Netherlands Commission for
**Environmental Assessment**

# NCEA Observations on the Draft Environmental Law Rwanda

Memorandum by the NCEA

## RWANDA

23 August 2016

# Advice of the Secretariat

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| **From** | The Netherlands Commission for Environmental Assessment (NCEA) |
| **Date** | 23 August 2016 |
| **Subject** | NCEA Observations on the Draft Environmental Law Rwanda |
| | By: the Secretariat of the Netherlands Commission for Environmental Assessment – Mr Gijs Hoevenaars, environmental lawyer and technical secretary at the NCEA; Ms Gwen van Boven, international technical secretary at the NCEA. |
| | Advice 7015-04 |

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# 1. Introduction

## 1.1 SEA in Rwanda

Rwanda currently has an Organic Law determining the modalities of protection, conservation and promotion of environment in Rwanda (N° 04/2005 of 08/04/2005). In Chapter IV of this Organic Law, Rwanda regulates Environmental Impact Assessment for projects. Strategic Environmental Assessment (SEA) for policies, plans and programmes, is not yet regulated as such.

Following the new Constitution, the Organic Law for the Environment will become an ordinary law. In July/August 2016, MINIRENA produced a '*Draft law determining the modalities of protection, conservation and promotion of environment in Rwanda*'. This revision provides an opportunity to regulate SEA at the level of the law.

## 1.2 The Request

On the 10th of August 2016, MINIRENA organised a consultation workshop for the draft law. On the 12th, through the initiative of REMA, the Ministry sent an explicit request to the NCEA to also provide inputs on the draft law (by Email dated 12/8/2016), in particular elements related to environmental assessment, and to do this from both a technical and a legal perspective. For this reason, the NCEA has made available the following expertise:

- Mr Gijs Hoevenaars, environmental lawyer and technical secretary at the NCEA
- Ms Gwen van Boven, international technical secretary at the NCEA

In the next chapter, the NCEA's specific observations related to SEA and EIA are provided. In chapter 3 further observations on the draft law are given.

## 1.3 Previously

Earlier this year, REMA took the initiative to start developing an SEA regulation, and asked the NCEA to provide observations on the draft regulation (NCEA advisory report of June 6th, 2016). During the development of the draft law, the work on the regulation will momentarily be put on hold and will be taken up again once the law has been submitted to Cabinet.

# 2. Observations concerning Environmental Assessment

*Overall conclusion*

Chapter VI of the draft law regulates environmental assessments, in particular in article 32: environmental impact assessment (EIA), in article 33: strategic environmental assessment (SEA) and in article 34: environmental audit.

The draft law contains broad delegation of competence to the lower level. This means that several aspects of environmental assessment are no longer regulated on the level of the law. In the following remarks the NCEA asks to reconsider whether certain aspects should be regulated on a lower level or should remain at the level of the law.

Currently, the procedures for EIA and SEA are not specified at all in the draft law. Everything will be delegated to the regulations. The NCEA recommends to mention at least the key elements of each environmental assessment procedure: screening, scoping, review, process (public involvement/participation), decision making, and transboundary application. It would provide more legal security if these elements were mentioned at the level of the law.

Overall, the NCEA recognises the wish to keep the law 'short & light' and regulate as much as possible at lower level legislation. Nevertheless, the NCEA feels that certain key elements of the environmental assessment procedures ought to be described at the level of the law to have sufficient legal basis. It recommends to remedy this and include these elements, in order to give EIA and SEA the legal basis they require.

## 2.1 On Environmental Assessment overall

- As in the Organic law, the draft law contains a definition of 'environment'. This definition entails that the concept of environment also encompasses social aspects. This is also reflected in the current practice, where one tends to speak of Environmental and SOCIAL impact assessment (ESIA). Shouldn't this terminology be codified in the new draft, in order to avoid that one thinks that social aspects need no longer be considered in EIA?

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| The NCEA recommends to codify this terminology in the new law, in order to avoid that one thinks that social aspects need no longer be considered in environmental assessments. |

- The draft law currently does not contain a definition for '*environmental assessment'* (or '*evaluation of the environment'* as in the Organic law);
- The draft law does not clarify the relation between 'Environmental audit' and EIA and SEA. Internationally, this relation differs. In some countries, an environmental audit is applied for those projects that already function under an environmental permit, without ever having conducted an EIA. The environmental audit is then applied to

remedy this omission. Such an approach seems only admissible in a transition towards a full EIA system. As Rwanda has already undergone such a transition, this no longer seems applicable. In other countries, environmental audit is similar to environmental inspection and is applied to all projects that operate under an environmental license and have undergone an EIA. It should be clarified what the role of environmental audit is in Rwanda;

The NCEA recommends to include a definition for 'environmental assessment', and to further clarify the definition and role of environmental audit in relation to EIA and SEA.

