to complete the studies. I am greatly indebted to them and thank my God for everything.

**Title: THE IMPLEMENTATION OF ENVIRONMENTAL POLLUTION CONTROL LAW IN KENYA**

**CHAPTER ONE**

**1) INTRODUCTIONS**

**a) Statement of the problem**

The problem of investigation in this project, otherwise referred to as “the study,” is to understand the real meaning and nature of implementation and enforcement of pollution control law in Kenya. The problem is noticed in the law’s substantive and procedural effects on application in the society to reduce pollution. It is to investigate the efforts of implementation and enforcement of pollution control law, to control environmental pollution in the Kenyan society. It is to recommend to the government measures and other initiatives, in the implementation of the law and its enforcement, in societal context, in order to achieve the expected results of halted, reduced and/or controlled environmental pollution.

The problem of investigation is in the context of the legal entitlement to a clean and healthy environment to *every* person in Kenya, and the corresponding legal obligation to safeguard and enhance the environment by all as stated in the Environmental Management and Co-ordination (EMCA), legal framework.<sup>1</sup> To us, this entitlement as a right seems to be a mirage to all Kenyans and the duty seems impossible to carry out by a good majority.

**b) Issues arising**

Firstly, due to inadequate financial and human resources, the institutions in the line of implementation and enforcement of pollution control law are constrained in carrying out their various roles. These institutions include the National Environmental Council, (NEC)<sup>2</sup> The Lead agencies<sup>3</sup> and the National Environmental Management (NEMA)<sup>4</sup> and all the committees and institutions it is mandated to work with, i.e. among others

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<sup>1</sup> Section 3 of the Environmental Management and Co-ordination Act, no 8 of 1999, italics is own emphasis.

<sup>2</sup> Ibid part III section 4[1],[5][b][c]

<sup>3</sup> Ibid section 2 interpretations.

<sup>4</sup> The authority is established under section 7[1] and its object and purpose stated in section 9 [1] and [2] of EMCA

the Standards and Enforcement Review Committee, (SAERC)<sup>5</sup> the National Environmental Tribunal, herein after referred to as (NET),<sup>6</sup> the Public Complaints Committee, (PCC),<sup>7</sup> the Judiciary and the people in general.

The implementations of the regulations of Environmental Impact Assessments, (EIA), and Environmental Audits (EA), and monitoring of activities that would otherwise result into controlled pollution, is riddled with constraints and therefore ineffective in the desired and intended objectives. For instance, the enforcements of EIA, EAs and monitoring, are not effective as regulations without the environmental the legally enforceable environmental standards. The process of promulgating into subsidiary legislations by gazetting, and implementing environmental standards and guidelines, is too slow and jeopardises all the efforts to control pollution by all.

There is evidence of pollution in the society due to Human activities in terms of discharges, effluents, emissions and deposits of hazardous and non hazardous wastes, toxic and chemical wastes that ordinarily pollute the air, water, soil, interfere with smell, cause noise and ionizing radiation. Considering the role that pollution control law, is expected to play, the presence of pollution can be blamed on the weak implementations and lack of enforcement of the said law.

The examples are: the Pan African Paper Mills in Webuye discharging into Nzoia River, Kenya Breweries Ltd discharging into Ruaraka River and into the sewers of the factory, while Kenya Cannery Ltd in Thika, discharges into the Thika River.<sup>8</sup> There are no in-stream water quality standards and effluent discharge standards under EMCA as subsidiary legislation duly gazetted to give legal basis for the command and control, of the water pollution arising in these rivers.<sup>9</sup> Any monitoring, inspections that are being done, if at all, cannot be enforced under EMCA as yet and until these rivers assimilative capacities is assessed and conditions of discharging effluents recommended to NEMA, for regulations by the minister for environment and natural

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<sup>5</sup> section 70 of EMCA

<sup>6</sup> Established under section 125 of EMCA, for its enforcement activities see sections 132 of EMCA.

<sup>7</sup> Established and mandated under section 29 to 36 of EMCA respectively.

<sup>8</sup> Report on the development and harmonisation of environmental standards in East Africa, June, 1999, vol 2 UNEP/UNDP/DUTCH Joint project on environmental law and institutions.

<sup>9</sup> *Ibid*

resources. The issue therefore further is that, there have been no prosecutions, fines and imprisonment as provided for under EMCA for polluting these rivers by the said industries as EMCA has not been fully implemented.

There is very little activity in, enforcement processes, such as, monitoring inspections, investigations and prosecutions of polluting activities as desired by the legislature under EMCA. The issues is that sector specific statutes that have some provisions on the environment, and have been in operation for years before the coming into force of EMCA,<sup>10</sup> are still in operation until they have been modified to give effect to EMCA.<sup>11</sup> For instance, the old charges and weak penalties regarding pollution under the Public Health Act,<sup>12</sup> the Factories Act<sup>13</sup> the Penal Code,<sup>14</sup> have not been repealed to give way to those under EMCA.

The proposals in the draft new constitution regarding the management of the environment, if passed during the referendum,<sup>15</sup> will require restructuring of the administrative system in the management of the environment. It will lead to law reviews of all the statutes relating to the environment and give effect to the pollution control law under EMCA. For instance, the constitutional guarantees of environmental rights and obligations shall result in multiple litigations in particular make possible public interest litigations which is otherwise not smooth sailing at the moment.

The issue is what preparations have been made or are being made by the regulated community, such as industries, projects, programmes and people, in terms of building capacity for the management of the environment to meet the eventualities of the new constitution. The regulated community is not receiving fiscal incentives to facilitate their compliance. For instance, the government's other policies on importations of products and installations' technology, are pegged on the status of the economy of the country and government's priorities in expenditure.

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<sup>10</sup> The Environmental Management and Co-ordination Act, [EMCA], no 8 of 1999 commencement on 14<sup>th</sup> January, 2000

<sup>11</sup> *ibid* Section 148.

<sup>12</sup> Public Health Act Chapter 389 Laws of Kenya

<sup>13</sup> Factories Act Chapter 514 Laws of Kenya

<sup>14</sup> Penal Code Chapter 63 Laws of Kenya.

<sup>15</sup> Kenya gazette supplement, Nairobi, 22 august 2005, of the proposed new constitution of Kenya, referendum set for the 21st November, 2005.

Alongside this issue are the governments, in ability to adequately support efforts of its institutions by providing enough financial and human resources. This would otherwise have enabled the institutions, such as NEMA, to have all its human resource in place. For instance, have all environmental educationists, economists for EA, trustees raise funds locally and abroad., for the trust fund, district and provincial environmental officers', inspectors , designated laboratories and analysts and all EIAs experts for all the stages of the EIAs, in place.

The question of environmental education in a wider policy of education has not been adequately addressed, in that, there is need to develop a school curriculum that encompasses environmental education and implement the same. The situation at the moment is that a large portion of the public are still uninformed on environmental issues, and therefore incapacitated participating in optimal utilisation of the natural resources, are steeped in poverty, and unable to access environmental justice, especially due to legal costs to, seek enforcement of remedies in the courts arising from pollution damage.

In Kenya there is lack' of Environmental education , which is one of the means to emancipate communities from poverty associated with pollution such as engaging in income generating activities, programmes and projects in the natural resources within their reach. The education also enables enforcement as the people can police and supervise compliance, can be the complainants and provide evidence of violations, but because it is lacking, the communities and people are helplessly surrounded with pollution until they can receive the environmental education anticipated under EMCA.

### **c) Objectives**

The main objective of this dissertation is to establish the fact that inadequate implementation of the pollution control law and poor enforcement efforts are the chief reasons for the continued uncontrolled pollution of all forms in the country.

The other objective is to show that without government equipping its institutions and enforcement actors charged with the responsibility of implementation and enforcement of the law with adequate financial and human resources, the said institutions are not able to effectively carry out their mandate in the implementation and enforcement efforts.

We hope to show that the pollution control law and regulations if implemented will control pollution, but that these results are not being realised due to constraints.

Thirdly, we hope to establish that command and control approaches on their own without being supplemented with incentives and other facilitating factors to industry and people, it is not possible to achieve the desired results of halted, controlled and/or reduced pollution in the country. It's hoped to show how environmental education and awareness with the effect of people seeking enforcement, may bring an impact of reduced pollution as it will spark compliance to the law by otherwise polluting projects and activities due to fear of prosecutions.

Finally, it is our objective in this study to show that an effective implementation and enforcement involves constant reviews of laws, informed policy adjustments, political will and lessons learnt from other jurisdictions that are ahead in time in the implementation processes of pollution control law. Such jurisdictions include the republic of India,<sup>16</sup> and the European Union.<sup>17</sup>

#### d) **The Hypothesis/arguments**

1] Environmental pollution is uncontrolled due to poor playing of otherwise important roles by institutions in the line of implementation and enforcement. That is: the NEC, NEMA and its committees such as the standards and enforcement review committee SAERC, PCC, NET, the Judiciary and the Lead Agencies.

If there could be adequate human and financial resources, coupled with a political will on the part of the government in favour of the environment, the government institutions in the line of enforcement and implementations will be enabled to carry out environmental education, train and retrain their personnel, post personnel in all positions countrywide for supervisions, and monitoring, among others.

If there could be co-ordination and cooperation amongst the said institutions and departments, there could be effective operations, private sector, Non-Governmental

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<sup>16</sup> The Compendiums on Environmental law volumes I, II and III

<sup>17</sup> Philippe Sands international environmental law second edition

Organisations (NGOs), communities and individuals to comply with the law, there could be effective management of environmental pollution in the society.

2] Environmental pollution is uncontrolled in Kenya due to weak efforts to implement environmental standards, guidelines and regulations for compliance and enforcement: facilitating and completing the work of the standards and enforcement review committee by Setting legal basis for environmental standards in all media of pollution, hastening and effectively processing of EIAs, Monitoring, EAs, inspecting and enforcing, where there is no compliance. That is, give punitive punishments, such as [heavy fines and long terms of imprisonments, restoration and clean up costs, restitutions and forfeitures].for violations as provided for under EMCA.

If EMCA could be fully implemented, and NEMA co-ordinates and supervises all matters relating to the environmental pollution, effective Reduction in environmental pollution will be noticed.

3] Environmental pollution is uncontrolled in Kenya due to poor responses by industry and the regulated community to comply with the pollution control law: That is, industry and the people lack adequate facilitating factors such as infrastructures, environmental education, technology, fiscal incentives and disincentives,<sup>18</sup> to enable them comply with the new requirements under EMCA.

If these factors could be in place, it could result in industry taking precautions not to flout the law due to environmental costs, legal or otherwise and enhancing the environment for sustained development. It could result in people being enabled with knowledge to participate in environmental decision making, and influencing policy in their favour and the environment. It could result in controlled pollution, better health and poverty reductions.

#### e) **Theoretical framework**

The theory of our study is that pollution control through the law is the major way of providing a clean and healthy environment to all people in the Kenyan society. The facts are that, complete and effective implementation and enforcement of pollution control law guides the regulated community in practices and operations, with the

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<sup>18</sup> Section 57[1] of EMCA

effect of reduced and controlled levels or halted environmental pollution in the society. The environmental law can then be viewed in its social context in that it will command and control human behaviour.<sup>19</sup>

The concepts are to transform the laws and policies already in place in the form of soft law,<sup>20</sup> and treaties,<sup>21</sup> as adapted by National legislations, to wit EMCA,<sup>22</sup> into set environmental standards and guidelines in regulations, processes and procedures by the appropriate government institutions,<sup>23</sup> to be followed by a defined regulated community. This will pave way for meaningful enforcements.

It is part of our theory that a clean and healthy environment is not achieved only through command and control methods which are the primary responsibility of the government, but that, the regulated community also has the responsibility to safeguard and enhance the environment. The facts are that, the regulated society has got to be enabled to comply with the law, meet their obligations, and realise their benefits from a clean and healthy environment in the present generation and the future generations.

It is also part of our theory that there has to be widespread, long lasting and sustained control of pollution, in order to realise a clean and healthy environment, as opposed to short term sporadic, shallow cleanup measures. The responsibility is to both government and the regulated community to realise this objective. The facts are to engage in continued and sustained research, collection of data, law reviews and reforms, drastic measures for a start, and constant provision of environmental education, and resources.

For instance, it is a fact that the courts can be effective by a vibrant legal practice enabled by Constitutional provisions guaranteeing justiciable environmental rights and obligations as proposed in the draft New Constitution slotted for the referendum, together with a review of the procedural laws.<sup>24</sup> Other jurisdictions for instance have

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<sup>19</sup> Bridget M. Hunter (LSE) A Reader In Environmental Law pg 9, 13,-15.

<sup>20</sup> The Stockholm Declaration of the United Nations Conference on the Human Environment [1972], see the principles, 1 2 3 4 6 7 9 12 13 and 14

The World Charter for Nature [1982] see the general principles and function 10 11 12 13 implementation 1, 23,

The Rio Declaration On Environment And Development [1992]

<sup>21</sup> Treaties that Kenya has ratified can be accessed at NEMA headquarters Nairobi.

<sup>22</sup> list sectoral statutes that deal with the environment one way or the other pg VII

<sup>23</sup> sector specific institutions will those in the lead agencies, first schedule of EMCA PG172

<sup>24</sup> The criminal procedure Act, CAP the civil procedure Act CAP and the Penal Code.

shown an increased number of cases in public interest litigation due to their constitutional guarantees<sup>25</sup> and legal aid schemes for the indigent.<sup>26</sup>

The collected information during implementations, permitting, monitoring, EAs and enforcements once analysed, will inform any policy adjustments and reviews of laws and regulations. The adjustments are necessary for long-term effects of sustained compliance and rids off unenforceable regulations and unnecessary procedures.

The challenges however are many in realising a clean and healthy environment due to constraining factors in the Kenyan government and society, overcoming these challenges is a key factor to a sustained clean and healthy environment free from environmental pollution. Whereas this is the desire of the legislature and efforts of the policy makers, our study contributes to investigate the implementation and enforcement efforts, by highlighting the weaknesses in the form constraints therein, and which we believe are responsible for the continued pollution in the society.

A clean and healthy environment is a desired objective by all in Kenya and in the international community which is part of the environment, and therefore the law to realise this objective should not be left in the shelves but be planted in society by the long arm of the law, nurtured by and guarded by all because the benefits are by all.

#### **f) Literature Review**

The literature for this study is drawn from various sources that have addressed issues pertaining to implementation and enforcement of policies in pollution control law in other jurisdictions that Kenya should learn from. Such is the publications of various articles published in, A reader in Environmental Law<sup>27</sup>. It gives the meaning of implementation of environmental pollution control law that has to precede enforcement efforts. It also gives what command and control approaches in any jurisdiction entails for an effective control of pollution that will put the law in its context. It defines command and control to mean, "Command of the law and the legal

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<sup>25</sup> The Compendiums on Environmental law volumes I, II and III

<sup>26</sup> Britain, South Africa And Malaysia

<sup>27</sup> A reader in environmental law by Bridget M. Hunter[ LSE]

authority of the state, in that, the regulations being enforced are normally backed with sanctions.<sup>28</sup>

The publication highlights the fact that policy makers may take very long to formulate the standards and regulations for various reasons and that the regulating agency need be strong financially and knowledgeable otherwise will be captured by the regulated community mainly wealthy multinationals.

In the Kenyan situation, this literature is relevant in so far as it highlights the pillars of implementation and enforcement. But it does not specifically appreciate pollution control issues that are a keen to the third world where the law has not been implemented. The various contributors address pollution issues of industrialised nations and not third world countries such as Kenya. However the literature is relevant in that it helps draw parallels to the Kenyan situation and highlights what can be achieved through implementation and enforcement. Kenya hopes to be industrialised in the twenty first century.<sup>29</sup>

The literature defines the regulated community to encompass industry and all activity that generate pollution in all environmental media and how the same can be controlled. The regulated community in Kenya is not similar as the one defined in this literature, but the said literature gives guidelines in defining the regulated community. Our study endeavours to interpret these definitions in the Kenyan context, and adds that the regulated community includes the government institutions, municipalities, industries people and communities. We hope to show what the Kenyan circumstances need during implementations of EMCA, for effective command and control enforcement approaches to control environmental pollution.

In our said endeavours, we shall make reference to the tireless efforts made by environmental policy making task forces, in the period running up to the enactment of EMCA, in order to understand the intentions, and the unfinished tasks of implementations and enforcements by the policy maker. These efforts are in the study

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<sup>28</sup> *ibid* an article, social-legal Perspective on environmental law: an overview at pg 5

<sup>29</sup> speech of MRS M W. GITHINJI , EBS, Published in a report of a workshop on Industries and enforcement of environmental law in Africa by UNEP/UNDP joint project on Environmental law and institutions in Africa

reports on the East African Sub-Regional Projects enabled by UNEP/UNDP/DUTCH, Joint Project on Environmental Law and institutions in Africa.<sup>30</sup> The reports are on:

[i] The Development and Harmonisation of Environmental Standards in East Africa,<sup>31</sup>

[ii] The development and Harmonisation of Laws on Hazardous Wastes.<sup>32</sup>

[iii] The development and harmonisation of laws on toxic and hazardous chemicals.<sup>33</sup>

[iv] The development and Harmonisation of Environmental Impact Assessment Regulations.<sup>34</sup>

This literature gives the necessary guidelines and starting point for the Standards and Enforcement Review Committee in consultation with the Relevant lead agencies, to proceed with their tasks of setting water quality standards, air quality standards, standards for waste, standards criteria for the classification of hazardous waste. The committee may also use the literature to recommend to NEMA, how to establish criteria and procedures for the measurement of water quality, air quality, measures to manage waste, and their entire mandate under EMCA. Both the lead agencies and NEMA can draw from this literature the insights to enable them carry out their mandate.

Our study will add onto this literature by highlighting how far the Standards and Enforcement Review Committee, NEMA, and the Lead Agencies have moved a step further, if at all, to carry out the Recommendations of the task forces, in setting up enforceable environmental Standards and guidelines, to control all forms of pollution.

In that, the literature was compiled in the period before the passing by parliament of the EMCA, the Water Act 2000<sup>35</sup>, the physical planning Act,<sup>36</sup> the setting up of the Kenya Maritime Authority KMA, MARPOL facility,<sup>37</sup> and the implementation of the Environmental Impact Assessments, EIA and the Environmental Audits EAs, among others. Our study endeavours to highlight the gains if at in the control of

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<sup>30</sup> The East African Sub-regional Project on Environmental Law and Institutions in Africa volumes 2,3,4, and 5

<sup>31</sup> Ibid vol 2

<sup>32</sup> Ibid vol 3

<sup>33</sup> Ibid vol 4

<sup>34</sup> Ibid vol 5

<sup>35</sup> the water Act no 8 of 2002

<sup>36</sup> The physical Planning Act Chapter 286 Laws of Kenya.

<sup>37</sup> International Convention for the Prevention of Marine Pollution from ships. Marine , MARPOL 73/78

pollution and the constraints that are upsetting the progress the country is making in implementations and give further suggestions.

We have in our study made recognition of the fact that the pollution control law that Kenya is out to implement and enforce is drawn from the international environmental law. We have made reference to international instruments of soft law to wit the Stockholm and Rio declarations,<sup>38</sup> the world charter for nature,<sup>39</sup> the international environmental treaties that Kenya is a party to.<sup>40</sup> The instruments show the international obligations the Kenyan state will be complying with if it implements and enforces the domesticated law in its jurisdiction.

The Principles of International Environmental Law by Philippe Sands,<sup>41</sup> is a wealth of information, on the implementation of pollution control law. For instance, it defines environmental quality standards and the graphic details of their implementations, monitoring and enforcements in selected jurisdictions in the European Community.<sup>42</sup>

This literature is useful in this study in so far as it gives guidelines and high standards of environmental management strategies which the Kenyan law implementers should aspire to. It also educates on international obligations and rights in the case of transboundary pollution. In this study, we use the literature as a parallel to the local circumstances in order to highlight the approaches to implementation and enforcement of pollution control law.

It is noted from these literature referring to international environmental law that implementation of international principles of pollution control law in developing countries of which Kenya is one, may take a while to implement and enforce due to lack of capacity in terms of unsuitable technology, trained human resource, adequate financial resources and the ability to set and enforce standards that are mostly international.

Our study adds onto these literatures by showing how far Kenya has gone about in the implementation and enforcement of the international principles already domesticated Under EMCA, and how far it has enforced the same.<sup>43</sup>

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<sup>38</sup> 1992 Rio Declaration on Environment and Development /World Charter for Nature, philippe Sands,

<sup>39</sup> ibid Philippe sands

<sup>40</sup> see appendix herein

<sup>41</sup> Principles of international environmental law by Philippe Sands second edition

<sup>42</sup> ibid pg 154 to 158

<sup>43</sup> Part II of EMCA sections 3 [1]- 5 [f].

The article by Tundu Antiphas Lissu on Environmental Impact Assessments of foreign investment projects a study in law policy and governmental decision- making in Tanzania,<sup>44</sup> confirms that policy makers may take long to implement policy of protecting the environment due to pressures such as political or economical in terms of trying to attract foreign investors into the country by making less demands in the regulations of environment.