- There is no regulation in the Organic law nor in the draft law on EIA and SEA in the case of transboundary effects. This ought to be regulated at the level of the law.

The NCEA recommends to include provisions for transboundary effects.

- The draft law does not contain a provision on notification and screening for EIA and SEA. How will the environment authority know of the intention to develop a project or a policy, plan or programme (PPP)? It should be the primary responsibility of the project proponent or the PPP owner to inform the environment authority of its intentions, so that it can be determined whether an EIA or SEA should be applied.

The NCEA recommends to include a provision on the obligation of the project proponent (in relation to EIA) or the policy, plan or programme developer (for SEA) to notify the environment authority of its intention to develop a project or PPP. It also recommends to include a provision on screening for both EIA and SEA.

- It is not clear in the draft (nor in the Organic law) in what way the public is involved in the EIA and SEA procedure. This should be regulated at the level of the law.

The NCEA considers the revision of the Organic law a good opportunity to repair the provisions for public participation in the EIA and SEA procedures. It is recommended to regulate this at the level of the law.

- It is not very clear in the draft who is meant by the state: MINIRENA, RNRA, REMA or RDB? One article mentions 'authority' and there is a definition of 'competent authority'. It should be clear which authority has competence on the various issues related to environmental assessment.

The NCEA recommends to clarify definitions of state, authority and competent authority and their respective competences, and to verify the correct and consistent use of each authority throughout the law.

## 2.2 Specific observations on SEA

*On the purpose of SEA*

- The purpose of SEA as proposed in the draft SEA regulation is clear: the carrying out of an SEA is not a goal in itself, but is done with the aim of integrating environmental considerations in the policies, plans and programmes. This purpose is currently not as such defined in the draft environment law, except perhaps in article 14, which states that plans '*must take into account environmental conservation*' and even adds '*Site selection and the location of economic, industrial, residential areas and leisure activities shall consider the environmental aspects*'. Shouldn't this be done by SEA? Article 30 of the Organic law explicitly asks for EIA in such cases for infrastructure projects. A similar article might be included in the new law, as well as for SEA;
- Similarly, article 21 of the draft law states that environment and climate change should be mainstreamed in the preparation and implementation of policies, strategies, plans and programmes. This is exactly what SEA is meant for! It should be clear that the mainstreaming should be done by SEA;

The NCEA recommends to further clarify the purpose of SEA and include the integration of social and economic considerations, and the mainstreaming of environment and climate change in the preparation and implementation of policies, strategies, plans and programmes in its purpose and definition of SEA. It further recommends to make specific reference to SEA in relevant articles in the draft law, such as articles 14 and 21.

*On the scope of SEA*

- It might be an idea to further stress why environmental considerations should be integrated (e.g. by referring to principles in the law) and to point out that SEA should only be done for policies, plans and programmes that are likely to have significant effects on the environment. See also article 1 of the European directive[1];
- There is another important reason to focus on likely significant effects: without that focus, a high number of policies, plans and programmes will need to undergo SEA. In a relatively young SEA system such as in Rwanda, it seems better to first ensure coverage of the most important plans, policies programmes, and to establish a good quality SEA practice. This is difficult when the limited experience and capacity needs to be spread too thinly;
- To regulate this limitation in scope for EIA, the law states that a ministerial order shall determine a list of projects that shall undergo EIA. For SEA, such provision has not been included in the draft law and the law does not delegate the determination of a list to a lower order legislation.

[1] "The objective of this Directive is **to provide for a high level of protection of the environment** and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes **with a view to promoting sustainable development**, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes **which are likely to have significant effects on the environment**."

The NCEA recommends to bring the SEA instructions in line with the EIA instructions and to focus SEA on those plans, policies and programmes that may have a significant social and/or environmental impact. It is also recommended to state in the law that a ministerial order shall determine the screening procedure such as a list of policies, plans and programmes that will require SEA.