An example given is the failure then by government of Tanzania to implement EIA in their law to regulate foreign investment projects in the country that were said to be having adverse effects on the environment.<sup>45</sup> In our study, we find out the reason for the delayed implementation of environmental standards in Kenya, and the slow ineffective implementations of the Environmental Impact Assessment [EIA], and Environmental Audits for all industries, activities and plants.<sup>46</sup>

The magazines on Industry and environment, and the one on Industries and enforcement of environmental law in Africa by UNEP/UNDP joint project,<sup>47</sup> Shows the lack of the necessary resources and economic difficulties for industry to comply with environmental pollution control measures during enforcements, and therefore a need for facilitating factors such as incentives. The literatures also show the various forms and levels of pollution in the country. The publications are a good source of literature on what industries need in order to comply with environmental pollution control laws and regulations and yet remain in business.

The publication Regional control of Ocean pollution; legal and institutional Problems and prospects,<sup>48</sup> gives a good summary of marine pollution which includes the land based sources and enforcement measures the country can put in place. This confirms the provisions in EMCA regarding the control of pollution of the coastal waters.

The compendiums publications,<sup>49</sup> give comparable jurisprudence on the role of the courts in enforcement process of pollution control laws. They also show an active

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<sup>44</sup>Environmental impact assessments of foreign investments project a study in law policy and governmental decisions- making in Tanzania. A rticle by Tundu Antiphas Lissu

<sup>45</sup> ibid

<sup>46</sup>Part VII of EMCA

<sup>47</sup> Industry and development, volume 19 no. 1 January to march 1996, Industries and enforcement of environmental law in Africa by ; UNEP Publications UNEP/UNDP Joint project by industrial experts , in 1997

<sup>48</sup>The regional control of ocean pollution; legal and institutional problems and prospects by Pro C. Odidi Okidi

<sup>49</sup> The Judicial decisions on matters relating to environment , national decisions volumes I , II, and III

legal practice litigating for the protection of the environment in jurisdictions that have laws and regulations implemented already. This when compared to the Kenyan situation shows a gap in efforts through the law to protect the environment from environmental pollution?

**g) Chapter Break Down**

**I. Chapter Two**

In this chapter we shall highlight the regulations that are crucial to pollution control and which the government has not implemented. These are environmental standards. We shall highlight the role of the SAERC in their task to recommend enforceable standards and conditions, and criterion of measurements and classifications among other regulations, to NEMA. We shall define environmental standards by describing the nature and role of the four types of standards in pollution control. Through this description we hope to see how their implementation will play a key role in pollution control. At the same time we hope to establish and confirm that the absence of the standards and guidelines for society are the real reasons for lack of effective enforcements and therefore continued uncontrolled pollution at the field level.

The overall contribution of this chapter to the study is to show that without full implementations of all regulations, enforcement cannot proceed. The contribution of this chapter is to show that, implementations are not without constraints but that it is in overcoming constraints that objectives of having a clean and healthy environment are realised. It is to appreciate the task of the SAERC and give recommendations on how to overcome the constraints.

**II. Chapter Three**

In this chapter, we define the nature and role of implementing EIA, Monitoring, and EA regulations. We shall endeavour to highlight the benefits in pollution control efforts to in implementing these regulations which govern the relationship between the regulated and the regulator throughout the life of the project, activity and programme.

We shall show the constraints in implementing EIA, EA regulations, and Monitoring tasks, on projects, activities and programmes. We hope to show that the constraints are the reasons for the slow implementations of the regulations. Also we hope to show that where the regulations have been implemented, there is need to implement

standards which should otherwise have preceded the EIA and EAs regulations for meaningful monitoring and useful data collection for environmental policy adjustments and law review.

### III. Chapter Four

In this chapter, we highlight why the government institutions in the line of implementations and enforcement need financial and human resources, to enable them effectively play their roles. In that, in chapter two and three we see the major constraints to be associated with the inadequacies of these institutions.

We also highlight the need and role of fiscal incentives and disincentives for projects, activities and programmes, to enable compliance to the environmental standards. This is on the premise that command and control regulations seen in the previous chapters are not enough to achieve compliance to pollution control law, especially by industry.

We specifically see the role of judiciary in implementation and enforcement, and how its successes are dependent on the capacities of the government institutions to play their role well to get convictions, and supervise restoration orders among others. We also see how substantive and procedural law reforms, Environmental Education (EE) for all industry, people, communities, and government workers, will contribute a great deal in compliance to pollution control law. We specifically refer to relevant articles in the proposed new constitution and how they will, contribute greatly, if enacted, to accessing justice in public interest litigations, and informed participation of communities and people in optimum management of the natural resources within their communities for sustainable management.

## **CHAPTER TWO**

### **THE NATURE AND ROLE OF ENVIRONMENTAL STANDARDS.**

#### **1. The role of the Standards and Enforcement review committee, (SAERC) and nature of standards**

The Standards and Enforcement Review Committee [SAERC] is a committee of NEMA and whose membership is a representation of all stakeholders in the regulating, regulated community, professional institutions and other specialities that will be affected one way or the other by the administration of the standards.<sup>50</sup>

The task of SAERC is to implement and enforce the environmental standards in the Kenyan environment as a main policy objective in EMCA. In that the composition of the SAERC, includes the law enforcers the regulators and the regulated, who are key players in the implementation and enforcement processes.

However the specific task of the SAERC is to recommend to NEMA, enforceable standards specifying how they can be applied, when and how to detect the violations, in order to take steps to protect the environment. The intention of the policy and law maker is to have command and control basis in the form of enforceable standards to control activities programmes and projects in their nature and operations from polluting the environment.

It is also to specify the means by which the standards will be applied by providing for inspectors, laboratories, analysts, and specifying the area and community on which the standards will be applied and which is expected to comply, in order to achieve the overall results of controlling pollution. To fortify compliance, the Act has provided for enforcement means in terms of offences and penalties to be administered by the courts in the event the said standards are flouted.

It can be correctly said that the role of the SAERC gives the basis on which the pollution control law can be brought to the field level to serve its purpose of controlling pollution.<sup>51</sup> The standards and their administration are the command and control approaches of regulating pollution control, as opposed to giving facilitating factors to enable compliance.

The hope of the legislature is that by the command and control means backed with sanctions, the regulated community will have the force of the law and that this can

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<sup>50</sup> Part VIII sec, 70-107 and third schedule at pg 175 of EMCA

<sup>51</sup> Bridget Hunter A reader in Environmental Law supra.

instill obedience to the commands whose purpose in the first place is not punish the regulated but to protect the environment.

The name SAERC, is descriptive of the premise from which the committee is to operate, in that, it is to review already existing standards, guidelines, criteria and procedures if at all of controlling pollution, in that, the country is not without some form of controls of pollution, and also review the existing enforcement efforts for that purpose by filling the gaps and replacing in effective controls.

The SAERC is to consolidate any efforts that might have been in place before its creation, to review and set national standards, recommend standards tailor made for the Kenyan environment within our means at the same time safeguard our the environment.

This is a difficult task considering the means and capacity to implement, and enforce, and the means and capacity of the regulated community and people to comply. In other words, the SAERC may run the risk of recommending standards which will become unenforceable regulations and just remain in the shelves.

In this chapter we see the nature of environmental standards as defined, their role in controlling pollution if and when applied on the Kenyan environment, the constraints of implementing and enforcing the standards and the status of pollution in the society at the field level.

Ordinarily; environmental Standards are on the premise that certain amount of pollution can be tolerated by the environment and human health, but only to certain levels. Beyond these given levels in the standards, the environment will be irreversibly damaged or restored at great cost, and human health destroyed or severely affected to call for compensation.

The standards are set at the receiving environment, to safeguard qualities of the environment that can be desired for various uses in given circumstances. Impairment of these uses due to pollution will be exceeding the standards/levels of accepted quality in given resources to the detriment of sustainable development and will be actionable in law. Standards are also set at the source of the pollutant, that is, nature of the pollutant in terms of quality and quantity of discharge/emission, before discharge..

These will only allow into the environment, that which the environment and human health can tolerate. For effective administration and protection of the environment, quality standards and effluent or emission standards and guidelines are combined.

Standards are set at the means by which pollutants will be generated and on the products to be generated and their handling from the cradle to the grave, by setting the acceptable processes and nature of products.

The standards are therefore necessary for pollution control that will at the same time allow development activities to proceed. Thus assess acceptable levels and limits, of qualities, quantities, and guidelines that will govern between development and protection of the environment and human health.

The standards must be developed for all areas and uses of the natural resources and to control all polluting activities, unlike the situation before EMCA. They must also be enforced according to specified and corresponding offences for effective enforcement of the law, also unlike the situation before EMCA.

The standards once set must be monitored to check for compliancy collect data for analysis and have them reviewed for adjustments. In this way sustained controls can be secured. This task on monitoring starts at the commencement of a project, activity or programme, and lasts through its lifetime, or until it is decommissioned.

The standards are therefore to be set during the EIAs, administered during monitoring and may be adjusted during EAs. These are new regulations for the administration of standards, unlike the situation before EMCA.

The standards are scientific in nature, as pollution is not just physical but can be measured in scientific terms, that is, the ability of matter to alter a part of the environment, otherwise defined as the alteration of the ;

“physical, thermal, chemical, biological or radio-active properties of the environment by discharging emitting or depositing wastes so as to affect beneficial use adversely, to cause a condition which is hazardous to public health and the environment.”<sup>52</sup>

The scientific nature of standards calls for accuracy in measurements. It means that to administer standards one must have the resources such as laboratories, specimen collection gadgets, monitoring equipment and other capacities, such skills in environmental science / social science, environmental economics, and other technical skills in areas of specialisations, on the part of the regulator and the regulated.<sup>53</sup>

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<sup>52</sup> see section 2 of EMCA

<sup>53</sup> Section 117 [3] [a], [b] [c], [e] [i] of EMCA

This task is for environmental inspectors duly appointed by gazette notice by the Director General of NEMA. They would be sourced from the public or private sector, including individuals and institutions, unlike the situation before EMCA.<sup>54</sup>

The standards are to be put in a language. They are to be translated from the technical and often scientific language, into communicable terms, in order to be understood by the enforcers and the regulated community. Unlike the situation before the standards are to be clearly stated in the permits and licences, and in rules and regulations for easy administration and enforcement in court.

Ordinarily, Environmental standards fall into four categories. These are: environmental quality standards, emission standards product standards, process standards. The categories are however, in operation, not independent of one another but may be dependent on each other for effective control of the environment.<sup>55</sup> To maintain the quality of water, air and soil, one must at the same time address effluent and emissions at their sources, and processes and means by which pollutants are generated and let into the environment.

We shall use this categorization to understand and appreciate the role of standards to control environmental pollution, see the task of the SAERC and appreciate environmental pollution problem in Kenya.

## **2. Water quality standard and conditions for discharging effluents.**

The water quality standards are also called the ambient or in-stream standards and are enforced together with the effluent discharge standards in order to effectively maintain the quality of the water resource. The in-stream standards by nature reflect the assimilative capacity of the water resource to receive effluents and other abuses that may be discharged, deposited or emitted into it.

The effluent discharge standards are those that apply to material being discharged to the receiving environment and in this case the aquatic environment. In Kenya the major pollution material being discharged include: those from industrial plants, mining, agricultural and municipal sources, directly into the water resource, or into a public sewer in the case of industrial effluent.

The industrial effluents, will include, organic substances, acids, alkalis and metalliferous sludge, while mining waste will find their way into the aquatic

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<sup>54</sup> ibid

<sup>55</sup>Philippe Sands Principles of International Environmental Law  
Second edition, pg, 155-158.

environment as top soil, rock and dirt which may be contaminated with metals lead and processing chemical such as mercury from the gold mining industry, for instance also , salt waste at the coastal region of Malindi due to salt harvesting, that has contaminated the coastal aquatic environment destroying the mangrove forests and affecting local fishing activities.<sup>56</sup>

Agricultural polluting substances find their way into the aquatic environment, due to soil erosion that is being washed into the fresh water bodies. They include animal slurries, and silage effluents, tank washings, following pesticide use, and sewage sludge applied as fertilizer in the farms.

Municipal waste on the other hand incase of solids waste will be due to land fills where methane which is [a green house gas], leachates will generate. These will contaminate surface water and ground water by seeping through the ground. These effluents are harmful to varying degree and require treatment to minimise their impact onto the aquatic environment. The standards will prescribe their conditions for discharge depending on the nature of the effluent no matter where it is going to be discharged.

The in-stream standards, and conditions for discharging effluent if at all, will be applied on certain protected water resource wherein certain pollutants may be prohibited. Thus after research some areas may be declared as protected areas.<sup>57</sup> Examples of protected areas that may need the standards and guidelines urgently are; lake shores, wetlands, coastal zones or river banks, fishing areas, aquatic areas, water resources, reservoirs and other environments which need absolute protection or certain level of protection,<sup>58</sup>.

The lead agencies with consultations of the SAERC will propose the areas that need protection, and have the minister concerned make regulations for the management of those areas based on the recommendations.

Absolute prohibition of dumping hazardous substances in protected water resources or emissions into a protected area is a way of maintaining environmental quality standards. The effluent may require physical, chemical treatment, sea disposal, or water recycling before discharging into the public sewer or open streams.

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<sup>56</sup> affected area include Gongoni, Kibaoni among others highlighted in the media

<sup>57</sup> Part V of EMCA.

<sup>58</sup> part v section 42, [1] [e] [2] [3] [e]

There are many instances in the country where effluents are being discharged into water resources.

The Instances include; Pan African Paper Mills, in Webuye, which discharge into the Nzoia River, Kenya Breweries Ltd discharging into Ruaraka River, the East African sugar industries Muhoroni discharging into the Nyando River and the Kenya Cannery Ltd, in Thika discharging into the Thika River. 30

It is also note worthy that all coffee factories processing the coffee berries are constructed along the streams in the coffee growing regions of the country due to the need of the water for the processes. The river Gucha in Kisii for example is such a river and those in Meru and Nyandarua and Nyeri among others.

The role of in -stream standards and effluent discharge standards is to preserve the aquatic environment and enable many uses of the water resources. The in-stream standards will be prescribed for all water resources defined as, “Any lake, pond, swamp, marsh, stream, water course, estuary, aquifer, artesian basin or other body or other body of flowing or standing water whether above or below ground.”<sup>59</sup>

These water resources will have uses ascribed to them thereby protecting them with standards to enable those uses. They include:

- [I] Drinking water;
- [ii] Water for industrial purposes
- [iii] Water for agricultural purposes
- [iv] Water for recreational purposes
- [v] Water for fisheries and wildlife
- [VI] and any other prescribed water use.<sup>60</sup>

By prescribing water quality standards on the basis of water uses will not only protect all water resources from various abuses and pollutants, but also allow optimum utilisation of water resources that hitherto, have been impaired and unappreciated.

In prescribing standards for drinking water uses, will ensure for instance that people and animals have accessible drinking water by protecting the water resource nearest to them. This will control all activities that might interfere with the drinking uses of the water and halt certain activities or treat the effluents to meet the required standards. It may also lead to other endeavours such as recycling of water or water harvesting to

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<sup>59</sup> section 2 [1] interpretation of the water Act, no. 8 of 2002,

<sup>60</sup> Section 71[b] of EMCA.

meet the desired water uses. This can benefit the areas in the country such as the Arid and Semi Arid lands (ARSALS).

In recommending water quality for industrial use, will play a key role in addressing industrial effluent discharges into the public sewers, into open environment that will percolate into the water aquifers, and discharge of effluents into water resources directly, to relying on the assimilative capacity of the water resources.

Recommending water quality standards for agricultural use may put controls on agricultural activities that cause used products in fertilisers to find their way into water resources causing pollution their in. the standards will address certain pollutants which hither to have not been seriously addressed or at all. For instances the powers of the ministers concerned to prescribe approved fertilizers and pesticides.<sup>61</sup> This will address the agricultural sector and its soil pollution problems, land policy and population issues leading to uncontrolled settlements next to water for agricultural purposes. In recommending water quality standards for recreational use, will protect abused waters such as sea water which receive land based sources of pollution deliberately, ignoring its recreational values.

The uses of water resources are limited and strained. For instance, drinking water is regulated, by the World Health Organisation's (WHO) unbinding drinking water standards guidelines which only concern themselves with the environment in so far as it affects human health. They are developed by the department of the WHO's Division of Environmental Health.<sup>62</sup>

The water from the springs, Rivers, boreholes and all water sources including the piped water in Kenya today, has to be boiled before use.<sup>63</sup> This is due to poor and selective administration of WHO guidelines and lack of ambient water standards. This has greatly impaired the drinking purpose of the water thereby endangering human life, fisheries and wildlife, and other uses that cannot avoid consumption of the water.

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<sup>61</sup> report on the development and harmonisation of laws on toxic and hazardous chemicals volume 5 pg 15

<sup>62</sup> See pg 99 of Philippe sands on W H O.

<sup>63</sup> Ministry of health operating guidelines issued on drinking water.

a. **Enforcements of the water ambient or in- stream and effluent discharge standards.**

The enforcement of water quality standards has been by generalised charges under the penal code, <sup>64</sup>which criminalises voluntary ‘fouling’ or ‘corruption’ of water of any public spring, or reservoir so as to render it less fit for the purpose for which it is ordinarily used. <sup>65</sup>The merchant shipping act covers the marine environment of up to one hundred miles but only in relation to discharges of oils. The maritime zone act<sup>66</sup> requires the minister for transport and communication to make rules for control and preservation of the marine environment.

There are numerous other sectoral laws, for the protection of water resources, including the public health act which refers to polluting activities and specific pollutants that are to be controlled. This mainly relate to drinking water and its sources. The acts also specify the particular water bodies and aquatic life for which protection is to be sought. There are various institutions that govern the waters. The said institutions such as the Kenya marine fisheries, ministry of tourisms and wildlife resources, ministry of water, issue sector specific permits, monitor pollution, inspect pollution sources, take remedial measures and punish the offenders.

The monitoring of pollution in the water resources is by installing and operating measuring equipment checking out for sudden increase in concentrations of the pollutants. For the ministry of water, monitoring for Water pollution is done by the Water Quality and Pollution Control Division (WQPCD) of the ministry. The ministry has its officers from this division seconded to local government and Kenya pipeline and corporation branches countrywide .the specifically monitor pollution to drinking water and a few rives that serve as receivers of discharged industrial effluents.

However the legislations for which pollution is monitored do not have and have never had prescribed in-stream standards and /or discharge of effluent guidelines. The charges for water pollution are thus unspecific. For instance they refer to discharges that are likely to be ‘injurious’ or ‘harmful’ or ‘poisonous,’ ‘corrupting’ and ‘fouling’ while not defining the terms ‘pollution’ ‘effluent’ and ‘waste’.<sup>67</sup> These terms leaves the magistrates to determine what pollution to constitute an offence is.

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<sup>64</sup> Section 191 of the penal code cap 63 laws of Kenya

<sup>65</sup>Section ibid

<sup>66</sup> Section 5 of cap 371

<sup>67</sup> the penal code section 191

These are the anomalies therefore that the standards and enforcement review committee are to review and recommend the appropriate standards and guidelines for the protection of the aquatic environment.

This is not the case now under the new water act<sup>35</sup>, and EMCA<sup>68</sup>, which prescribe severe penalties for the water pollution offence and for flouting effluent discharge conditions. They prescribe specific charges that will be based on proven evidence and heavy penalties accompanied with cleanup measures and compensation for the damage.<sup>69</sup> There are to be formulated, conditions for discharge of effluents, which will be based on the assimilative capacity of the water resource, and prescribed treatment for any discharges into public sewers. All discharges will be by discharge / effluent licence. Enforcement will therefore be based on the prescribed standards and the conditions in the licences. The licence may be cancelled if flouted.<sup>70</sup>

Due to the fact that the SAERC's task of recommending the water quality and effluent discharge guidelines has not been honoured by the recommended water quality standards being gazetted as supplementary legislation, there are no enforcements under EMCA protect the water quality. The situation is as has always been, that is, Unchecked polluting activities due to generalised and improvable charges, weak and unfettering penalties. Although NEMA has called on all owners of undertakings that may discharge or has in the past been discharging effluents to submit information to it of the nature and quantity of the effluents, this has not been done by all dischargers. The register effluent discharge licences indicates only a few considering the number of complaints received by the PCC regarding dischargers whose names are not in the said register.<sup>71</sup> The discharge licences issued so far are factory specific and based on some ungazetted, enforceable guidelines.

The resultant effects are continued pollution in the country and which is getting worse with increased demands and diminishing natural resources. There are known pollution activities still going on as complained to the Public Complaints Committee, [PCC]. There is a good collection of these complaints for instance Malindi South Resident Association (MASRA) vs. Oasis Village.<sup>72</sup> In this matter, the complaint was against

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<sup>68</sup> sections 72(1) EMCA

<sup>69</sup> sections 72 (2) (a) (b) EMCA

<sup>70</sup> section 76(1) EMCA

<sup>71</sup> Section 77 EMCA, the register is available at NEMA.

<sup>72</sup> Vol one of the complaints received by PCC shows 40-50 complaints on effluents see

discharge of raw sewage into the marine environment by a hotel establishment. This was much to the inconvenience of the residents of the same vicinity by the effluent.<sup>73</sup>

In the case of Baraka Estate Residents Association vs. Kapa Oil Refineries,<sup>74</sup> the complaint was about discharge of effluents into Nairobi city council Sewerage system. The matter was handed over to NEMA.

The incidences of water pollution reported to the PCC, show rampant water pollution incidences by mostly industrialists, discharging polluting effluents into the water resources and are from all parts of the country.<sup>75</sup> The same could be prosecuted under the water act and EMCA if only the water standards were in place. The said reports forwarded by the PCC have not resulted into prosecutions.

The reports are investigated through site visitations by officers from the PCC and hearings of parties. The officers then compile and submit their report to NEC to form part of the annual report to be submitted to parliament by the minister on environment. At the PCC, there is no follow up to know how the cases reported to NEC end up. The PCC's work ends at making recommendations. The enforcement at the moment for water pollution is therefore the penal code with the lenient charges and penalties.

**b. Constraints of implementing and enforcing ambient or in-stream standards**

There are constraints of implementing and enforcing the minimum water quality standards in the event they will come into force. This include: lack of the technology for the necessary complex surveillances on the part of the regulating agency especially to pin down the violator. In this case, the regulator will be the lead agencies and NEMA, while NEMA will be supervising the work of the supervisors of the lead agency.<sup>76</sup> It will require a adequate number of personnel to monitor all activities near the water resources.

The issue of increased population and demand for land and water leading to settlements and agricultural a activities near to water resources has led to uncontrolled pollution, which cannot just be overcome by enforcement. The government policies on land distribution and ownership come into play. Unless the political will of the

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Complaint registered on 9<sup>th</sup> January, 2003.

<sup>73</sup> No case was told to the writer at the PCC; s offices.

<sup>74</sup> SEE, VOL I of the list of complaints to the PCC 8<sup>th</sup> of Oct, 2004

<sup>75</sup> volume one of the list

<sup>76</sup> section 117[1] [c] of EMCA

government is for settling the landless and optimum utilisation of water resources amongst communities being ensured, water polluting activities may not be contained from these sources.

There are usually contributions from diffuse or non-point sources for instance, from non fixed sources such as acid rain which can be due to clouds blown from elsewhere. Another instance is the pollutants that may be carried by rivers from agricultural areas into the water masses. This will make it difficult to apportion blame or locate the offender. Further difficulties will be on how to contain the pollution from diffuse sources. It will require research to establish the sources of the pollutants. It will also require resources on the part of the regulating agency to contain the pollutants.

Pollutants from diffuse sources may bring conflicts between the inspectors and the activities being monitored as the situation will give room to arguments. This incidences are already occurring especially in lake Naivasha where the wash offs from the flower farms are polluting the lake and causing water resource scarcity leading to community conflicts due to diverse interest in the uses of the resource.

The other constraint is how to treat the polluters equally when they are required to administer different standards of treatment to their effluents depending on there point of reach of the water resource. This brings about inequalities and creates unfair advantage amongst the regulated community. It will bring conflicts and further arguments within the regulated community, and with the regulator.

General and broadly drawn standards may lead to inconsistencies and ambiguity and therefore difficult to enforce, while uniformly drawn standards though easy to implement, may lead to unfair competitions among the business groups. The idea is to avoid being vague as opposed to specific. The existing regulation leaves the inspector to judge what amounts to 'pollution' as they have no standards for measuring the quality. This may prolong the arguments in court and lead to the dismissal of cases due to ambiguity in the charge sheet. The challenge therefore is to transform symbolic guarantees in the law into enforceable standards.<sup>77</sup>

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<sup>77</sup>Bridget M Hunter Social-Legal Perspectives on Environmental Law; An overview at pg 12 of Reader In Environmental Law by Bridget M Hunter [LSE]

The ambient standards will have to be combined with effluent discharge standards for effective water pollution control, in that there is need to control pollution from the source and will be much easier since the source is known. The Kenyan existing guidelines are borrowed from the British Royal Commission Standards on the prevention of river pollution which are to the effect that the receiving water body must have a dilution capacity of not less than 1; 10<sup>78</sup>. This simply, is a guideline that the receiving water body has a capacity to dilute the incoming effluent 8- 10 fold and meant for rivers and effluents in Britain.<sup>79</sup>

The legislature in both statutes of the water Act and EMCA means to have protection of water resources through recommended standards and regulations of protecting all the waters of Kenya. By first implementing the EIAs regulations before the standards, they seem to have jumped the line, as the implementation of the EIAs, the EAs and the monitoring regulations are not complete and effective to control water pollution, without the environmental standards.

### **3. The nature and role of Air Quality standards**

Air quality standards refers to ambient air quality standards, occupational air quality standards, emission standards from fixed sources and those from mobile sources.<sup>80</sup> The ambient air has been defined as the atmosphere surrounding the earth but does not include the atmosphere within a structure or within any underground space.<sup>81</sup> This has not been a subject of regulation before in any of the statutes in Kenya. However there have been some guidelines in isolating air polluting activities, such as industrial areas from residential areas to protect human health.

Zoning areas to protect the environment against air pollutants, is away of maintaining minimum air quality standards.<sup>82</sup> Examples in Kenya would be designating industrial areas to be away from central business district, and residential areas. This would call for a policy in physical planning and urban settlements, public works and housing, co-ordinated with industry. In that the ambient air quality has to be at safe level of air pollutants.

Almost all the big urban centres in Kenya, Nairobi City, Mombasa city, Kisumu City, Thika, Nakuru and Eldoret, have big industrial areas in whose vicinity are the biggest

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<sup>78</sup> See vol 2 of the UNEP/UNDP/DUTCH Joint Project report pg 15 and pg20 see also table 2.1

<sup>79</sup> Supra UNEP UNDP DUTCH Joint Report pg 20

<sup>80</sup> Section 78 EMCA.

<sup>81</sup> Section 2 of EMCA.

<sup>82</sup> Section 79[1] [2]

slums in the country, and middle class residential houses. The slums, apart from the pollution from the industries are overcrowded and lack basic sanitary facilities.

For instance ,Mukuru Wa Njenga in Nairobi's industrial area , Dandora estate, near the Dandora sewage plant, Majengo estate in Thika,<sup>83</sup> and Shimanzi area of Mombasa, Embakasi Estates and residential area Nairobi surrounding the Jomo Kenyatta international Airport and Embakasi airports.

The pollution media that need quality standards is air water and soil due to effluents discharged from the industries and plants, into sewages, water bodies and open land , emissions into the air and unsorted solid waste sourced from the industrial areas as garbage dumped in the vicinity of the residential and working environment.

Creating controlled areas is however not enough to control air pollution which is known to travel long distances into controlled areas. The air quality has to be maintained by controlling the pollutants at their sources. This will call for emissions standards from known and fixed sources, combined with process and product standards.

Ambient air needs protection due to risks to health, acid rain, and Ozone depletion among other known reasons. In the air is also noise, and smell which have not been subjects of regulation in terms of protecting the environment. There are no ambient air standards in Kenya.

a. **Emission standards,**

Emission standards set levels for pollutants not to be exceeded from, fixed and mobile installations or activities being carried out. For instance, automobiles, aircrafts, and industries in fixed sources. The said standards have the role of arresting the air pollution at source, as opposed to isolating places as controlled areas. Since these sources are known to cause air pollution, if they can be controlled by prescribing emissions standards which must not be exceeded, the regulations will contribute to the reduction of air pollution in the country. The implementation of ambient air quality standards is a combination of efforts to control the importation of substandard products and old technology, and the status of the economy. These include policy issues for instance to import clean technology, unleaded fuels and technology that can use alternative sources of energy. Emission standards are also applied with

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<sup>83</sup> information by observations of the Nairobi city council

occupational air standards and under the International Labour Organisations [ILO] guidelines. This is on the premise that occupational operatives are controlled by emission standards which will have both ambient and occupational air quality in mind.

**i. Enforcement of emission standards/ambient air quality standards.**

The current law in emission of pollutants into the ambient air is scattered in several statutes. The penal code calls air pollution ‘foul air’ which affects the health of others.<sup>84</sup> This could be by industrialists, and manufactures. The ‘foul air’ also refers to “noise” and “smell.”<sup>85</sup> the traffic act calls on motorists to use proper fuel and maintain their vehicles in order not to produce smoke.<sup>86</sup> These are generalised terms that are hard to prove in court. The traffic act for instance, although insisting on the use of fuel that is designated in the logbook of the motor vehicle, does not prohibit the additives to fuel such as lead.

The traffic police have no means of measuring the intensity of the smoke coming from a vehicle in order to charge it for pollution. The police officer, who arrests a vehicle for smoking, must accompany it to the motor vehicle inspection unit for inspections, whereof it will be inspected and a report made which will be used in court as evidence to get a conviction. The fine usually is Kenya shillings two thousand, with an order to carryout service of the vehicle. There is usually no follow up to ensure that the services were carried out or that the vehicle is not in use until such service.

There is also lack of personnel as motor vehicle inspectors, in that there is usually one for a whole district, and the reasons for inspections range from complying for TLB to accidents. The line of vehicles waiting to be inspected is too long. For these reasons enforcement of the traffic rules on emission of leaded smoke is never carried out. The policies to allow importation of old second hand vehicles facilitate the menace of lead production into the ambient air. The government move to phase out these fuels is one towards the right direction.

The local authorities regulate smells by zoning locations of industries, and slaughter houses. Beyond zoning the legal framework does not have other controls. Motor vehicles and air crafts are a major cause of noise. Enforcements of noise control law

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<sup>84</sup> Section 192 of the penal code. cap 63

<sup>85</sup> Section 193 of the penal code cap 63

<sup>86</sup> traffic Act cap403 laws of Kenya section 51

are through licensing crusades gatherings, events and discos. Permits from the district officers and chiefs are normally issued as a form of control. Zoning of industrial areas bars and discos to be away from residential places. Regulating the period of time when they can operate is also a form of control. Fireworks for instance, can be held at a notified time.

The enforcement has been very poor due to lack of the criteria of determining; standards of emissions i.e., how to measure vibrations pollution, subsonic vibrations, their emissions, minimisations, and correct levels. There is no criterion or standards of noise in construction sites, industries, vehicles and aircraft. There is continued lack of meaningful enforcement to control pollution by noise until the regulations are formulated and enforced.

Due to lack of controls that are yet to be put in place under EMCA, prosecutions of those bad smells that affect comfort and convenience especially of use of amenities are yet to be done. This will see controls enforced for tanneries, and paper mills which emit such nose rendering smells.

The measure and determination of noxious smells are yet to be established. This would require determining its origin whether caused by human activity or from natural causes and set the minimum standards for its control. The offence would then be contravening the set standards for smells and the general penalty for contravening any set standards under EMCA.

Emission standards would be specific and easy to prove with the right technology in place to show that levels have been exceeded. Since the sources are fixed or if mobile identifiable, it will be easy to implement and enforce. For instance it has been easy to prescribe certain measures for the factories that emit smoke under the factories act, by prescribing machineries and other installations, thus combining the ambient air quality with occupational air quality for effective controls of air pollution.

There is continued air quality pollution through emissions from industries, factories, automobiles, aircrafts noise, and smells. Under the PCC, complaints of smell have been received. These include foul smell and emissions of fumes. The case of Environmental Trust of Kenya KenGen vs. Chagamwe wayside tyre sales and causeway tyre services,<sup>87</sup> is illustrative of this air pollution complaint that was caused

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<sup>87</sup> VOL I of the PCC report.

by the burning of tyres that released toxic fumes causing illness to the nearby residents. The findings and recommendations were forwarded to National Environmental Council [hereinafter is referred to as NEC.] and NEMA for action.

The other illustrative case along this line is the complaint by Landmark Realtors Ltd and Residents of Hazina Estate South B vs. Kenya Railways Brike Manufacturing Factory.<sup>88</sup> the complaint was that for one year to the time of complaint on 6<sup>th</sup> September 2002 the respondent had been burning metallic containers used to carry tar bases chemicals within its premises. But the fumes would affect the residents of Hazina estates and Maasai village causing respiratory problems. The findings and recommendations were forwarded to NEC and NEMA for action. The PCC reports show that there is uncontrolled air pollution in the country.

Most of the industries in Kenya use the energy source of biomass, imported fossil fuels and geothermal to a small extent.<sup>89</sup> It has also been said that traditional fuels contribute as much as 40 percent of both CO<sub>2</sub> and CO emissions into the atmosphere.<sup>90</sup> there are therefore environmental concerns for the sector relating to the gaseous emissions generated by industrial processes as the sector grows during Kenya's quest to be industrialized in that, for the last thirty years Kenya's national development agenda has been an emphasis on industrialisation.<sup>91</sup> The transport industry, i.e. motor vehicles and air craft are said to contribute a great deal to air pollution in terms of emissions of CO<sub>2</sub> from burnt fuels especially due importation and processing of leaded fuel.<sup>92</sup>

#### **b. Occupational air quality standards**

The occupational air quality standards address the quality of air that would be prescribed for health, safety and welfare in the working environment. Occupational air quality is defined under EMCA to mean: "The concentration prescribed under or pursuant to this Act of a substance or energy in the atmosphere within a structure or under-ground space in which human activities take place"<sup>93</sup>.

The occupational air quality standards are to measure the constitution of dust, fumes, or gases. The dangerous impurities emitted in the working environment need to be

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<sup>88</sup> Ibid. Complaint no ten

<sup>89</sup> industries and enforcement of environmental law pg18 quoting Wandiga world res 1994-95

<sup>90</sup> Ibid. pg 14

<sup>91</sup> Ibid. pg 6 speech by permanent secretary ministry of commerce and industry, Kenya

<sup>92</sup> Ibid pg21

<sup>93</sup> see sec 2 of EMCA

listed for control purposes. The standards, will limit the quantity and quality of the impurities by prescribing measures to be taken before their emissions. These include, purifications or treatment of substances during emissions processes, use of certain equipment and technology,<sup>94</sup> for safety, such as masks, chimneys, and have contingency plan for preparedness and safety measures in case of dangerous fumes, explosive or inflammable dust or gas, and removal of dust.<sup>95</sup>

The standards for occupational air quality will go along way if implemented, to halt occupational air pollution. They will improve the air quality in the working environment. But for successful control of air pollution in the work environment, the occupational air quality standards must be combined with process and product standards.

The occupational air quality standards have not been gazetted. This leaves control of the occupational air pollution to the general and in effective regulations under the factories act, and the penal codes public health act, the mining act, the local government act, and others that should regulate through process and product standards, For instance; the aerosols in the flower industries in green houses.

The regulations under the factories act are general, in that, they demand the factories to be kept clean, free from effluvia arising from any drain, sanitary convenience or nuisance. In 1990 the act was amended to include treatment of emissions before being released into the atmosphere. Such emissions include: dust, fumes, and impurities. Without the standards it is left for the inspector to decide whether the dust or fumes are injurious or not. The inspector has no means or criteria prescribed to determine the air pollution has occurred. The standards enforcement and review committee are to recommend such criteria that should be known and used for controlling air pollution and enforcing in the case of violations.

The penalty for exceeding emission air standards specified under EMCA as two years in prison or fine of five hundred thousand or both. Besides, there a general penalty for the offences relating to standards under which the penalty is a fine of five hundred thousand and or imprisonment for a term not exceeding twenty four months in prison.<sup>96</sup>

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<sup>94</sup> section 78[c], [f]

<sup>95</sup> the factories act section 19,39,57and parts IV, V,and VII

<sup>96</sup> See section 140 of EMCA.

The lack of enforcements for air pollution at the moment under EMCA is pegged on the absence of standards and regulations in the legal frame work for enforcement.<sup>97</sup> Since the same have not yet been formulated and gazetted, there are no prosecutions going on of the offences as to environmental standards and the prescribed penalties. But prosecutions can go on under the penal code as has been going on, with the lenient penalties.

In the meantime, there are numerous incidences reported to the PCC and still not yet prosecuted due to lack of the standards and regulations for enforcement. Enforcement for compensation due to injuries arising from occupational air pollution can be more enhanced and made easy with the implementation of the occupational air quality standards. But there are constraints in the civil litigations as well since one must prove negligence on a balance of probability among others. The limitations are institutionalised in the workman's compensation Act.<sup>98</sup> If the standards could be in place, strict liability would be applied.

#### 4. Environmental Product Standards.

The Product Standards establish levels for pollutants which must not be exceeded in the manufacture or emission of a product. They specify the properties or characteristics or designs of a product. They are also concerned in the way a product is used or handled. In that they specify testing, packaging, marking, labelling and distribution.<sup>99</sup> For effective control of pollution by product standards, one need prescribe process standards which will address the final disposal by incineration of the product as hazardous waste depending on its nature, its confinement, or burial.

The principle behind product standards is "to prevent as much as possible, minimize, the generation of hazardous wastes, as well as manage those wastes in such away that they do not cause harm to health and the environment."<sup>100</sup> the products are usable until their final disposal when they become waste.

The waste include among others radioactive waste, for which standards prescribe there generation, safe processing, conditioning, transportation, importation, and disposal. Implementation and enforcement of the provisions in EMCA, regarding hazardous waste, will be in compliance to regional and international agreements by

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<sup>97</sup> See the work of the standards and enforcement review committee section 70.

<sup>98</sup> Workman's compensation act cap 236 laws of Kenya.

<sup>99</sup> Principles of International Environmental Law by Philippe Sands sec edition pg 156

<sup>100</sup> *ibid* pg 705

the country.<sup>101</sup> The agreements address the Transboundary movements of hazardous wastes and prohibitions of importation of the same into the African region. The product standards on pesticides, industrial chemicals and contaminants, have the ultimate objective of to eliminate discharges, emissions, and losses of Persistent Organic Pollutants (POP) to the atmosphere. They are a subject of international agreements, which among others include the principles of prior informed consent, and information exchange.<sup>102</sup>

In Kenya the products include toxic chemicals and substances through agricultural activities, such as pesticides, leather tanning, fishing, small-electroplating processes, timber processing, processing of agricultural produce such as coffee, disposal of used batteries, hospital and pharmaceutical wastes. Instances are DDT waste whose degradation products are harmful to birds and fish.

The main areas to regulate and enforce the product standards are: the leather industries which discharge effluents whose content has high biological Oxygen Demand (BOD) and metal into water resources, , textile industries, which have high dye and suspended solids that affect the quality of water, automobile, cement, chemical industries which have high concentration of heavy metals, , and municipal domestic wastes which has high concentration of heavy metals harmful to the aquatic environment. Examples are the contamination caused to the Athi River from the Nairobi municipal waste treatment plant, which has been poorly managed by the Nairobi City Council (NCC) Water Department.

Product standards are addressed by EMCA under the topics of: toxic and hazardous materials and substances such as oil, chemicals, pesticides, ionising and other radiation. The regulations as to product standards direct their discharges, registration, and handling. The enforcement relate to their, inspections, seizure, destruction and prosecution of offences.

The role of the product standards is to reduce the pollution danger the products pose to the environment, by prescribing their handling during their lifetime and final

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<sup>101</sup> the Basel Convention, 22 March 1989 in force 1992 and the Bamako Convention 1991

<sup>102</sup> 1998 Aarhus Protocol on Persistent Organic Pollutants and FAO Code of Conduct 1985

disposal, that is, “from cradle to the grave, which is an integrated approach to control pollution”<sup>103</sup>

The standards are recognition that the products are necessary in the social economic context, hence can only be controlled to protect human health and the environment.

Some of the standards restrict manufacture and production of certain products and seek alternatives, and some to regulate their emissions and production in quantities and quality. Product standards are applied to protect all media of pollution including air quality, water quality, and, soil/land protection.

In Kenya, the product standards will play the role of protecting the soil in agriculture, and therefore will address the agro-chemicals. They will also play a role in protecting the water resources, therefore will address their effluent, and disposal, and in air quality protection, will address their emissions into the atmosphere, and interference with occupational air quality, which in the final analysis contributes to the pollution of ambient air quality.

Product standards play a role to protect the Ozone layer and other specifically protected areas in the wider environment.<sup>104</sup>, the standards for instance, apply to Products from specific targeted industries that use Ozone – Depleting Substances (ODS) in manufacture.

#### **a. Constraints of implementing environmental product standards**

The major constraint in the implementation of product standards is the fact that Kenya has got to import most of the products from the outside world, in that, Kenya is not industrialised to the extent of manufacturing the said products, and it is cheaper for the country to import than to manufacture the same. Kenya however is at its infant stage in industrialisation and requires product standards to start on the right footing. Implementing the product standards for Kenya must address the issue of technology, alternatives, and practices. This requires resources for research and training.

The incidences of uncontrolled pollution due to lack of product standards to guide conduct and enforcement are many. These can be seen in the industries, plants and activities that handle importation, manufacture and consumption or use of,

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<sup>103</sup> supra pg 167

<sup>104</sup>Part V and sections 56 of EMCA,

refrigeration, foam blowing, degreasing as solvents, agriculture and dry-cleaning. The complaint by makongeni estate residents in Thika vs. Kel Chemicals is illustrative of a repetitive scenario of complaints against most emitting industries in Kenya.<sup>105</sup>

The other big constraint in the implementation of product standards is the population distribution and urban settlement. This hinders any efforts to reduce the risks of the products by regulating exposure targets of people. the mushrooming of settlements near industries is the natural consequence of starting a project and is being institutionalised by the requirement in the EIAs, in that, it is a requirement to state in the report how the programme , project or activity is going to mitigate environmental concerns for the likely settlement on the site.<sup>106</sup>

The major consumption of Chlorofluorocarbons (CFCs) is in domestic refrigeration, where foam blowing is used for insulating panels. It is also found in air conditions. These are mainly imported. The agricultural sector on the other hand, deals in Methyl bromide, regarded as one of the most important ODS which is used to preserve cut flowers, fumigation, pre-shipment and quarantine purposes.