*SEA and Policies, plans and programmes*

- In the definition of terms in article 2, it is clarified that SEA applies to policies, plans and programmes. In other articles defining SEA however, the text refers inconsistently to strategies as well. Will SEA be applied to strategies, or not?
- It is not defined what is meant by policies, plans, strategies or programmes. To which decisions or documents does this refer, at which government levels? Are there specific policies, plans and programmes that Rwanda would want to exclude from SEA, for example for security reasons?

The NCEA recommends the consistent use of policies, plans and programmes (and strategies?) throughout the text. It also recommends to clearly define the terms policy, plan and programme (and strategy?) and to specify whether some policies, plans and programmes (and strategies?) are excluded from SEA and for which reasons.

*SEA and Decision making*

- The most important part of the SEA procedure, the relation between SEA and decision making, is lacking in the draft law. In other words, what should the responsible authority do with the results of the SEA process? To what extent will they need to consider the results of the SEA in the policy, plan or programme, and justify the use of these results?[2]
- For EIA, a provision is made that it should be done before obtaining authorisation for the implementation of a project (article 32), but it is not specified for SEA that policies, plans and programmes cannot be adopted without a prior SEA. Because of its importance, this should be regulated at the level of the law.

The NCEA recommends the inclusion of the above mentioned provisions in the draft law.

[2] See article 8 of the European directive that requires that the report, the opinions expressed in consultation, and the results of any transboundary consultations **shall be taken into account during the preparation of the plan or programme and before its adoption** or submission to the legislative procedure. Furthermore, see article 9 that requires that when a plan or programme is adopted, the public and the consulted states, are informed by the adopted plan or programme, a **statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared, the opinions expressed and the results of consultations entered, have been taken into account** in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and the measures decided concerning monitoring.

## 2.3 Specific observations on EIA

The NCEA compared the provisions for EIA in the Organic law to the draft law, and noticed in particular that the draft law contains less specific provisions. Notably:

- Articles 67 and 70 of the Organic law mention the relation between EIA and the authorization of a project: it should be done before the authorization and authorization cannot take place without a proper EIA. This relation is missing in the draft: article 32 only states that it should be before obtaining authorization, but it does not state explicitly that authorization cannot be obtained without a prior EIA;
- Article 68 of the Organic law provides what the EIA report should contain (content requirements). This article does not reappear in the draft. Isn't it of huge importance that this provision returns at the level of the law?;
- The Organic law contains a specific reason to carry out EIA in article 17: '*any acts concerned with water resources like watering plants, the use of swamps and wetlands and others, shall always be subject to prior environmental impact assessment'*. Shouldn't this be included in the draft?

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| The NCEA recommends to repair or adjust the above identified elements related to EIA in the draft law. |

# 3. Further observations on the draft law

Aside from providing recommendations on environmental assessment specifically, the NCEA made some overall observations on the draft law. Most importantly:

- Chapter One: general provisions
    - Compared to the Organic law, the draft does not contain an aim (see art. 1 Organic Law). What is the aim of the draft law?
    - The draft does not contain an article like the current article 5 or article 50 of the Organic law. These articles mention a national policy or plan on environment and the responsibility of the Government of Rwanda to establish such policy or plan.
    - The draft does not contain articles with regard to the scope of the law (as in articles 8-10 of the Organic law). Shouldn't these articles be included?

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| NCEA recommends the inclusion of the aim of the environmental law, the scope of the environmental law, and the responsibility of the Government of Rwanda to establish a policy or plan on environment. |

- Chapter V: Obligations of the state, the decentralised entities and the population
    - The equivalent Title III of the Organic law is more elaborate than chapter V in the draft law. Furthermore, it provided clearer delegation provisions than the draft law;
    - In article 30 of the draft law there is an obligation for the population. In the Organic law this is only a duty;
    - In the Organic law there are also 'rights' of the population, for example the right to information, or the right to a healthy environment as mentioned in article 6 of the Organic law. This is eliminated in the draft.

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| NCEA recommends the inclusion of the above mentioned provisions in the environmental law. |

- Article 14, third paragraph, of the draft law states that no competent authority can issue permission for construction in cases where such constructions may degrade the environment. This seems unrealistic. In most cases, constructions will have negative impacts on the environment that may need to be mitigated to acceptable levels.

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| The NCEA recommends to rephrase article 14. |

- Other observations:
    - The draft law contains detailed provisions with regard to climate change whereas all other aspects seem to be reduced. Why should climate change have as much focus whereas it is only one aspect of the environment?

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| The NCEA recommends to find a better balance between the provisions on climate change and other aspects of the environment. |