The standards and enforcements review committee will recommend process standards and regulation to meet the government policy to conserve the existing stocks, introduction of alternatives, new installations and equipment, and regulate the importation and recycling of all ODS. For instance Methylene chloride is the alternative to CFC-11 in other sectors of foam blowing.

However, there are no alternatives in sight for the methyl bromide in the agricultural sector especially the flower industry which is a flourishing for Kenya in the international market. The aerosols are reported to cause damage to human health, by contributing to respiratory diseases like asthma and bronchitis apart from depleting the ozone layer.<sup>107</sup> Importations at one point were reported to be 400 metric tonnes per year.<sup>108</sup>

There are incidences of misuse of products that should be regulated, for instance, reports of domestic animals dying due to over use of pesticides, sickness of people

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<sup>105</sup> UNEP/UNDP/DUTCH JOINT project vol 2 pg28-29

<sup>106</sup> see any of the EIA reports filed with NEMA office NAIROBIS

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

caused by drinking milk from sick cows that have been dipped in pesticide, death of people due to a fro- toxined maize, and misuse of industrial spirit are very common in the media an judicial notice of them can be taken. The incidences are an indication of lack of environmental education, policy, lack or poor controls.

Pesticides once applied affect the ecology by killing other species. The persistent ones such as the organochlorines that are persistent in the environment should not be used. They have been banned in Kenya except for public health purposes but are still found in tissue of fish in Lake Baringo and Hola irrigation Scheme and in all inland lakes of Kenya.<sup>109</sup>

Product standards also refer to requirements to construct new oil tankers with double hulls. Kenya being a port state, and a party to regional arrangements, United Convention on the law Of the Sea, (UNCLOS),<sup>110</sup>, has only recently taken steps for the protection of its part of the Indian Ocean from oil spills by commissioning the MARPOL facility installed in Mombasa port,<sup>111</sup>. The country has also created the Kenya Marine Authority.<sup>112</sup> These institutions are expected to enforce all the standards that will be protecting the marine environment. The standards only need be gazetted as subsidiary legislations

#### **5. The environmental Process standards**

There are basically two types of process standards: installation design standards, and operating standards. Installation design standards are prescribed for fixed and mobile installations. They demand certain requirements to be met in the design and construction of installations, which will protect the environment. Operating standards demand certain requirements to be met in the cause of activities and operation of installations.

The process standards in nature apply to technology, technique and practice. The standards require the use of particular technology and alternatives in constructions, installations and processes in activities, for the protection of the environment against pollution. The process standards require the use of: Best Available Technique, [BATeni] or Best Environmental Practice, [BEP] or Best Available Technology, [BATecno] or Best Available Technology Not Entailing Excessive Costs, [BATNEEC] or Clean Production Methods, [CPM] or Environmentally Sound

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<sup>109</sup> *ibid*

<sup>110</sup> The Nairobi protocol and the UNCLOS both can be found at the NEMA offices in Nairobi.

<sup>111</sup> *Supra* MARPOL/73/78

<sup>112</sup> The Kenya Marine Authority [KMA]

Management, [ESM] or Best Available Technology Which Is Economically Feasible [BATWIEF].<sup>113</sup>

The role played by the process standards on implementation and enforcement results in many benefits and achieving objectives to control pollution from the source to the end otherwise known as “from cradle to grave.”<sup>114</sup> On applying these standards, programmes, activities and projects are addressed in their nature in an integrated manner to control pollution. In that, with the installation of the prescribed installations emission and effluent standards will automatically be addressed.

There need not be inspections all the time by NEMA or the lead agency. This will reduce the costs of inspections otherwise draining the meagre resources in supervisions, investigations analysis and enforcements. It will also reduce the environmental costs of the developer especially legal costs for non-compliance to pollution control law.

The process standards play a role of sustainability of development activities in that, the project can still operate within new legal requirements and at the same time protect the environment. This is much to the advantage of the investor, the government and the environment, in that, income generating activities sustain livelihoods, reduces poverty, and creates a clean and healthy environment.

The process standards, in so far as they control and regulate operations and services based on environmentally friendly installations, may lead eco-labelling of products much for the benefit of the investor or country. The services and products must be those that reduce the negative environmental impacts, contribute to efficient use of resources, and high level of environmental protection. Eco-labelling is now an economic instrument in the European Union and in the global market.<sup>115</sup>

Thus the process standards play the role of minimizing, reducing and halting pollution menace from the environment. They also promote good health standards amongst the population.

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<sup>113</sup> PHILIPPE SANDS PG 158

<sup>114</sup> *ibid* pg 168 on integrated pollution control.

<sup>115</sup> *Supra* pg 863.

#### **a. Constraints of implementing process standards**

Implementation of the process standards in Kenya is pegged on issues of replacing old technology, old techniques, and environment unfriendly practices. These can only be replaced at a great cost.

The cost include for replacement of old technology, importation of automobiles, machineries and engines fitted with gadgets to meet emissions, and effluent /discharge standards. The cost of replacing the old machines, engines, boilers and motor vehicles may be unaffordable to the users and project, activity and programme owners.

Most of the techniques and practices are dependent on the available technology facilities and the law. In the case of bulky domestic waste, to replace the techniques of handling the waste in the dumping site by sorting it on the site, and the practice of not sorting the waste at source, will require the environmental education and rules to sort domestic waste at source, technology such as motor vehicles to collect the garbage at regular intervals, and the technique to process the waste for instance re-cycle the same for re-use.

The cost of implementing the process standards would thus include environmental education for individuals and institutions to sort their garbage at source as a benefit and a rule, learning new techniques for income generating activities such recycling waste and waste minimisations such as re-use of otherwise waste products by institutions. For instance, the soda manufacture can process in their operations parking of their products in bottles which can be recycled instead of plastic and tins that litter the environment, with plastic material that are hazardous as they are not bio-degradable.

Instances and results of these constraints can be seen in the way the Kenyan municipalities handle their waste. And the way industrial and agricultural waste, that is, hazardous waste, is handled. The process standards are not in place to address the generation and treatment of, say domestic waste to sort and classify it at source. This would facilitate planning and handling of the waste based on information regarding quantities and qualities.

Poor planning and lack of implementation and enforcement of sector specific laws has resulted in low standards in all sectors. The sector specific laws implemented are not effectively enforced. The said laws are responsible for the poor practices. For instance the local government act, public health act, and penal code's definitions of pollution

and waste as nuisance and the weak penalties, are responsible for continued low standards of handling municipal waste.

Old technology, such as old model garbage collection trucks, that break down often, are a set back to efforts of controlling pollution. They need be replaced by modern garbage collection facilities that is waste specific, and equipped with processing equipment that start processing the garbage even as it is being collected.

The old techniques of dumping unsorted, untreated waste in the open air and near residential places need be replaced by permanent solutions. The measures of sorting the garbage at the dumping site as income generating activity is short lived and does not address the long term solution of maintaining clean and healthy standards that come with technology and alternative techniques of recycling and good environmental practices.

Ordinarily, standards for waste are for the good environmental practice. They demand that waste be identified, classified, handled, transported, stored, segregated, or destroyed in a particular specific manner that is prescribed.<sup>116</sup> For the hazardous waste the process standards would prescribe for their classifications to determine their: hazardous waste, corrosive waste, carcinogenic waste, flammable waste, persistent waste, toxic waste, explosive waste, radio active waste, and others to be considered necessary.<sup>117</sup>

Implementations will have to replace not only the current regulations and law, but practices, technology, and techniques. The old practices are in the existing regulations on the management of waste under the local government Act,<sup>118</sup> to the effect that the local authority keeps sanitary conditions by maintaining services to remove refuse and effluents, and by compelling its residents to use the services. Residents too have to keep their residents clean. The by-laws reflect similar letter and spirit of these provisos and refer to the waste as nuisance. The municipality is in return to collect the garbage and transport it to the dumping site. The residents pay for these services in the water bills.

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<sup>116</sup> supra section 86,87,89,

<sup>117</sup> section 91[1] of EMCA

<sup>118</sup> Section 160 of the local government Act

The same language is used in the public health act which is implemented by the local authorities'.<sup>119</sup> The local authorities are to prosecute at law any violations regarding waste that is violated under the public health Act. The minister of for local government may make regulations on diverse issues and this may include management of waste, according to local government act. However the regulations do not include classification and handling of waste as envisaged under EMCA.

It is common knowledge that a lot of domestic garbage is not collected in most urban centres, if it is not at the intervals to cope with the generated garbage, and a lot of garbage is poorly transported to the destinations, for instance sewage water in open tanks pouring on the roads and fouling the air, a lot of the garbage is not deposited in approved dumping sites and even that in the designated dumping sites is not processed to finality, and is accessed by children and others.<sup>120</sup> The complaint of Ngarā Girls vs. Nairobi City Council<sup>121</sup> is illustrative. This is a clear case where the council does not collect the domestic waste generated at the school yet collect revenue for the services from the school.

Implementation of process standards on hazardous waste equally has constraints, in that, the industries where the same is generated need new and alternative technology. These come at a great cost. The projects, activities and programmes will need fiscal incentives to enable them sustain their projects within the environmental law requirements. Under EMCA, fiscal incentive have been provided for thus,

“Notwithstanding the provisions of any relevant revenue Act, the minister responsible for finance may, on the recommendation of the council, propose to government tax and other fiscal incentives, disincentives, or fees to induce or promote the proper management of the environment and natural resources, or the prevention or abatement of environmental degradation.”

This at least means that the lead agencies and government institutions can have certain utility costs waived for them in order to enable them purchase technology such as incinerators for the hospitals to dispose of the pathogens.

This however is not happening in many hospitals and clinics as illustrated by this complaint to the PCC. Masandukuni Business Community vs. Kenyatta National

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<sup>119</sup> see section 13 and 116 and 118 of the public health Act

<sup>120</sup> garbage collection department of mombasa municipality.

<sup>121</sup> Complaint to the PCC, Per the list of complaints

hospital.<sup>122</sup> The complaint was that of burning by the respondent of medical and domestic waste in an undesignated area. The PCC made their recommendations to NEC and NEMA. The hospital does not still have an incinerator. The government has increased their stance on collection of revenue from the industrial sector and will not relent to give reprieve to the regulated community for environmental practices. This is the case despite the fact that the NEC, made proposal to the government for fiscal incentives.

The offence for the contravention of standards and measures relating to waste upon conviction would subject one to a fine of five hundred thousand and or imprisonment of not more than eighteen months. Due to the fact that EMCA has not been fully implemented, the prosecutions have not taken place as then waste is not yet being sorted out and classified. The fact that there are many complaints about waste especially against municipalities to the PCC means that environmental pollution by waste is rampant.

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<sup>122</sup>*Ibid* and vol I of PCC list of complaints.

## **CHAPTER THREE**

### **THE NATURE AND ROLE OF ENVIRONMENTAL IMPACT ASSESSMENTS, ENVIRONMENTAL AUDITS AND MONITORING**

#### **1. Introduction**

Environmental Impact Assessment is a regulation to be complied with by the regulated community before a developer commences a Programme, activity, or project. The EIAs is the systematic examination of the said project, programme or activity to determine the possible adverse impacts it will have on the environment.<sup>123</sup>

An environmental Audit on the other hand is an evaluation of a project during its lifetime. It is the systematic, documented, periodic and objective evaluation of how well a project, programme, or activity, is managing environmental concerns, including how well its equipment are performing in conserving or preserving the environment<sup>124</sup>

Environmental monitoring is the continuous and/or periodic determination of the actual and potential short-term or long-term effects of a programme, activity or project.<sup>125</sup> The EIA, the EA and Monitoring are therefore regulations already made and are being implemented currently. They have a role to play in pollution control, on their implementation and enforcements.

#### **2. The role of implementing Environmental Impact Assessments in**

##### **Pollution control**

The EIA is a technique and a process by which information about the environmental effects of a programme, project or activity is collected, both by the regulated or developer, and from other sources including from the members of the public in the area of development. The information will be taken into account by NEMA, in forming a decision or judgement on whether to let such programme, project or activity proceed by issuing an EIA licence or refusing to issue the same.

The kind of activities, programmes or projects that must under go the systematic examination,<sup>126</sup> are those arising from the areas of; urban developments, construction of transportation systems, electrical infrastructures, works in the construction of water courses, dams, Aerial spraying, mining including quarry and open-cast extraction of certain selected types, forestry related activities, Agricultural activities, various types of processing and manufacturing industries, management of hydrocarbons, waste

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<sup>123</sup> EMCA, section 2 interpretations.

<sup>124</sup> *ibid*

<sup>125</sup> *supra*

<sup>126</sup> *Ibid* section 58 [1] [4]

disposal, natural conservation areas, nuclear reactors and major developments in biotechnology including the introduction and testing of genetically modified organisms. These areas are otherwise enlisted under EMCA.<sup>127</sup>

The selection of these areas for examination is based on prior study which must have revealed where to prioritise pollution control and environmental degradation. The EIA process requirement per se, controls potential pollution from these projects in that they will not be allowed to proceed without an EIA being carried out in the prescribed manner and a licence thereof being issued.<sup>128</sup>

The processes are undertaken by proven experts as per legal requirements and in accordance with the regulations, guidelines and procedures issued under the law.<sup>129</sup> This includes; firstly, screening to assess whether a project requires an EIA, secondly, scoping to identify the key impacts the nature of project will have on the environment, identifying priority concerns and contentious issues, and requiring further investigation by involving the affected community and the lead agency. The role of this requirement which is based on expert opinion ensures only controllable in pollution projects to proceed, thereby legitimately eliminating potential uncontrollable polluters from the society.

The experts assist in drawing Terms Of Reference (TOR), and actual environmental impact assessments that makes the EIA study report. It shows Identified, analysed and evaluated predictions of a project's social, economic and health impacts based on the TOR. This includes mitigating measures that the developer proposes to put in place to prevent, reduce, or compensate environmental damage. EIA study reports are prepared based on the foregoing EIA studies and submitted to NEMA in a prescribed form and pay prescribed fees. This may be the user fees that ensure that those who use environmental resources pay proper value for the utilisation of such resources.<sup>130</sup>

In so far as pollution control is concerned, the EIA study report must contain an impact management plan. The plan reveals mitigation measures, monitoring schemes and strategies, and evaluation procedures. It must contain contingency plans for emergencies; liaison arrangements with the communities, environmental audit system,

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<sup>127</sup>EMCA second schedule pg 172.

<sup>128</sup>Section 58[5] and [7] of EMCA.

<sup>129</sup>Section 58[5] and [7] of EMCA.

<sup>130</sup>section 57(2) (d)

and indicate how to manage the environment at the end of the project or de-commissioning stage. The report basically forms the terms and conditions of being allowed to carry on with the project. If contravened, the cause of action will arise and enforcement will ensue.<sup>131</sup>

The purpose of the report is to effectively communicate with the audience, and have executive summary and main conclusions and options for decision making by NEMA. NEMA is expected to process the report with the assistance of the technical advisory committee, including publishing it for public scrutiny, within three months in order to Issue an EIA Licence.<sup>132</sup>

The structure of the EIA process must involve decision making whether the proposed project must proceed, and on what conditions, and if not, the reasons why. The fact that the public and stakeholders are informed of the decision making process, gives them a chance to negotiate for their interests to be included in the decision making process. These has the advantage of reducing future conflicts between the communities and project owners, apart from the overall advantage of benefiting the communities who may participate in the management of the natural resources in their areas.

The structure of the EIA process also includes a review of the EIA report. The technical committee for review may seek expertise to assist in the review. Consequently, additional work may be required to carry out further evaluation or EIA study, review or submit additional information towards the accuracy of the study report.

A fresh EIA report may be required after licence has been issued and the project is in operation. in the case of changes or modifications of projects, unforeseen impacts during the initial study, or due to wrong data given by the proponent during application for a licence.<sup>133</sup>

The EIA and licences are anticipatory prevention regulations in that, EIAs has the role to reduce pollution at the same time allow development activities to operate by insisting on those projects to mitigate the environmental damages in the polluter pay principle. And improve the social welfare of the communities of the stakeholders in the vicinity of the project.

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<sup>131</sup> study reports are obtainable from NEMA offices Nairobi.

<sup>132</sup> Section 61 and 63 of EMCA.

<sup>133</sup> Section 62 and 64[1] of EMCA.

The results of an EIA guides the regulated in the implementation of a project and fosters self regulation to keep the regulated from the harsh sentences, high damage awards, restoration costs, and clean up measures that may ensue in the event an unguided project may blindly proceed without an EIA.

The EIA exercise enables the project owners not only meet their economic objectives in their projects and activities, but also realise the objectives to safeguard the environment and health of the people affected by their activities. The Bamburi Portland cement, for instance has the integrated programme to plant casuarinas trees around the factory and the quarries to arrest the dust from the air generated by the factory. It has created the Haller Park which is a nature trail. It has rehabilitated the roads surrounding the factory. It has a bursary scheme to support education programmes for the poor in the poverty reduction programmes.<sup>134</sup>

Apart from the penalty on the offence of not carrying out an EIA, The amount paid on submission of projects reports and Environmental Impact study reports, project report is in addition to the payments for other licences required by the various sectors such as for public health licences and for trade and industry among others, in line with the polluter pay principle, in that the project owner contributes to the environmental fund before commencement of their project.<sup>135</sup>

There are gains that have been achieved by the EIAs already in place in Kenya. Several activities, programmes and projects have undergone EIA and have been issued with licences to proceed with developments. The depository of the EIA reports, at the Director General's office, shows thousands of EIA reports, presenting a big task of desk work for the technical committee, and NEMA to process the reports within the three months.<sup>136</sup>

This response is a clear indication of dissemination of the benefits of an EIA. Although in this study cannot give the statistics, it can be logically concluded that if the project owners are complying with the EIA reports legally issued, then pollution which would otherwise be in the environment has been reduced. NEMA has also rejected some study reports and declined to give EIA licence requiring further and comprehensive mitigating factors.<sup>137</sup>

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<sup>134</sup>Information available at Bamburi Portland Cement, in Mombasa

<sup>135</sup>article by Green Watch on criminal aspects of environmental

And the technicalities of environmental crime dated 3<sup>rd</sup> -7<sup>th</sup> Feb. 2004 America Hotel Nakuru.

<sup>136</sup> NEMA offices, Nairobi, and section, 58[8] of EMCA.

<sup>137</sup> the case of Theo mine mining project in kwale district

a. The constraints in the implementation of Environmental Impact Assessments [EIAs]

Apart from EMCA, the legal framework as exists in the sectoral statutes, do not put any legal requirement on proponents of projects, plants, activities and industries, when being established, that is, being financed, commenced, proceeded with, carried out, executed or conducted, to undergo proper or any Environmental Impact Assessments [EIA], but they give several of other licences as legal requirements to start a project. EIA licence is therefore one of those licences that a developer has to obtain in order to start a project.

This means that a developer is subjected to several visits to the authorities before he can eventually start a project. This may prove tiring and may drain financial resources of the developer before he even starts his project. Among the licences he must obtain the EIA licence takes the longest to obtain. The fact that there is room for public scrutiny may give room for further protracted arguments and even court actions, which means, it may take longer than the ninety days to obtain an EIA licence.

The response to this has been an outcry from the investors, and the government eager to please them, put pressure on NEMA to issue licences without proper EIAs, being completed.<sup>138</sup> What this means to pollution control, is allowing a project to proceed without acceptable impact mitigation plans in place. This may also lead to further litigations from the stakeholders in public interest litigations.

There is room in the law for projects to proceed without undergoing an EIA, in that, in the event the director general of NEMA does not respond or communicate to an EIA licence application within three months, the project proponent has the leeway to start their undertaking.<sup>139</sup> This includes polluting activities that will have been allowed to commence.

The chances that this is happening are high since all applications for EIA licences are to be responded to by the Director General (DG) in person.<sup>140</sup> Considering the vast area in which EIAs must be undertaken, there are quite a number of projects, activities and programmes that the DG of NEMA must be called upon to handle. Besides, the said DG has other functions to personally attend to.

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<sup>138</sup> The Theo mine mining project in Kwale District of Kenya is a case in point.

<sup>139</sup> Section 58[8] and [9]

<sup>140</sup> *ibid* section 58[9]

To overcome this problem of overburdening the DG and having activities proceed with for want of requisite communication from the DG, NEMA has devised a standard form to acknowledge receipt of the application for an EIA licence, and thereafter take their time to publish the study reports as they are no longer under pressure from time limits.

They may also delay due to bureaucracies at the government printers to publish the study reports in the Kenya gazette.<sup>141</sup> Enquiries at the NEMA offices on the position of publishing study reports shows a backlog of study reports waiting to be published some exceeding three months since they were submitted by the project proponents.<sup>142</sup> This is a constraint in that it's only the government printer that must be used. It is also expensive to advertise the study report on the local news paper circulating in the area of the proposed project. Apparently each advert is charged according to the number of words involved.<sup>143</sup> Although this expense is charged to the project proponent, it is drawn from the fees paid by the proponent and which is in a fund designated for many other uses.

Implementing EIA is constrained further by the fact that until a project proponent applies for an EIA licence, they are not known by NEMA. They may be known to the lead agencies from where they must obtain other licences. Such licences include: those issued for the location of the projects in physical planning, work permits, trading licences, VAT certificates, and public health certificates, and several others, which will enable the project developer to proceed with the project unnoticed by NEMA.<sup>144</sup>

It means that NEMA can only enforce EIA regulations on these errant project developers, by policing the whole country using their personnel, and relying on the peoples complaints to the Public Complaints Committee PCC, NGOs and public interest litigation lawyers.

The constraint is further complicated by the fact that the lead agencies have an attitude that EIA is a sole concern of NEMA. This is evident from the number of unanswered written requests by the DG of NEMA for comments on EIA study,

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<sup>141</sup> section 59[1]

<sup>142</sup> Enquiries were made during research for this study at NEMA offices Nairobi.

<sup>143</sup> Information obtained from NEMA offices Nairobi

<sup>144</sup> Information obtained at the Nairobi mineral water processing plant Mombasa at port reitz.

evaluation and review reports.<sup>145</sup> The same are supposed to be answered within thirty days from the date of request but do take more than the said days all the time.

A further constraint of implementing EIA is that NEMA has on occasion issued licences after inappropriate EIA reports. NEMA cannot be sued for any criminal or civil liabilities arising from such projects.<sup>146</sup> The PCC has received such complaints, For instance, Mr Naram Pindoria [owner of plot no 209/4909-nairobi and Nairobi city council.<sup>147</sup> This is a report to the effect that an inappropriate EIA was issued. The case was addressed by the city council of Nairobi in that the construction of a high-rise building which was out of character with the surrounding environment was likely to cause strain on sanitary services, noise pollution through increased population and had a flawed EIA which did not reflect the true future impacts of the project in the environment.

The few cases that have been reported to the PCC are illustrative of these incidences of inappropriate EIAs reports. One other being, the Green Belt Movement vs. Golf Options Kenya (Ngong' Race Course) the Jockey Club of Kenya.<sup>148</sup> The complaint was that the respondent had started constructions without the appropriate EIA. This calls for the attentive eye and close supervision of activities by both the informed public and NEMA officers on the ground. Pressure groups will assist very much as demonstrated by the number of cases reported to the complaints commission.

Another constraint of the EIA is the lack of enforcement on defaulters on the part of NEMA. The PCC has reports of defaulters that commenced projects without EIAs. But no report of prosecution was found by the writer at NEMA offices or the registry of the National Environmental Tribunal NET.<sup>149</sup> No one has been imprisoned or made to pay the fine as prescribed under EMCA for defaulting in EIA undertaking. The explanation from the legal department of NEMA is that they are still disseminating the Act and giving projects and activities to comply before they can start enforcement.<sup>150</sup>

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<sup>145</sup> *ibid*

<sup>146</sup> section 66(1) of EMCA.

<sup>147</sup> List of PCC OF COMPLAINTS ON 19<sup>th</sup> October 2004.

<sup>148</sup> report on 4<sup>th</sup> June 2003 list of PCC vol I

<sup>149</sup> Information obtained from PCC and NET offices Nairobi during research for this study.

<sup>150</sup> Information received from NEMA legal department Nairobi during visits to the offices for this study

A major constraint is the lack of compliance to EIA requirement by the lead agencies. There are complaints that some lead agencies are the major defaulters in proceeding with projects programmes, and activities without undertaking EIAs.<sup>151</sup> Municipalities, shows complete lack of waste and hazardous waste management due to shifting of dumping sites as and when residents protest, at least, in the case of Mombasa.<sup>152</sup>

In this case, residents have seen the site shifting from Makupa cause way where the dumping site was situated right on the entry route to Mombasa city. Complaints that the site was an eye sore in a tourist destination, and that it had damaged the mangroves, caused the site to be shifted to the show ground at English point. This is an up market residential area. The Lawyers residing in the vicinity of the show ground, protested by threatening the municipal council with a suit. The dumping site was as a result, shifted to Mwakirungi in the north coast of Mombasa. The area Member of Parliament for Kisauni constituency protested to the mayor and the site was again shifted back to Kibarani Makupa causeway.

NEMA through the district environmental officers and the forestry department intervened and the disposal site is now due to worsened conditions by oil spillage affecting the mangroves shifted from Makupa cause way to Mwakirungi.

This constraint of the lead agencies not complying with the EIAs requirement is tied together with the lack of environmental education amongst the lead agencies and the public in general. The environmental education would expose the people to the benefits environmental regulations to safeguard the environment from pollution.

The EIA requirement for public scrutiny of its study report is constrained, in that most members of the public are illiterate, while they can also not afford a news paper. They cannot effectively participate in an EIA debate since they do not have the critical environmental education. NEMA is yet to embark on environmental education in that it is now it is recruiting the educationists to facilitate optimum participation of the Kenyan public in environmental management. The need for environmental education is even more necessary in view of the proposed new constitution which will give the

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<sup>151</sup> construction of Bundaran'gi dykes, dykes for Nyando river, and road constructions in Nyanza province

<sup>152</sup> Information from district forest officer Mombasa and NEMA Mombasa office.

communities rights to access information, participation and justice, together with participation in the management of environmental resources within their communities.<sup>153</sup>

Another major Constraint for the EIA regulation is the lack environmental standards that will be implemented by the project to which the project proponent pledges to comply with before being issued with the EIA licence. Projects for instance that will be discharging effluents, have been issued with licences without discharge conditions, as these are yet to be recommended to NEMA by the standards and enforcement review committee. We have dealt with standards in the previous chapter. It would have been logical to first implement standards before the EIA regulations.

### **3. The Role Of Monitoring In Pollution Control**

Monitoring is a step forward from the initial stage of regulating the commencement of a project by the EIA process. Monitoring in particular, enables the regulator and the regulated to implement and operate the project as licensed, in the natural and cultural environments. Monitoring, when implemented will improve the effectiveness of the EIA process. It checks whether mitigation measures are being carried out, and if the predictions in the EIA report were accurate.<sup>154</sup>

The mechanism of monitoring has a major role in pollution control as it may lead to a closure of a project which made wrong predictions in the EIA reports. Through monitoring, the nature and scale of impacts on the environment can be determined through collection of data by authorised inspectors. In monitoring, the inspectors check compliance with effluent and emission standards set. The same have environmental quality objectives agreed to be met during the EIAs. The information will be analysed in designated laboratories.<sup>155</sup>

Apart from closure of a project or activity, depending on the nature and extent of pollution, the project or activity owner may be prosecuted.<sup>156</sup> In most cases, the project owner may be given time to rectify the problem, or make adjustments to meet the objectives and comply with the regulations of operations.

The information collected during monitoring, may lead NEMA to require a fresh EIA after issuing an EIA licence, if it is discovered through that information that, there is

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<sup>153</sup> Chapter 8 and Article 51, 62, 67 of the proposed new constitution of Kenya, Kenya Gazette Supplement, 2005

<sup>154</sup> Section, 68[3] And [4]

<sup>155</sup> See Part X section 119[1] of EMCA.

<sup>156</sup> Section 118 of EMCA

substantial change in the modification of a project, or that the project poses environmental danger that was not foreseen at the time of the initial EIA, or that, the information given in the first place, by the project proponent was false, fraudulent, inaccurate, or intended to mislead,<sup>157</sup>. This calls for knowledgeable inspectors that can be a step ahead of the regulated community.

Monitoring provides the policy maker information on cumulative impacts of projects on the environment, which information is essential in wider environmental planning, drawing of programmes, and adjusting policies, in the country and future handling of EIA study reports and licensing projects. The lead agencies are to participate with NEMA in monitoring environmental phenomenon, industries, activities and programmes, in order to make assessment of the changes and impacts, in the environment.

Thus by implementing the regulation for monitoring all projects that have been licensed will lead to effective control of pollution during operations of a project, manage pollution in the country, and enable successful enforcement in the case of violations and committing of environmental offences.

**a. Constraints of environmental monitoring in Kenya.**

Monitoring requires trained personnel in the field of inspections, activity, industry, or programme. The task requires enough personnel to make 'on sport' and periodic inspections. It equally requires trained 'environmental analysts' to work in the 'designated laboratories'. There is also a need for enough laboratories for quick analysis and results. The needs as such, call for financial resources to re- orientate the current inspectors in the inspectorate departments of the lead agencies with environmental considerations, for a start.

The said inspectors and analysts, once gazetted will be workers of NEMA. The constraint is sharing the said employees with the lead agencies in-terms of employer's liabilities.<sup>158</sup> To date, only a list of inspectors has been drawn for approval before gazettment to enable the regulation of monitoring projects with EIA licences. It is not known when the gazettment will take place. NEMA has not recruited analysts for environmental purposes and has only a few designated laboratories. The explanation given for the slow process of having the appropriate staff is lack of financial resources.

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<sup>157</sup> section 64[1] [a] [b] and [c] of EMCA

<sup>158</sup> Information obtained from the legal department of NEMA head office Nairobi.

These constraints are further compounded with the fact that the inspectors, once gazetted if they are to serve as prosecutors in the courts of law, must be trained as such and approved by the Deputy Public prosecutor. The inspectors must be gazetted as public prosecutors in order to prosecute offences and violations noticed during their work in monitoring. The other constraint in monitoring is lack of equipment to preserve and transport samples for analysis, monitoring gadgets, installations and machines for spot checking.

Further monitoring without environmental standards in place does not control pollution. The essence of monitoring is to check whether environmental standards are being complied with in the first place and what impacts the allowed standards have had in pollution control or if not, what adverse effect has taken place due to allowed or fluted limits. The major constraint therefore is the lack of the environmental standards to allow meaningful collection of data for analysis.

#### **4. The nature and role of implementing Environmental Audits**

The major role of environmental Audit is to reveal or determine the potential environmental liabilities of a programme, activity or project. It assists in assessing the environmental costs of production.

Environmental Audits may also be called Eco- auditing. It may be a voluntary exercise on the part of the project, activity, and programme owner. However, it is a requirement by the government on all projects that might have significant effects on the environment. It is to be supervised by the regulating agency [NEMA]. thus the regulating agency has complete control of pollution from activities licensed to operate.<sup>159</sup>

For voluntary schemes, EA is part of environmental accounting process where by the project is screened to determine its potential environmental liabilities, and that of its sponsors. The scheme may be demanded by the financiers of the projects, or insurance companies covering environmental liabilities. It may be voluntary for a company to asses the impact of its activities on the environment which impacts take into account environmental costs of production, which otherwise ordinary accounts treat as zero-priced resources. These voluntary schemes are mainly found in Europe within the European community countries.<sup>160</sup> In Kenya the voluntary schemes are

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<sup>159</sup> Part VII section 68[1] of EMCA.

<sup>160</sup> Principles of International Environmental Law by Philippe Sands second edition pg 868.

encouraged by the Kenya bureau of standards, which gives awards and recognitions for advantages in the consumer market.

EAs have the advantage of disclosing information on the use of natural resources. For instance, what the environmental policies and programmes of the company or activity holder are, what environmental improvements have been undertaken, what the financial impacts of environmental measures are, and what the responsibilities of clean up measures are. For instance, if implemented, it should reveal what environmental objectives the lead agencies in charge of solid waste are. Since it is a periodic exercise, it will reveal what measures the project owners have taken within the 'environmental year,' to rectify situations.

The major role of the EA to control pollution is that planning for environmental costs is done to cater for the sustainability of the project. The project owner will endeavour to cut down on costs due to environmental liabilities, such as fines, clean up measures, heavy awards of damages, and even the costs of closing the project due to poor environmental practices. The project owner instead, will put resources to training personnel for enhanced and safe performance of operations, purchase equipment or chose alternative methods of operations that will enable compliance.

The EA have the effect of enabling the regulated community to self regulate. The Audits enables the internal management of the company to properly manage their operations, retrain their staff, in order to keep away pollution accidents or liability costs on environmental matters. This reduces the costs of the regulating agency whose resources are otherwise strained to supervise all projects to ensure that they are doing the audits and putting improvement measures in place as demanded by the lead agency and NEMA. The Audits reveals the equipment that projects may need for better performance in the environment.

The offences and penalties drawn for the enforcement of EA regulation are those relating to inspectors, and to records,<sup>161</sup> the penalty for the offences relating to inspectors, say in obstructing them in the cause of their duties, failing to comply with any lawful order such as an improvement order that they may order as by law, impersonating them, refusing them access to records, or misleading them, will if

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<sup>161</sup>See section 137 and 139 of EMCA.

convicted imprisoned for maximum twenty four months and or pay a fine of at most five hundred thousand.

The penalty for failing to keep records that are required to be kept, altering fraudulently and making false statements therein, is if convicted maximum prison term of eighteen months and or a fine of Kenya shillings five hundred thousand.

**a. Constraints of implementing Environmental Audits**

The major constraints of implementing EA in the country are the lack of personnel, in terms of inspections, and analysts to deal with the records submitted for analysis, and supervise the implementation of improvement orders issued pursuant to the EA of the companies and activities submitted. The district and provincial offices of NEMA are manned by individuals expected to deal with the reports from the districts and provinces. The reports are first of all received in the head office of NEMA and sent to the provinces for follow up by the provincial environmental officer.<sup>162</sup>

Further constraints are non-compliance to do EA by some companies and activities. The director general has issued notices for projects and activities to do Environmental EA with a threat to prosecute the defaulters by a given date. When the date reaches, no prosecutions are done on the defaulters. This has the effect of watering the requirement as a serious regulation to be complied with.<sup>163</sup>

The other constraint on the EA regulation is the attitude of the regulated community that the requirement is for NEMA and not for their own benefit to assess their environmental performance. This is evident from the fact that majority of the activities and industries that have submitted the EA reports are companies with multinational affiliations often to comply with international standards.<sup>164</sup>

The effects of these constraints on pollution control efforts cannot be overlooked. For instance, it is hard to know the nature and extent of polluting activities in the country, since without the EA, NEMA cannot take stock of the extent and nature of pollution of various activities to enable planning.

Without EA, it is not possible to issue environmental improvement orders on activities and programmes. It is not even possible to assess the need for improved

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<sup>162</sup> Coast Province NEMA office has several EA reports with pending supervision work on issued improvement orders.

<sup>163</sup> The current notice was to expire on the 31<sup>st</sup> October

<sup>164</sup> Bamburi Portland cement, Kenya Cannors Ltd

technology or where to advice on adoption of alternative measures to control pollution.

Thus in this chapter we have seen the importance of implementing the regulations of Environmental Impact Assessment [EIA], Monitoring procedures after the issuing of EIA licence, and the necessity to ensure Environmental Audits take place on every activity that will have significant impact on the environment. The very nature of these regulations is that they control pollution. From the constraints we have seen weak efforts in their implementations, which will have adverse effects on enforcement procedures in the event of violations of pollution control law.

In the next chapter we examine the nature and role of implementing environmental standards to control pollution, and efforts to enforce pollution control law.

## **CHAPTER FOUR**

### **FACILITATING FACTORS FOR INSTITUTIONS IN LINE OF IMPLEMENTATION AND ENFORCEMENT AND FISCAL INCENTIVES FOR COMPLIANCE**

#### **1. Facilitating factors to enable compliance with pollution control law**

The concept is that, command and control approaches alone cannot achieve compliance to pollution control law. The government need to combine the command and controls together with facilitating factors to enable easy and effective administration of the commands on a community that will find it easy to comply having been enabled to do so.

Facilitating factors in this study, refers to those that enable the government institutions to implement the pollution control law, while for the regulated community such as industries are those that enable them to comply with the pollution control law. For the people communities, the facilitating factors are those that enable them access environmental justice.

Implementations and enforcement of pollution control law in the regulatory process of environmental law, typically refers to the work and role of government institutions. The institutions meet constraints in their endeavour to implement and enforce pollution control law. This results in the institutions poorly acting out their roles as such. It is the duties of the government to implement its policies by enabling its institutions implement those policies.

In this chapter we examine the role of facilitating factors such as fiscal incentives for the regulated communities and the institutions in the line of implementation and enforcement, environmental education and accessing environmental justice through the judiciary. We also deal with the role of specific institutions in the implementations and enforcement processes. Highlighting their constraints and what this means to pollution control efforts intended under EMCA.

We shall then give a summery of the study in terms of our findings, our conclusions and recommendations.

**a. Fiscal incentives and disincentives for industry, programmes and activities to enable compliance**

Facilitating factors to enable compliance in Kenya include fiscal incentives and disincentives, civil and criminal litigation as disincentive, Information instruments, environmental education and awareness. The main facilitating factors that the government means to offer the regulated community to enable them comply with pollution control law among other laws are fiscal incentives and disincentives, stated in EMCA. These refer to customs and exercise, tax rebates, tax, and user fees.<sup>165</sup>

The giving of Fiscal incentives by the government is pegged on the government's fiscal policy, which are the government's aims of the financial year, to manage the level of total spending, That is, the aggregate demand in the economy. It will also depend on the government its expenditure that will determine whether the government will have a budget deficit in a financial year and has to borrow.

To implement the fiscal policies the government may use different methods: The government may use changes in its pattern of spending to boost or slow down the economy depending on the demands, by increasing or decreasing government expenditure: or the government may make changes in direct taxation levied on individuals or businesses, increase or decrease income tax rates to encourage or discourage spending on goods and services as this will lower or increase the level of aggregate demand:

Or the government may make changes in indirect taxation, that is increasing or decreasing Value Added Tax [VAT] in order to raise the price of goods that will result in discouraged spending, and raise revenue to finance government spending plans. This in return increases the costs of production.

Fiscal incentives initiatives to enable compliance in Kenya remains inadequate, as the government has always had a budget deficit and employs all the methods to raise revenue for its high expenditures. It means that, its grants, budgetary allocations, say to the lead agencies and NEMA, will not be enough since it has to borrow from

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<sup>165</sup> Section 57[1], [2][a] - [d] of EMCA.

banks, public or increase foreign aid demand, to service its increased Public Sector Borrowing Demand (PSBD).

The regulated community such as industry have to bare the plant as they are instead of receiving customs and exercise waivers, tax rebates or lowered fees or decreased demands on the deposit bonds, are heavily burdened with increased customs and exercise on imported capital goods, increased VAT, and prescribed heavy fees heavy fines and penalties on almost everything, thereby discouraging the importations, of environmentally friendly products, and encourages environmentally harmful products that enable harmful practices to the environment.

The importations are further constrained by Intellectual Property Rights (IPR) pegged on them that is unaffordable by the government and the industry. For pollution control this is a blow as it means that the regulated community can only afford second hand or generic products that do not meet the requirements of the environmental quality standards.

These include second hand machineries as mobile or fixed installations that have no controls for emissions, for instance Smokey automobile such as diesel engine trucks matatus or cars using leaded fuel, and boilers that use firewood and coal.

The government means well in enacting for the fiscal incentives under EMCA, but the issue is still the replenishing the various funds without hurting the regulated community and using the funds for the objectives intended.

The tax and user fees are deposited in the National Environmental Restoration Fund, (NERF), and may act as disincentives. The fund is made of deposit bonds from the industry, programme or activity, found and enlisted that in its operations, it is negative to environmental enhancing and safeguarding. The bonds may be confiscated, and licence cancelled in the case of habitual offenders. The fund is also made up of fees levied to industry and on applications by project proponents, and from donations made specifically to the fund for its objectives. The objectives of the NERF can be seen in what it is intended to be used for, that is, for mitigation of

The government is also to enable and avail other fiscal incentives referred to under EMCA. This could be referring to the grants, gifts, donations, or endowments to be received by NEMA, <sup>166</sup>and into the Trust Fund, as will be specifically designated.

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<sup>166</sup> Section 14[c] of EMCA.

These are meant to facilitate research for better management of the environment, capacity building, environmental awards, environmental publications, scholarships and grants.<sup>167</sup> The other funds are those that may be received into the Fiscal incentives may refer to monies to be granted by the minister for environment into the General Fund [GF], and grants out of monies provided by parliament for the expenditure by NEMA of the GF. These include the budgetary allocations for NEMA to enable it function through the environmental committees, which should regard the accounts of NEMA prepared during its financial year and estimates of revenues and expenditure for the years from the GF.<sup>168</sup>

The fiscal disincentives have the effect of inducing the industry, activity and programmes to comply. It seems from the foregoing account that in the Kenyan position, the disincentives are more than the incentives. The owners of Industry, programmes and activities have got to see the need to comply with the law. This need has been emphasized thus

“Easy measures, such as frightening professionals not to apply the laws, regulations or standards of the country, will not buy industry time indefinitely. After all industry should be aware that such officials and the company itself may, in many countries be sued by a member of the public under emerging laws which allow such suits without the need to show specific interest or personal injury.”<sup>169</sup>

In other words, with introduced environmental law and effective enforcement measures, the government may drastically close down some polluting industries. It has been reported that the republic of China closed or suspended operations of sixty thousand industries that had been polluting its environment between June 1996 and august 1997.<sup>170</sup>

This scenario is likely to happen in Kenya if environmental awareness and education goes up to the grassroots. Environmental education and awareness may put up consumer demands and consumer pressure on both the government and industry.

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<sup>167</sup> Section 24[4] of EMCA

<sup>168</sup> Section 20[3], 20, 21. of EMCA.

<sup>169</sup> ibid note 103

<sup>170</sup> industries and enforcement of environmental law in Africa UNEP/UNDP joint project on Environmental law and institutions in Africa pg 4

The industry for instance, will need to benefit from that awareness with technical and marketing benefits which are associated with participation in voluntary programmes. The awareness on the other hand may act to the detriment of industry, programmes and activities, in the event they do not adjust to the new requirements. In that, with the awareness at the same time, with the proposed constitutional reviews coming into effect as the new constitution in the country, will enabling easy access to environmental justice to all people, through public interest litigations. Most industries, programmes and activities will be found on the wrong footing.

Instances of these are many: the dumping sites for unsorted and untreated waste, the open sewers in the municipalities, the discharges of effluents into water resources such as raw sewerage into the coastal waters by beach hotels and beach front properties, the uncontrolled digging of boreholes and sock pits in urban centres, and flouting of environmental quality standards, such as emissions from installations mobile and stationery. The list of polluting activities that are currently going on can be drawn from the account on standards in chapter three above.

Litigation by civil society with awards of damages by the courts that will have industry and activities budget for legal costs will motivate industry to have an appreciation for environmental concerns and self interest to minimise litigation costs. Counsel is on the industry to determine and review with the government what incentives they require in order to upgrade their equipment and improve the efficiency of their delivery as sustainable development, or risk being closed down.<sup>171</sup>

**b. Information based instruments and Environmental education as facilitating factors for compliance**

Other facilitative factors that would enable compliance are information based instruments and a wider policy in education to include environmental education.

Information based instruments serve the purpose of informing the public of environmental issues and acts as economic instruments. Information based instruments include environmental awards and publicity of the same. They have been defined to mean:

“measures taken to enhance awareness on environmental issues, such as technical assistance programmes, advertising, eco-labelling”,

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<sup>171</sup>Ibid

performance reporting, group empowerment programmes, and small business incentive schemes”<sup>172</sup>

Publicity is a facilitating factor especially if the enterprise has international links such as a hotel for tourism promotion. Praising in the media of a hotel with sewage treatment plant and therefore not discharging raw sewerage into the ocean, has happened recently sending a message that those Hotels not praised engaged in unfriendly environmental practices.<sup>173</sup> The Kenya bureau of standards has a form of information based instrument with regards to manufacturing standards for industries with accrued benefits of advertising the company services and products.<sup>174</sup>

The information based instruments play the role of inducing projects programmes and activities to stop polluting activities by installing the appropriate plants and machinery, and therefore clean production. The effectiveness of information based instruments depends on the consumer market of the services and products to have the appropriate environmental education, without which there will be no pressure or demands on the culprits to change their polluting practices.

Environmental Education has been defined to include:

“The process of recognising values and clarifying concepts in order to develop skills and attitudes necessary to understand and appreciate the interrelatedness among man, his culture and his biophysical surroundings”<sup>175</sup>

The need for environmental education is universal to all the regulated and the regulator as well. The regulator has to keep at the pace of the regulated in Kenya since industry has highly specialised personnel that must be monitored and their compliance supervised by often junior staff of the lead agencies with meagre salaries. Therefore creating a well informed and adequately remunerated community of inspectors, analyses and EIA experts among others, is the priority of NEMA.

For a start, provision by government of the necessary infrastructure, and quick delivery of services, Computerisation of processing programmes eases on the bureaucracies that are typical of government offices. This will facilitate good working

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<sup>172</sup> Ibid note 114 pg 51

<sup>173</sup> this information was obtained at NEMA offices Mombasa and at Severin Sea Lodges Hotels

<sup>174</sup> Information obtained at the Kenya bureau of standards mombasa.

<sup>175</sup> Section 2 EMCA on interpretations

environment and professionalism in handling matters of the environment. This can be achieved through environmental education of staff serving in the lead agencies.

The environmental education can be achieved in many ways. Published and disseminated manuals, building national awareness on the importance of sustainable use of the Natural Resources (NR), codes, advice, technical support, and incorporate emerging knowledge in planning.

Further on environmental education means advancing and engaging in Research and Development (R&D), by properly and adequately funding the environmentally related research institutions. It further refers to funding education through bursary and scholarships, the government at the moment allocates one billion Kenya shillings bursary in education, out of which two hundred million goes to supporting Kenyan students outside the country as scholarships. Considering the need, the allocations are not enough to support R&D.

The research to further environmental education would otherwise be in the form, of and includes projects based at grass root level where pollution is occurring. The question is how many of these projects which would otherwise build capacity at the national and local levels have been initiated by for the environmental education purposes. For instance the project to curb the plastic menace in the country can hardly take off as intended by NEMA due to lack of funds.

There are only short measures of cleaning rivers and dams that are short lived, while the water hyacinths in the Lake Victoria is an on going project which can only be sorted out by solving the eutrophication of the lake due to raw sewage discharged into the lake from the environs such as Kisumu city, and the agricultural wash ups from the heavily mechanised large scale farms using pesticides and fertilizers that have ammonia.<sup>176</sup>

The Ugandan NEMA has had successful grassroots projects for the purposes of environmental educations.<sup>177</sup> Such projects include poverty reductions and encourage good environmental practices.<sup>178</sup> These are especially necessary now more than ever in view of the constitutional amendments that will take management of the environment into local communities and people. The education would be used to build capacity for that purpose at the local levels in that the devolution of powers

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<sup>176</sup> Principles of International Environmental Law second edition pg 335-336 Philippe Sands

<sup>177</sup> report on synergy of activities on Environmental Activities on Environmental law and institutional issues

<sup>178</sup> *ibid*

means that the district governments will have a say in the optimum utilisation of the resources within the district.<sup>179</sup>

For the industries environmental education would boost the performances of the industries in their operations. In that, Lack of education in terms untrained factory operators managers and supervisors may lead to high rate of accidents, poor record keeping and incompetent (EA) which may lead to offences in the monitoring regulation requirement. A good environmental industrial training will be a facilitating factor that will enable compliance to the law of pollution control.

It will take care of the problem of ignorance, incompetence by poorly trained operators and inadequate supervisions. Industries and activities have undertaken some steps towards this direction, due to information on EA and to meet ISO14000 standards. They include for those who can; using Best Available Techniques([BAT)<sup>180</sup>, Best Environmental Practice, (BEP),<sup>181</sup>, Best Available Technology Not Entailing Excessive Cost (BATNEEC),<sup>182</sup>, Clean Production Methods, (CPM)<sup>183</sup>, Environmentally Sound Management, (ESM),<sup>184</sup> and Best Available Technology Which are Economically Viable. (BATW E V).<sup>185</sup>

The results are visible in terms of reduced pungent smell from Webuye paper mills, Kenya meet commission at Athi River, dust emissions from Bamburi Portland cement factory,<sup>186</sup> municipalities on going beatification programmes by planting trees and flowers to cleaning efforts to enhance the scenic value of the a few urban centres free from pollution, contracting private companies to collect and dispose off municipal waste.

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<sup>179</sup> gazette supplement , 2005 of the proposed new constitution of Kenya, articles, 92[d], 211[1][3]

<sup>180</sup> 1992 OSPER COMMUNICATION Art 2(3) b and Appendix 1, supra philipe sands

<sup>181</sup> 1992 OSPER CONVENTION Arti 2(3) b and Appendix 1 and 1992 black sea convention, supra philipe sands

Arti 3(3) and annexure 11

<sup>182</sup> 1992 Baltic Convention Arti 3(3) and Annexure 11 and Council Directive, 84/360/EEC on the combating of air pollution from industrial plants. OJ L188, 16<sup>th</sup> July 1984,20 Arti 4.

<sup>183</sup> 1991 BAMAKO Convention, Arti 2(8) 2 4

<sup>184</sup> Basel Convention Arti 2(8) 2 4 (2) (b)

<sup>185</sup> 1979 LRTAP, Convention Arti 6 and 1988 NOx Protocol, Arti 2

<sup>186</sup> supra

## **2. Facilitating factors and role of government institutions in the implementation and enforcement**

Implementations and enforcement of pollution control law in the regulatory process of environmental law, typically refers to the work and role of government institutions, such as NEC, NEMA, NET, PCC. The judiciary's role is dependent on the role of these other institutions communities and private sector to access environmental justice.

The institutions meet constraints in their endeavour to implement and enforce pollution control law. This results in the institutions poorly acting out their roles as such. The private sector, communities and people have constraint to access environmental justice.

The constraints include: inadequate resources both human and financial, political will in favour of the environment, co-ordination and cooperation amongst the said institutions and departments for effective operations, in adequate involvement with the private sector, and Non-Governmental Organisations, (NGO) and communities for better management of the environment.

### **a. The National Environmental, Management Authority [NEMA] in implementation and enforcement**

NEMA is the principle instrument of government in the implementation of all policies relating to the environment. This means, NEMA is to play the key role in implementations of the pollution control law among other areas of environmental law, as formulated by the NEC. The question is how this has been realised with the lack of rules regulations and procedures for enforcement to control pollution.

To be the principal instrument as such, NEMA has the legal clout as the institution charged with the responsibility to supervise generally, and co-ordinate in matters relating to the environment.<sup>187</sup> This means that NEMA will work with the lead agencies and stakeholders to achieve the objectives of a clean and healthy environment. That is, have horizontal liaisons with the lead agencies at national level and with them up to the grassroots levels, and with the private sector, higher institutions of learning, NGOs, and communities.

NEMA is the principle implementer of the EIA, EA, and in charge of monitoring. The DG gives written consents regarding protected areas, issues restoration orders,

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<sup>187</sup> Section 7 [1], [2] of EMCA.

and, revokes, or denies EIA licences.<sup>188</sup> In order to do this NEMA enlists the services of the private sector by approving and gazetting EIA practitioners specialised in each field. It also designates laboratories appoints inspectors and analysts. NEMA must have all these in place for it to successfully play its role in accordance with the law.

NEMA has got to work through the various committees that are representative of the lead agencies and the private sector communities and people. The Director General of NEMA is the secretary to the NEC which is responsible for environmental policy formulations,<sup>189</sup> therefore participates in policy formulations. For implementation, this means NEMA can push their agenda for implementations of environmental policies especially to meet their goals and objectives within their mandate.

For instance, can table and push the agenda for fiscal incentives and disincentives to the minister for finance through the NEC, in that, NEMA is better placed to assess the need for fiscal incentives during the compliance promotions, through its committees such as the National Environmental, Action Plan Committee (NEAPC), in which also the DG is the secretary.<sup>190</sup> It is also worth noting that this same membership forms the membership of the national environmental action plan committee that is formed for NEMA.<sup>191</sup>

NEMA is to carry out its mandate by disseminating information, environmental education, and carry out projects and programmes for this purpose, and by promoting and supervising compliance, through its committees that are to be posted up to the district level.<sup>192</sup>

NEMA is supposed to receive grants, gifts, donations or endowments from which it can make legitimate disbursements. This means, it can use this resource for environmental awards, dissemination of the regulations and carry out its projects and programmes. The question is how far it has managed to do these, considering the issue of resources.

NEMA has the greater role in implementing the EIA only requesting for comments from the lead agency in considering an EIA study report, and receiving advice from the standards and enforcement review committee, for revocations, cancellations or

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<sup>188</sup> Part VI section 58-67 of EMCA.

<sup>189</sup> Section 5 [a], [b], [c] and [d] of EMCA

<sup>190</sup> section 37 [

<sup>191</sup> Section 37[1] of EMCA.

<sup>192</sup> Section 9[1],[2], [a] –[q].

suspensions of EIA, licences. For these, appeals to the NET are to be against NEMA.<sup>193</sup>

The fact that NEMA cannot be sued for issuing an EIA licences to a project on whom criminal or civil liabilities attach in that project, means that NEMA enjoys some immunity that enables it to carry out the implementation of EIA process with ease. The question is whether this has contributed in anyway to NEMA issuing EIA licences in cases where otherwise they should not have issued any or with stiffer conditions.

The appeals against NEMA in the tribunal, may ratify NEMA's decisions, regarding licences, environmental restoration orders, and improvement orders. Besides, the fact that the high court may issue restoration orders means that in this sense, NEMA is carrying out a task equivalent to that of a court of law for the benefit of the environment. What's more, it enforces or supervises restoration orders, and in the event it's not being complied with, restores the environment to recover the costs as a civil debt from the person responsible.

i. **Constraints of the National Environmental Management, Authority NEMA in implementations and enforcement of pollution control law.**

NEMA's implementation and enforcement roles are severely limited due to several reasons: The mandate is overwhelming considering its meagre budgetary allocation from the central government.<sup>194</sup> The resources would enable NEMA carryout grassroots project that would be used to educate people on good environmental practices. For instance, clean and healthy environment income generating activities and poverty reductions programmes.<sup>195</sup> NEMA has not been able to push their agenda through the NEC for fiscal incentives.

All the lead agencies with their constraints below stated, have got to be supervised by NEMA. But this is hardly possible without the co-operations of the said lead agencies. Unlike the Ugandan NEMA, the Kenyan NEMA does not have co-operations of the lead agencies to the extent of having effective horizontal linkages with the sector ministries. In that, apart from participating in the NEC, and the standards enforcement review committee, NEMA is severely limited in linkages with the ministries for effective management of the environment.

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<sup>193</sup> Sections 67 and 129 [2] of EMCA.

<sup>194</sup> The budgetary allocations information was obtained at NEMA offices in an interview with One of the officers.

<sup>195</sup> One of the goals set by NEMA as found out *ibid*

The provisions are to have in the provincial and district committees' representatives from the various ministries as members to manage the environment and attend to matters as may be directed and gazetted. To date NEMA has not posted its officers to all the districts. Those posted to the provincial levels also serve the districts.

The said provincial officers severely lack in resources to manage the environment in the provinces and the district level. For accidents and emergencies for instance, they have got to rely on other government departments. They do not have supporting staff for their operations that is no secretaries, no messengers.<sup>196</sup> These are the officers expected to stand in as inspectors, and officers to follow up on improvement orders issued to plants and industries on receiving EAs. They are to do environmental education up to location level. Their work is overwhelming and their resources meagre.

The question is whether it has established meaningful linkages with academic institutions NGOs, and other entities at national level. A few workshops, seminars, and conferences have been carried out to create awareness amongst especially with the industry, lawyers and judges.<sup>197</sup> These however are not enough as more training is needed for both short term and long term needs in the implementation and enforcement of the law.

NEMA need be up to the location level where polluting activities are going on. The inspectors need be every where with the necessary technology and a good number of laboratories that would give results and reports necessary for prosecutions. This is judging from the responsibilities assigned to it under the Act, the implementations of the Act, the enforcement machinery and the direct supervision of all the lead agencies and coordination's for policy making. Its mandate is as big as that one of a ministry.

This observation is made the basis that unlike other authorities and like all ministries, it is the only authority that must deal with all lead agencies, and be in every part of the country at the same time ensuring. to have NEMA 's presence be felt all over the country and public to know what it stands for need resources for compliance promotions as the implementation process goes on.

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<sup>196</sup> At least the provincial officer NEMA Mombasa has no supporting staff.

<sup>197</sup> Supra report on industry and enforcement of environmental law workshop held in kisumu and machakos, for judges and lawyers in Nakuru and Mombasa.

Instead NEMA cannot afford to have officers posted to all districts leave alone all provinces served by at least one officer at any one time. Like other government administrative machinery getting its funding from central government, NEMA has to budget for the workers pay and pensions, utilities or overhead expenses. Due to the shortage of funds, it cannot at the moment hire consultative services and meet other budgetary requirements to be met.

Information obtained,<sup>198</sup> at the NEMA offices during visitation for purposes of this study were to the effect that, the budgetary allocation from central government was so limiting that NEMA has to prioritise its institutional implementing and enforcing activities. From the current budget NEMA intends to train their district environmental officers to double up as inspectors, investigators, and prosecutors. This is yet to take place as the implementation process is underway before the enforcements in the courts on environmental crime takes off.

NEMA which can be sued and can sue may need to higher legal services should for instance, the cases filed against it in the tribunal, proceeds to the high court on points of law.<sup>199</sup> The legal officers serving the authority cannot go to the high court due to the provisions of the advocates act.<sup>200</sup>

NEMA is now the main licensing body for projects and activities after an Environmental Impact Assessment [EIA] has been done, in accordance with EMCA, but it only issues and EIA licence or deals with environmental issues alone. The specific ministry departments are still responsible in their various disciplines, to issues the projects activities and programmes other licences as required in the sector specific laws. And even where EMCA has not become operational, the lead agencies are regulating, until EMCA is operational in respective areas after implementation.<sup>201</sup> These makes starting a project burdensome to the investor, in that, there is no one stops shop for licences, or some sort of an integrated licence. This makes investors dislike NEMA because it's the only authority that requires so much before issuing a licence.

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<sup>198</sup> Visit to NEMA Nairobi offices on the 12<sup>th</sup> of July 2005

<sup>199</sup> section 7 [2] [a]

<sup>200</sup> the advocates Act Cap 16 laws of Kenya .

<sup>201</sup> See section 148 of EMCA. The laws are applicable subject to modifications to accommodate EMCA when it comes into force.

For enforcement and administration roles , of environmental offences and offences relating to standards, NEMA and the lead Agencies and all others can only wait for the standards and enforcement review committee to recommend standards to NEMA , which NEMA will then ensure are administered by the regulated community . This makes the provisions under EMCA, on environmental offences and offences relating to standards meaningless as they cannot be enforced owing to lack of enforcement by NEMA, under EMCA.

Most of The constraints facing NEMA in implementations can also be found amongst other implementing institutions herein especially the lead agencies to which we now turn to. For NEMA the constraints are almost fatal to its role as the principle government instrument to implement the law on pollution control amongst others.

**b. The lead agencies in implementation and enforcement**

The term lead agency refers to any government ministry, department, parastatal, state corporation, or local authority, in which any law vests functions of control or management of any element of the environment or natural resources.<sup>202</sup> Instances of these agencies otherwise enlisted under EMCA, include the ministry of environment and natural resources, economic planning and industry, finance, health, water resources, agriculture, education, research and technology, local government, public administration and law enforcement among others.<sup>203</sup>

The lead agencies are enlisted for implementation in that the operational functions for environmental management such as public health, sewage disposal, and water pollution control continue to be carried out by government departments of the relevant sector lead agencies from the national, provincial, district and location levels. These are because the sectors have already in place, the infrastructures and expertise in the respective areas of competence. They only need appraise themselves with new requirements under EMCA.

For purposes of implementation of pollution control law, these present a good coverage in the management of the environment. Indeed in environmental policy formulations, all permanent secretaries from the lead agencies are members of the NEC, among others.<sup>204</sup> The lead agencies therefore form the management team that sets environmental objectives and goals to achieve those objectives.

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<sup>202</sup> Section 2 of EMCA.

<sup>203</sup> First schedule EMCA PG 171

<sup>204</sup> section 4[1] b,

The activities of these lead agencies in so far as managing the environment is concerned apply the sector specific laws already in place, subject to modifications as may be necessary to give effect to EMCA.<sup>205</sup> EMCA provides the legal framework for the management of the environment from the time it came into force.<sup>206</sup> In so far as implementing the pollution control law is concerned, this means that the lead agencies are to shed off the sector specific laws as they give effect to EMCA. It means statutory amendments to the sectoral laws to prescribe new rules, procedures and practices, to be in harmony with EMCA.

Most projects and programmes needing environmental management emanate from the lead agencies.<sup>207</sup> Most investors approach the relevant lead agencies for, permits, licences and other authorisations for the implementation of the projects. The lead agencies provide most members of the standards and enforcements review committee responsible for the formulations and recommendations of the environmental standards, guidelines, criteria and procedures and classifications to NEMA for enforcement.<sup>208</sup>

As far as enforcements are concerned, NEMA rely on the personnel from the lead agencies for implementation and enforcement, to wit give there written comments on an EIA to the director-general on request by the director during processing of EIA licence, and appointment of environmental inspectors.

**i. Constraints of the lead agencies in implementation and enforcement**

The biggest constraint of the lead agencies in implementations and enforcement is the change of laws and regulations, from sector specific laws to new regulations procedures and requirements under EMCA. Most of the regulations under EMCA have not been formulated; the lead agencies are still applying the old environmental laws that are sector specific.

For enforcement, this means that the old penalties are still applied in the case of prosecutions which are still under the old offences in the penal code. Only a few statutes have been repealed such as the water act, parts of the local government act,

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<sup>205</sup> section 148 EMCA

<sup>206</sup> supra

<sup>207</sup> Second schedule EMCA

<sup>208</sup> Third schedule EMCA.

and the physical planning act.<sup>209</sup> Even then the water new water act is yet to be implemented as it is undergoing the transition period and most regulations not formulated as some, such as the water standards are dependent on the implementations under EMCA. This means that for water pollution for instance, despite the new penalties, cannot be applied until the water standards have been gazetted for application and enforcement.

The other constraint is lack of resources to retraining their staff, to reorient them to the new environmental management law. The training for staff is necessary as the lead agencies are a regulated community, engaged in many projects, activities and programmes that need undergo EIAs and be monitored.

The lead agencies face the risk of being sued for non-compliance to the law. The training of staff is necessary also because the lead agencies need own the environmental law as they are engaged in day to day activities that have a bearing on environmental degradation. This will also make them appreciate the mandate given to NEMA in the implementation and enforcement, and will ease the task of NEMA on supervisions and co-ordinations with the lead agencies. For instance, the lead agencies need train staff on the specialised area of EIAs and at every stage of the EIAs such as, natural resource scientists, sociologists, economists, environmental inspectors, environmental lawyers, administrators, and judicial staff including magistrates and judges.

The resources will be for training this staff for long-term and short term needs. For instance, there is need for resources to finance workshops, seminars, colloquiums, and conferences for short-term needs, and tailor-made courses in the environmental field that will meet the civil service manpower and capacity for long term needs.

In connections with this, the lead agencies need to borrow a leaf from their Ugandan counterpart and establish as their responsibility, Environmental Liaisons Units otherwise referred to as [ELU], to act as focal points for liaisons with NEMA. The lead agencies site lack of resources for this endeavour.<sup>210</sup>

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<sup>209</sup> [preamble ] of water act 2002 repealing the water act [cap 372], and certain provisions of the local government act cap265 and for related purpose.

<sup>210</sup> Information obtained from the water department Mombasa offices, ministry of agriculture mombasa. NEMA offices Nairobi and Mombasa offices.

The current link with NEMA through the provincial and district environmental committees are not effective as the appointees, apart from the NEMA officers, are not permanently stationed in the environment offices, in that, they are permanent employees of the lead agencies and may not be responsible for the day to day management of the environment. Some districts still do not have NEMA personnel duly appointed therefore have not formed all committees countrywide.<sup>211</sup>

The lead agencies also lack resource for modern equipments, and technology as a regulated community to enable compliancy and as a regulator for administration. The lead agencies lack basic requirements such as serviced motor vehicles, computers and stationery. Data collection and analysis is constrained for lack of analyses' facilities such as laboratories and trained staff. For instance the government chemists are overwhelmed by the number of specimens awaiting analyses that are received from all disciplines enquiry. This takes too long to get critical information. For instance the local government will need tracks and other facilities to collect and sort waste, treat sewage and municipal waste water, otherwise discharged into the environment.<sup>212</sup>

### **c. The Public Complaints Committee [PCC]**

The PCC is established under EMCA as committee of "the authority" NEMA. Its enforcement role is to investigate allegations on the condition of the environment. Those allegations may be against person, meaning corporate, individual or government department, or even against NEMA. It can do these investigations in open proceedings after summoning the parties on investigations of reports received or of its own motion. It is a quasi judicial institution.<sup>213</sup>

The enforcement role of the PCC is summarised in these words

"The committee provides a process for legal empowerment of the public as well as a forum to check and control private and public policies and decisions in order to ensure environmental accountability and consequently, sound environmental management."<sup>214</sup>

In so far as implementation is concerned, the PCC plays the role of creating awareness of the pollution control law, in that, its presence is a statement that

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<sup>211</sup> The officer NAKURU is also in charge for Eldoret, while the provincial

<sup>212</sup> the writer found out in a workshop attended in Nakuru organized by Michael Ochieng

<sup>213</sup> section 32 -36 of EMCA

<sup>214</sup> See paper presented at university of Nairobi symposium on environmental law held at Merica Hotel Nakuru Kenya on 3<sup>rd</sup> -7<sup>th</sup> February 2004. By Francis D. P Situma, PhD Director, Legal services NEMA Kenya.

environmental matters should not be taken for granted anymore. The fact that there is no fee for filing a complaint means that the same means of halting polluting activities can be achieved without incurring expenses by the complainants. There fore in away the PCC enforces the law.

For national environmental policy formulations the reports of the PCC submitted to the NEC, form part of the annual report on the state of the environment that the minister for environment is supposed to table in parliament annually. The data is very important for national planning as it reveals the priority areas to double efforts on and therefore adjust the law and policy to meet the needs on the ground.

i. **Constraints of the PCC in implementations and enforcement**

The PCC is supposed to be all over the country investigating complaints, and of its own motion checking on the environment conditions. It is then supposed to hear the complaints or have forums for the investigations it has carried out of its own motion. They need summon people and convene sessions,

From the assessment of the list of complaints received so far, the PCC is overwhelmed already with the number of complaints it has received.<sup>215</sup> The complaints are from all over the country. Considering that the staff are based in Nairobi and have no representative at the districts and provincial levels, they have to travel at the instance of every such complaint for site visits. This requires financial and adequate human resources. At the moment the PCC which is situated at NEMA premises at the headquarters Nairobi is not able to cover the mandate due to the scarcity of the resources.

Apart from investigating, compiling reports and submitting them to the National Environmental Council [NEC] periodically, there is nothing else the PCC can do about the investigations they have so much laboured for, in that, there report is just a report and not a judgement that is binding on anyone. In this way the PCC is for data collection to give the necessary information for planning. Unfortunately this is not how the complainants wish their complaints to be treated, just data.

It is also worth noting that there is conflict of interest in having the NEC, receive the overall activity report of the PCC which consists mainly of complaints made and investigated against NEC's members. Most complaints are against the lead agencies,

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<sup>215</sup> Volume one of the list covering the period 31<sup>st</sup> January 2002 to 28<sup>th</sup> April 2005

such as, local authorities, whose representative form half NEC's membership. The Director General of NEMA is the secretary to NEC and therefore actually receives the said reports, when the complaints may be against NEMA.<sup>216</sup>

The volume one list shows all the reports they have submitted to NEC the PCC'S reports are very important for enforcement as they show where policing is needed and the inspectors sent to investigate. Without the inspectors being in place as stated herein above, its enforcement role is limited.

The PCC cannot do much when there is hostility between the parties during investigative hearings. Its investigators receive a lot of hostility during investigations, especially if investigating in activity to enforce, by the lead agencies charged with the responsibility to enforce the law on pollution control.

The PCC's investigators have got to rely on other government lead agencies for analysis of samples taken by its officers who go on the ground. This takes very long to get results due to the few laboratories designated for this task. On the list of the complaints there are cases that are noted to have been overtaken by events due to lack of investigations. From this an observation can be made that although it seems an enforcement institution, the PCC's force of the law is not felt in so far as its reports are not binding and enforceable against those they are against.

The only imagined effect it may have perhaps is that it may scare away some violators since this is a PCC whose proceedings are open to the public. But again it does not publish the complaints and circulate them to the public. Unless one goes to the offices to seek the list, one may never know of a complaint that was received and investigated.<sup>217</sup>

d. **The role of the National Environmental Tribunal [NET] in implementation and enforcement**

The National Environmental Tribunal [NET]'s enforcement/implementation role, is engraved with the implementing process of the environmental law as is under EMCA and especially the role played by NEMA. In that, this institution is meant to resolve disputes arising from the specialised field of the environment especially those relating

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<sup>216</sup> Section 32 [a] [i]

<sup>217</sup> Visitations at the PCC will reveal this.

to: refusal to grant licences, transfer of the licence, and imposition of alleged unfair conditions, limitations, or restrictions in the licence under EMCA.

Other disputes relate to revocation, suspension, or variation of a licence, the amount of fees charged under EMCA or the impositions of environmental restoration/improvement orders issued by NEMA. The disputes can also be appeals from the decisions of the Director General of NEMA, NEMA, and the committees under EMCA. The NET may also deliberate on points of law, unusually important or complex matters, upon reference from the authority [NEMA].

The fact that the tribunal may upon hearing appeals to it, confirm, orders or decisions of the implementing bodies under EMCA, or exercise the powers which could have been exercised by NEMA in the matter, means that the tribunal is engaged in the implementation processes much like the said bodies.

The fact also that the NET can vary, or set aside, an order or decision in question made by the said bodies, is engaged in accessing environmental justice to the aggrieved parties by the implementing bodies under EMCA, a necessary pillar in the implementation of the law in that, the law is endeared and accepted by the regulated community and for sustainable development.

The parties to the disputes can be any person including project owners such as industrialists, constructors, miners and any other body or organisation that may be engaged in development activities and programmes relating to the environment the fact that the NET is specialised in the environmental matters, will serve this community well, and faster, therefore hasten the implementation exercise, which would otherwise be delayed in the normal courts. Not to forget, the NET is not bound by rules of evidence and procedures as the normal courts of law.<sup>218</sup>

It is also affordable in terms of expenses compared to the regular courts of law where the filing fees are exorbitant, and the procedures are rigorous. This means that the NET is better placed to solve as many disputes as possible that relate to the environment. The quick dispensation of cases means that development activities can

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<sup>218</sup> Section 126[1] of EMCA

proceed within the law instead of stalling for too long waiting for a decision. This is a facilitating factor for sustainable development.

**i. Constraints of the NET in the implementations /enforcement**

The tribunal's implementation /enforcement tasks have just begun with a few sittings already underway in the year 2005<sup>219</sup>. It was however started in the year, 2002. Although the implementation process of issuing EIAs has been going on, not many cases have been registered in the tribunal.<sup>220</sup> This has been attributed to the slow exercise of issuing EIA licences. It is expected that the number of cases will start increasing with the increasing number of applications for EIA licences.

At the moment the task is to make known to the public the presence of the tribunal and how it can be utilised along side compliance promotions. The major constraint therefore is lack of its publicity, and the resources to promote its services to the public. The resources will enable it have its own premises away from NEMA 's premises so that its not compromised , or so it seen by the general public to be compromised in that, most disputes as per its mandate are against NEMA, the main implementer of EMCA.

The institution officers are expected to travel country wide and render the services once implementation of EMCA is fully underway. It will then need financial and human resources to have its courts and personnel countrywide.<sup>221</sup> The minister may appoint other tribunals for this purpose but the fact that he has not proceeded to do so means that the need has not arisen or that there is short of resources.

The other constraint for the NET in the implementation role is the fact that there is no finality in it's awards although the chairperson is supposed to be one eligible to be judge of the high court of Kenya<sup>222</sup>. Reviews of the awards of the tribunal can be made to the high court on matters of law and that will be final. But if one by passes the tribunal and goes to the high court, one has the chance to go to the court of appeal. This is a constraint in that the tribunal is then relegated to be subordinate to the high

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<sup>219</sup> information obtained from the tribunal in Nairobi

<sup>220</sup> ibid

<sup>221</sup> See section 126[3] of EMCA, the tribunal to sit at such times in such places as it may appoint.

<sup>222</sup> see section 130 [1] of EMCA

court. These are not fair to a body that is so highly specialised and is bound to hear many disputes regarding the sustainable development.

This lack of finality in the tribunal dents its image to the seekers of enforcement of the law. There is also nothing to bar litigants from directly seeking redress in the high court in that , section 123 and section 60 of the constitution give the high court unlimited jurisdiction. Section 3 of EMCA the litigants to seek redress in the high court and not necessarily in the tribunal.

The tribunal is weak in enforcement as its mandate is limited to only hearing and adjudicating upon disputes on revocations, conditions put on licences, monies required under specific conditions, refusal to grant transfers of permits. The rest of the disputes such as compensations to personal injuries due to pollution have to go to the high court. Because of this image of the tribunal, that it's not a one stop institution, for redress, legal practioners and litigants would rather take their complaints to the high courts.

From the foregoing, polluting activities not abated by enforcements under the sector specific machinery and which have been complained about to the PCC, but not yet abated, and also due to the in activity and therefore in effectiveness of the NET, one would look to the normal regular courts for enforcement of the pollution control law.

#### **e. The Judiciary's Role In implementation/ Enforcement**

The legislature, and policy maker intends to make the judiciary one of the institutions for the implementations of pollution control law, in that, the high court is given a place in the provisos of EMCA, not only to render environmental justice in civil remedies, , but also may confirm or vary a decision or order in matters appealed to it from the NET. The NET as we saw above basically deals with the implementation of EIA licences.<sup>223</sup>

The High Court also will hear matters of confiscation of deposit bonds and issue environmental restoration orders grant environmental easements and environmental conservation orders and assess compensation for the easements.<sup>224</sup> The Act also gives the criminal jurisdictions to the subordinate courts, to adjudicate the environmental

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<sup>223</sup> Sections 3 [3] – 5, 130 [3], [4] [a ]-[d], of EMCA.

<sup>224</sup> section 111[1] [2], 112[1] 114, of EMCA

offences and other offences regarding persistent violations of environmental standards and regulations for enforcement.

The subordinate courts have the role of enforcing the environmental quality standards and other environmental offences under EMCA.<sup>225</sup> Like the high court the subordinate courts will wait for the cases to be brought before them for considerations where of upon convictions the appropriate sentences may be pronounced.

These enforcements take place in the subordinate courts. This is an advantage in that the subordinate courts are more than the high courts in the country. The procedures are also different and may be faster to secure a hearing than proceeding in the high court. The high courts however are better placed to supervise the enforcement of their orders than the subordinate courts, in that; the matters might be weighty in terms of costs exceeding the pecuniary jurisdictions of the lower courts. The subordinate courts also have many other criminal cases to handle besides the criminal and civil matters in other fields. There can also be private prosecutions as is in normal criminal cases preferred by any member of the public that may be aggrieved, subject to relater action requirements.

**i. Constraints of the judiciary in relation with institutions in implementing and enforcing**

The constraints are both legal, practical and logistical problems that hinder the administration of justice they include, Constitutional guarantees, locus standi public interest litigations, costs of filing fees and security costs, and costs that follow the event otherwise known as costs that follow the event.

The substantive and procedurals law ordinarily provides, among others, the avenue and tools with which to approach the courts for enforcement of remedies. The constitution, the statutes, the civil and criminal procedure codes with rules of practice and the advocates act, are the relevant laws as tools with which to seek the courts enforcement role to control pollution as intended under EMCA. The requirement to rigidly follow the law while administering environmental justice as in all other cases makes the courts in accessible for instant justice such as is the case in environmental issues.

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<sup>225</sup> Part XIII Sections 137-146 of EMCA.

For the purposes of implementation of pollution control law, the judiciary's role is tied with the role of other institutions in the implementations of the law. In that for appeals to be taken to the high court it depends on the work of the NET, which is also dependent on the work of NEMA and the lead agencies through the standards and enforcement review committee that may revoke EIA licences, and prosecution of the environmental offences and offences relating to violations of set standards.

This means the court cannot be utilised for implementations until the said institutions play their role fully. In view of the few cases that have been filed in the NET, the high court has hardly been utilised for implementations/enforcement of the EIA, restoration, and improvement, and easement orders. And in view of the delay in gazetting environmental standards, the criminal jurisdictions of the subordinate courts have not been utilised.

These institutions need to have adequate financial and human resources to enforce and supervise the enforcement of the court orders. For instance it is intended by the legislature that the court will make the restoration improvement orders. But that NEMA, will supervise the enforcement of the court orders to the extent that, NEMA can use the restoration funds to mitigate the damage and file a civil recovery claim for the costs of restorations.<sup>226</sup> Thus NEMA needs to have adequate financial resources to enforce restoration orders.

The lead agencies may be ordered to supervise implementation of court orders in matters that fall within their sectors. They may also be the ones being ordered to restore the environment. They will require resources as they are public bodies. It has been correctly observed and summarised that,

“These enforcement mechanisms of the judiciary may be weak especially where there is lack of information and resources. This will be compounded with the weaknesses of the institutions in charge of environmental law enforcement.”<sup>227</sup>

In order to secure a conviction Under EMCA, to prosecution may need scientific reports and pictures from appointed investigators. All these enforcement workers and institutions will need financial and human resources for the evidence that the courts

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<sup>226</sup> section 109 of EMCA.

<sup>227</sup> COMPEDIUMS of Judicial Decisions on Matters Related to Environment.

will rely on for convictions and assessments of restoration orders, and cease to operate order others.<sup>228</sup>

Environmental cases are unique, in that, unlike the normal criminal cases, the environment case does not just end at sentencing the offender, but need several steps further by the courts and the prosecutor. For instance, it is a requirement that restoration and improvement orders be supervised to completion.

The restoration process may take several years to accomplish depending on the damage subject of the case before the court. The agency supervising the implementation of the court orders will have to revert to court for applications as the case will remain open until the environment has been fully restored. These may involve the work of experts to carry out their investigations and monitor proper restoration steps. The case of Indian council for environ-legal action and Others vs. Union of India and others, Is illustrative, of the courts enforcement powers in pollution control cases thus,

“The supreme court has to ensure the observance of the law and of its orders as a part of enforcement of the fundamental rights. That power cannot be disputed. If so, the court is competent to make orders necessary for a full and effective implementation of its orders- and that includes the imposition and recovery of costs of all measures including remedial measures”<sup>229</sup>

This means that the role of the court does not terminate at the issuing of orders in the court but may extend for several years or as long as it may take to restore the environment. In the case under reference the courts supervision of its orders went on from 1989 to 1996, when it was decided and the responsibility of supervising remedial actions was handed over to the central government.

Thus during and after the trial, the courts will rely on the competency of investigators, experts reports, prosecutors and lawyers that understand the environmental field and subject.<sup>230</sup> The other institutions such as NEMA, lead agencies and all the stakeholders need to have adequate resources for enforcement.

This constraint is expected in the Kenyan courts in enforcing the environmental quality standards offences by the environmental inspectors, in the event the resources

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<sup>228</sup>Sections of EMCA.

<sup>229</sup> COMPEDIUM of judicial decisions on matters related to environment national decisions vol I AT PAGE 397 judgement of the court was delivered by B .P. JEEVAN REDDY, J writ petition [c] no 967 of 1989

<sup>230</sup>:ibid

fostering collection of data and its analysis are not availed to the inspectors. The courts will have no option but to dismiss the cases as the inspectors cannot secure convictions.

The courts act within the law, following the rules of practice. The courts of their own volition do not supervise enforcement, but have the machinery for such enforcements. For instance execution orders can be sought; forfeited property can be sold in the case of forfeitures.

ii. **Constraints of the judiciary due to technical and logistical issues**

There are other technical reasons that will hinder the courts from carrying out their enforcement role of the law herein. This includes the delays to hear and finalise cases in the current practice of the courts. The delays are major hindrances to giving environmental justice to the parties much to the detriment of the environment. The delays are blamed on many and legitimate factors. These include:

Lack of enough judicial staff in the country as a whole is a problem to administer justice in all other disciplines, and the environmental area will not be an exception. The few judicial staffs are transferred all the time and have to leave cases part heard, only for the cases to start afresh by a different magistrate or wait for proceedings to be typed for the new magistrate or judge to continue hearing from where the counter part left the case. Lack of enough judicial staff has been cited as the problem that riddled the NET for sometime as the officiating officer was recalled and redeployed in the main stream of the regular courts.<sup>231</sup>

The other reason for the delays in hearing cases is the amount of work or cases that a magistrate or judge is expected to hear in a day. The cause list is just too long and encompasses cases from all disciplines. The country only has very few specialised courts that is the family courts and the commercial courts and only in some parts of the country.

The lower courts where the environmental cases will have to be heard has a worse situation in that the magistrates have got to hear and decide on both criminal and civil cases from all disciplines and at all stages of hearing, in that some cases are just mentions, applications; hearings / fresh and part heard.

The high court where prerogative remedies will have to be sought by individuals, communities, projects programmes and activities, also have appeals from the lower

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<sup>231</sup> information obtained at NEMA's Headquarters, during visits to the offices for the purposes of this study

courts both in civil and criminal discipline . This means that the environmental cases are going to add to the cause list. The judges are few and the courts of appeal judges for instance have got to travel country wide to hear the cases from all over the country.

There are other problems sited such as the judiciary's functions being crippled by strikes due to poor salaries by the magistrates. This are the magistrates expected to hear the weighty issue of the environment. The judicial staffs are also not acquainted with the environmental law, to wit, EMCA. Workshops that have trained some of the judicial staff are for short-term measures and for long-term measures there are very few environmental lawyers and judges in the active legal practice.

This reflects poorly on the sort of jurisprudence that is going to be produced in the cases for future references. There is therefore need for training for long term needs. There is a good reason for specialisation in the environmental legal practice by having environmental lawyers and judges, and courts. Apart from judicial staff being inadequate to hear and finalise cases, the courts are not enough country wide. Some of the courts are housed in dilapidated buildings, and lack in basic amenities such as sanitation facilities. The lack finances to construct court houses are sited.<sup>232</sup> The fact that other special courts such as children's courts are located in other places other than the same premises as regular courts makes a good case for special courts for environmental matters with enforcement procedures.

The legislature foreseeing this eventuality of delayed environmental justice has provided for NEMA to take steps to avert irreversible degradations while awaiting the decisions of the courts which may take quite long to finalise cases.<sup>233</sup>

**f. Constitutional guarantees, locus standi, public interest litigation and access to justice**

The substantive and procedurals law ordinarily provides, among others, the avenue and tools with which to approach the courts for enforcement of remedies. The constitution,<sup>234</sup> the statutes, the civil and criminal procedure codes with rules of practice,<sup>235</sup> and the advocates act,<sup>236</sup> are the relevant laws as tools with which to seek

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<sup>232</sup> Children's courts and tribunals are located in places far from regular courts.

<sup>233</sup> Section 130 (3), 143 of EMCA.

<sup>234</sup> The constitution of Kenya

<sup>235</sup> The civil procedure act Chapter 21 and rules, the criminal procedure code chapter 75 .

<sup>236</sup> The advocates act and advocates remunerations order .

the courts enforcement role to control pollution, and get compensated for damages, and restore the environment.

In the Kenyan position, the constitution provides for the right to life to all citizens but not specifically the right to a clean and healthy environment,<sup>237</sup> and corresponding duty to protect and enhance the environment. This means that the right to a clean and healthy environment is not a justiceable right and equally parties may be constrained to exercise the duty to protect and enhance the environment, personally, or through public interest litigation as they must show and prove in the civil and criminal procedure rules that they have locus standi before the court.

The public interest litigation is the means to access the courts to carryout the duty to safeguard the environment even where not directly injured. For instance in seeking prerogative remedies or judicial review one must, among other issues show that he has been personally injured.<sup>238</sup>

The environmental management and coordination Act, unlike the constitutional guarantees as such, has provided that every person in Kenya is entitled to a clean and healthy environment. The law has also imposed a duty on the people under the same provision, to safeguard and enhance the environment.<sup>239</sup> It has also provided that, this is an entitlement which enables any person in Kenya to access various public elements and segments of the environment.<sup>240</sup>

The statute means to confer environmental rights to all people and arm them with the locus standi to approach the courts on behalf of the environment, even if not personally injured in the cause of action before the court, for instance in matters of public interest litigation.

Since however these are not constitutional provisions as such, EMCA cannot confer rights. Equally the duty that is to correspond with that right cannot be exercised without contradicting other laws and rules already in place. In that, the civil procedure act and rules on the issue of locus standi,<sup>241</sup> the criminal procedure codes,<sup>242</sup> on the issue of private prosecutions, are not inline with the sentiments of the legislature in EMCA.

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<sup>237</sup> constitution of Kenya

<sup>238</sup> ibid civil procedure rules order

<sup>239</sup> Part II General Principles , section 3 [1] [2] [3] of EMCA

<sup>240</sup> ibid

<sup>241</sup> supra civil procedure act and rules

<sup>242</sup> supra , criminal procedure code

The legal practice in public interest litigation is not smooth sailing in Kenya. This is not just in environmental matters but also in other areas of the legal practice.

It is due to these statutory provisions that public interest litigation practice has not taken off to enforce environmental justice. The other reasons are the costs of litigation as will be demonstrated herein below.

The entitlement to a clean and healthy environment is a justifiable right in the constitutions of other jurisdictions and has therefore enabled effective use of the court's enforcement role in environmental justice.<sup>25</sup> The said constitution also gives the duty alongside the right to safeguard and enhance the environment.

The on going constitutional reviews have recognised the need to have in the bill of rights, several environmental rights, that confer the right to a clean and healthy environment, and the locus standi to access the said rights in order to effectively implement the duty of protecting and safeguarding the environment.

These include the rights to: human dignity which will address the poverty and squalid conditions of the slums. It means that, public interest litigation can be hard on behalf of the slum dwellers to demand for basic such as clean water, sanitation and reasonable settlement away from polluting industries. The right to water and sanitation are specifically provided for in the bill of rights. This can be used to enforce the water quality standards.

The bill of rights also include: the freedom of expression, association and access to information, which will enable and enhance the right of participation in environmental management, such as provided for under EMCA in the EIA processes. Further, they include the right to environment and the right to accessing the courts and at reasonable cost as court fees. We find it necessary to quote the article that deals with the locus standi and public interest litigations thus

“every person has the right to (a) an environment that is safe for life and health; (b) have the environment protected, for the benefit of present and future generations, through legislative and other measures that- (i) prevent pollution and ecological degradation; and (ii) promote conservation and secure ecologically sustainable development and use of natural resources, while promoting economic and social development....”<sup>243</sup>

If the referendum exercise goes in favour of the draft, and the proposed constitution becomes the constitution of the country, the problems of locus standi public interest

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<sup>243</sup> article 67 of the proposed new constitution Kenya gazette supplement, 2005

litigation and legal costs will be a thing of the past in the Kenyan courts. This now depends on the political will to enact the new constitution into law as the members of parliament have taken sides on political grounds against or for the draft.<sup>244</sup>

Other jurisdictions such as India have gone far in jurisprudence under such fortifying constitutional rights and duties with enabling articles. This was the position in the case of Kinki Devil Vs State of Himachal Pradesh. The court pointed out referring to constitution of India that;

“There is both a constitutional pointer to the state and a constitutional duty of the citizen not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and the fauna, the rivers and the lakes and all other waters resources of the country.”<sup>245</sup>

These constitutional provisions thus empower the people in India with the capacity to seek the enforcement powers of the court through public interest litigation for public and statutory remedies. The case of Gupter VS Union of INDIA,<sup>246</sup> is a further illustration of the courts interpretations of the constitution to play their role in enforcing environmental law when accessed in public interest litigation cases.

Justice Bhagwati spoke of public interest litigation,

“If public duties are to be enforced and social collective diffused rights and interests are to be protected, we have to utilise the initiative and zeal of public minded persons and organizations by allowing them to move the courts and act for a general group or interest, even though they may not be directly injured in their own rights.”<sup>247</sup>

The constraints in the law at the moment until the new constitution is passed are as follows: An applicant for the writs or order of the courts as envisaged under section 3 of EMCA must first seek leave of the court under order LIII of the civil procedure rules.<sup>248</sup> One must show by way of affidavit the relief sought and the grounds on which it is sought.<sup>249</sup> It is understood that since these are prerogative remedies, one must show among others that he is a person injured and that unless the court intervenes he may suffer irreparably.<sup>250</sup>

Further the spirit and letter of the civil procedure act of Kenya and the rules are to the effect that the person who brings a suit to the courts must be the personally injured in

<sup>244</sup> The local news shows political utterances supporting this stance.

<sup>245</sup> A.I R 1988 [HIM Pad] 4 pg 8

<sup>246</sup> A.I.R. 1982 SC. 149

<sup>247</sup> *ibid*

<sup>248</sup> Order LIII of the civil procedure rules applications for judicial review.

<sup>249</sup> Rule 1[2] of order LIII of the civil procedure rules.

<sup>250</sup> On prerogative remedies. kuloba

the matter or his or her property, unless one is coming in representative capacity. In the latter case must show relationship with the injured person and must have leave of the court.<sup>251</sup> In the case of public nuisance, the Attorney general will sue on behalf of the public unless relator proceedings are sought, even then, the applicant must show that his interest has suffered over and above the rest of the people in the injured public.<sup>252</sup>

The Kenyan courts in the interpretation of these sections and orders, have interpreted the locus standi issue strictly and inconsistently. In the year 1989 in the first case of Professor Wangare Maathai, coordinator Green Belt movement] vs. Kenya Media Trust Ltd<sup>253</sup> The court by Justice Dugdale held that, the applicant of an injunction to stop the proposed construction of a complex at Uhuru Park by the defendant respondent, had disclosed no cause of action and that had no locus standi to file the suit or application.

The arguments that were upheld by the court in its holding were among others that the plaintiff applicant not only needed have a suit upon which to base the application for an injunction but the suit had to be a sustainable one not one to be amended later. It had to disclose reasonable cause of action.

It was found that the plaintiff did not have such a suit against the defendant. Also upheld was the argument that the applicant had to come to court in a private capacity without complying with the procedure of representative capacity or relator action. Upheld was the argument that only the Attorney General could file and prosecute an action on behalf of the public further that the applicant could not file a relator action suit on behalf of the public.

The courts however in the year 1992 gave different interpretation of the issues of locus standi and public interest litigation. This was in the case of Maina Kamanda and Another, Plaintiffs vs. Nairobi City Council AND Another, Defendant,<sup>254</sup> the court relied in the holdings of Lord Diplock in the case of House of Lords IRC Vs National Federation of Self- Employed AND Small Business Ltd,<sup>255</sup>.

The court rejected objections raised in support of the law that, showing sufficient interest in seeking the relief in a matter that was in the realm of a public wrong, i.e.

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<sup>251</sup> sections 11-15 61-62 rules 1-10 and order III

<sup>252</sup> Section 61-62 of the civil procedure act, and the case of Oginga Odinga and 3 others vs. Zachariah Richard Cheson and Attorney General, Misc Civil Application No 602 of 1992.

<sup>253</sup> HCC NO 5403 of 1989

<sup>254</sup> HCC no 6153 of 1992

<sup>255</sup> [1982] AC 617 at pg 740 et seq

exrelatione, in which they required the permission of the Attorney General to bring the action. They had not got that permission. The applicants had sought the intervening of the court and stoppage in matter regarding rate payers' monies, and therefore public funds, that were allegedly being misapplied.

The other rejected objection was that, the applicants had wrongly brought the case in representative capacity; and that in view of all that, the applicants were mere busy bodies who were abusing the process of the court by instituting the action. The court instead held that;

“A rate payer as opposed to a tax payer has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes.....even if the present case be a relator action, and do not think so, I will not prevent the applicant from bringing to the notice of this court the improper conduct of the 1<sup>st</sup> respondent..... The applicants as rate payers have sufficient interest in bringing to the attention of this court any alleged unlawful act being committed by the 1<sup>st</sup> respondent and to seek its stoppage.”<sup>256</sup>

The courts further inconsistency in interpreting the rules of accessing the courts through public interest litigation by strictly or unilaterally applying the locus standi rule continued, in that, Wangari Maathai and two others vs. City Council of Nairobi and two others,<sup>257</sup> The applicants sought an injunction on behalf of the public that land belonging to the council and therefore ratepayers' money had been wrongly subdivided and allocated to a private person who had obtained approval of plans to construct a car park. Justice Ole Keiwua in upheld the preliminary objections that; the case should have been brought by relator action, that, the plaintiffs had not suffered and damage and that they were not going to suffer any , and that therefore had no locus standi. The court in very few words dismissed the application thus

“I am therefore satisfied that the plaintiffs have no locus standi in this case and they should not be heard. Accordingly the plaintiff's suit is struck out as urged in the preliminary objection. The plaintiffs will the all defendants the costs of this suit”.<sup>258</sup>

Thus the success of a Public Interest Litigation case lies in the moods and temperaments of the courts, as long as the capacity is not guaranteed by constitution

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<sup>256</sup>see COMPEDIUM of Judicial Decisions On Relating to Environment National Decisions  
Vo I PG 78-79

<sup>257</sup>HCC NO 72 of 1994

<sup>258</sup>supra note 167 pg 19-21

and inconsistencies of EMCA, in it and with the civil procedure rules, is not reviewed. The courts enforcement role is limited by these shortcomings in the law.

The benefit of public interest litigations that are lost in these way are protecting interests of the future generations by safeguarding the environment on their behalf, class or group cases that safe on costs and time of the courts and all, and convenience for the litigants both plaintiffs and defendants by reducing the duplicity of suits.

**g. Costs of litigations; filing fees, security for costs, condemned costs and access to justice**

The civil procedure Act provides that costs of a suit and interest shall be ordered in the discretion of the court. Further that the costs follow the event unless the court for “good reason” so orders.<sup>259</sup> The issue of costs are in terms of filing suit, security of costs that may be imposed by the court when granting leave to apply for prerogative remedies.<sup>260</sup> And advocates’ costs that have to be paid in advance before commencement of a suit in that, the advocates cannot charge contingency fees since this will amount to touting for business under the advocate’s remuneration order.<sup>261</sup> The effect of these legal positions on costs is that, the indigents cannot access the courts in view of the legal requirement, and therefore cannot enforce the rights of the law.

On public interest litigation, it means that the laws and NGO who would otherwise participate in the same cannot do so in fear of filing fees and condemned costs, should they loose the cases. These only left such practice at the mercy of the courts as they have the discretions on condemned costs.

The position on the law regarding costs will only change under the new constitution if passed in that parties will be to not be prevented from accessing the courts on account of costs as reasonable costs will be charged.<sup>262</sup> There is no legal aid scheme in Kenya to aid the poor to access the courts. Other jurisdictions have legal aid scheme for the poor people and especially on environmental matters.<sup>263</sup> This would greatly assist in the filing of cases in the courts.

### **3. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

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<sup>259</sup>Section 27 [1] of the civil procedure Act.

<sup>260</sup>Order LIII Rule 1[2]

<sup>261</sup> The advocates Act cap 16 and the advocate’s remunerations order.

<sup>262</sup> Ibid article 71

<sup>263</sup> Legal aid scheme of South Africa.

We had set out in chapter one to investigate the real meaning and nature of implementation and enforcement of pollution control law in Kenya today. We have found that implementation that would effectively control pollution must be complete. That is, from the formulation and making into law all of the environmental quality standards, guidelines, conditions of discharges, emissions criterion of measurements, to effective monitoring by a good number of trained personnel in the form inspectors, analysts, and experts that are well equipped with good technology, in the form of enough designated laboratories and monitoring gadgets.

We have found that there are no gazetted environmental standards, and all the rest except the EIA, and EA, regulations which have been gazetted and which are being implemented without standards for enforcement. From the way the implementations of the EIA and EA and monitoring, are being implemented without standards in place, we can safely conclude that, there are no meaningful enforcements under EMCA that are going on. From the nature and role of environmental standards EIA EA and Monitoring if properly implemented and enforced, they will halt reduce and control pollution as we found. However, since this is not the case at the moment, we can safely conclude that, weak implementation efforts and lack of enforcement of pollution control law are the reasons for the presence of pollution in the country.

Our recommendations are that there be more efforts to gazette all environmental standards, and that this should have been the first step before the EIA EA and Monitoring regulations.

We recommend that this is an urgent step to be undertaken as a step forward to give meaning to EMCA and all the international and regional agreements Kenya is a party to. We recommend that as soon as the standards and all the related regulations are gazetted, there be a review of the penal code, criminal procedure codes, civil procedure codes and all the other sectoral statutes, in order to guide and redirect the attention of the sectors and lead agencies to EMCA and international agreement on environmental.

From the study, we have seen that, the standards need not be enforced by force of law for compliance to result. We have found that, especially product and process standards can be complied with by industry programmes and activities, if the right clean technology, vetted importations, research and development, for alternatives that

are friendly to the environment and human health are availed and their acquisitions facilitated by the government.

From the areas of application of the standards, we found that the Kenyan communities, industry and programmes are polluting the environment, not because of their own making, but because of the poor and old technology, and poor practices due to lack of environmental education. We found mainly that incentives are not being given for industry to be enabled to comply. But that instead, there are more disincentives than incentives. We can safely conclude that the industries, programmes and activities are not complying to pollution control law because they have not been given enough incentives or at all to enable compliance.

We recommend that the government of Kenya and industry addresses the issue of incentives. The establishment of the various funds that has just begun is a move towards the right direction. We recommend that there be funding on research and development and prioritized steps towards environmental education. This as we saw will inform the public especially the consumers of services and products to promote eco-labelling and other environmental instruments. It will also give meaning to environmental awards, if the public understood the worth of the awards in environmental terms.

Further we found that the judiciary and people engaged in public interest litigation can play a big role to bring compliance by those that have got to cut down on environmental costs in terms of legal liabilities.

We can conclude that in view of the lack of law reforms on the issues of *locus standi*, and justice able environmental rights in the constitution, we can rightly conclude, that this is the reason why there is low key legal practice in public interest litigations, besides the costs of litigations. We recommend that the constitution review process succeeds, and even if does not go through in the referendum, the proposed articles on access to justice and bill of rights be maintained to be re-tabled for constitutional amendments.

We also found that there are many problems that have caused the judiciary not to actively play their role, especially due to the financial and human resource issues of the government institutions in the line of implementation and enforcement as we

found. We recommend the establishment of special environmental courts and trained personnel to man and supervise the implementation of the court orders.

The way forward is to intensify the efforts on environmental education and at the same time constitutional reforms. We also propose the immediate supply of incentives and a compliance amnesty period for industry activities and programmes after which, with gazetted standards enforcement should proceed. To affect these proposed steps we further propose the unity of NEMA and the lead agencies in the implementation and enforcement of EMCA.

These are our findings, conclusions recommendations, proposals and the way forward among others.

**ABBREVIATIONS**

EMCA.....	Environmental Management and Co-ordination Act
EIA.....	Environmental Impact Assessment
EA.....	Environmental Audits
NEC.....	National Environmental Council
PCC.....	Public Complaints Committee
NEMA.....	National Environmental Management Authority
VAT.....	Value Added Tax
ISO.....	International Standards Organization
UNEP.....	United Nations Environment Programme
UNDP.....	United Nations Development Programme
CO2.....	Carbon Dioxide
CO.....	Carbon monoxide
KTN.....	Kenya Television Network Cable
DPP.....	Deputy Public Prosecutor
AG.....	Attorney General
NGO.....	Non- Governmental Organization
WHO.....	World Health Organization
TLB.....	Trade Licensing Board
SAERC.....	Standards And Enforcement Review Committee
CAP.....	Chapter
KMA.....	Kenya Marine Authority
MARPOL.....	International Convention for the Prevention of Marine Pollution
NR.....	Natural Resource
R&D.....	Research and Development
ARSALS.....	Arid and Semi Arid Lands
WQAPCD.....	Water Quality And Pollution Control
BAT.....	Best Available Technology

BEP.....	Best Environmental Practice
BATNEEC.....	Best Available Technology Not Entailing Excessive Cost
CPM.....	Clean Production Methods
ESM.....	Environmentally Sound Management
BATWEV.....	Best Available Technology Which is Economically Viable
DG.....	Director General
NEAPC.....	National Environmental Action Plan Committee
ODS.....	Ozone Depleting Substances
CFC.....	Chlorofluorocarbons
POPs.....	Persistent Organic Pollutants
FAO.....	Food and Agriculture Organization
UCLOS.....	United Nations Law Of the Sea
DDT.....	1, 1, (D.P –dichloride biphenyl)-2, 2, 2, dichloromethane
BOD.....	Biological Oxygen Demand
NERFF....	National Environmental Restoration Fund
IPR.....	Intellectual Property Rights

## **LIST OF STATUTES**

1. Environmental Management & Co-ordination Act 1999
2. The Local government Act Chapter 265 laws of Kenya
3. the penal code Chapter 63 laws of Kenya
4. the physical planning Act chapter 286
5. the standards Act Chapter 496 laws of Kenya
6. the civil procedure act and rules
7. the advocates act chapter 16 laws of Kenya
8. the constitution of Kenya
9. the constitution of India
10. the use of poisonous substances Act Chapter 247
11. the pest control act
12. the agriculture Act Chapter 318 laws of Kenya
13. the factories Act Chapter 514
14. the water act 2002
15. the Radiation Act Chapter 243 Laws of Kenya
16. the traffic Act Chapter 403 laws of Kenya
17. the criminal procedure code
18. merchant shipping act
19. maritime zone Act

## **International Instruments Referred to**

20. Climate Change Convention 1992 and Kyoto Protocol 1997
21. 1985 Nairobi Convention and 1985 protocol concerning Marine pollution in combating Marine Pollution in Cases of Emergency.
22. Basal convention on the control of transboundary movement of hazardous wastes and their disposal( Basal) 22<sup>nd</sup> march 1989 , in force in 1992
23. Bamako convention on the Ban of import to Africa and the control of transboundary movement and management of Hazardous Wastes within Africa, (Bamako), 29<sup>th</sup> January, 1991 in force April, 1998.
24. 1998 Aarhus Protocol on Persistent Organic Pollutants (POP)
25. United Nations Convention on the Law of the Sea. UNCLOS
26. 1998 Aarhus Convention 25<sup>th</sup> June 1998 in force in October 2001 on access to justice in environmental matters.
27. 1998 Chemical convention (with FAO).
- 28.

## **LIST OF CASES REFERRED TO:**

### **Reported Cases**

1. Kinki Devil Vs State of Himachal Pradesh A.I.R 1988(Him) 4 pg 8
2. Gupta Vs Union Of India Air 1982 SC. 149
3. Wangu Maathai, coordinator Green Belt Movement Vs Kenya Media Trust Limited HCC No. 5403 of 1989.
4. Maina Kamanda and another vs. Nairobi City Council And another HCC NO 6153OF 1992.
5. IRC vs. Nairobi Federation of Self Employed and small business Limited (1982) AC 617 at pg 740 ET esq.
6. Wangare maathai and two others vs. city council of Nairobi and two others HCC NO. 72 OF 1994
7. Indian Council for Environ-Legal Action and Others vs. Union of India and Others vol II of compendiums of judicial decisions on matters related to environment national decisions.

### **List of complaints registered with the Public Complaints Committee PCC**

8. Malindi South Resident Association (MASRA)VS Oasis Village 9<sup>th</sup> January 2003
9. Baraka Estate Residents Association vs. Kenya oil refineries 8<sup>th</sup> October 2004
10. Environmental trust of Kenya vs. Changamwe wayside tyre sales and causeway tyre services 1<sup>st</sup> Feb. 2002
11. Landmark Realtors Limited and Residents of Hazina estate south B vs. Kenya Railways.
12. Masandukuni Business Community vs. Kenyatta National Hospital 7<sup>th</sup> April 2004
13. Ngara girls' high school vs. Nairobi City Council undated as per list
14. Raziya Mohamed Ali vs. Truck ParkCum Juok Yard 8<sup>th</sup> April 2005-11-16
15. Severine Plaza vs:Lodge Beach Hotel , 2004
16. Mr. Naram Pindora ( Owner of Plot No .209/4909) Nairobi Vs Nairobi City Council19th October
17. Green belt movement vs. golf options Kenya ( Ngong race course) the Jockey Club of Kenya 4<sup>th</sup> Feb., 2003