Netherlands Commission for
Environmental Assessment

NCEA Observations on Draft EA Regulations

Memorandum by the NCEA

RWANDA

4 October 2018

Advice of the Secretariat

To	Ministry of Environment
Attn	Ms Juliet KABERA, DG Environment & Climate Change
CC	Mr Theophile DUSENGIMANA Environment and CC Policy Specialist
From	The Netherlands Commission for Environmental Assessment (NCEA)
Date	4 October 2018
Subject	NCEA Observations on Draft EA Regulations 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
Reference	Advice 7015-04

Contact
W www.eia.nl
T +3130 234 76 60
E ncea@eia.nl

Table of contents

1. Introduction....2
1.1 Environmental Assessment in Rwanda....2
1.2 The Request....2
1.3 Previously....2

2. Observations concerning Environmental Assessment....3
2.1 On Environmental Assessment overall....3
2.2 Specific observations on EIA....7
2.3 Specific observations on SEA....9
2.4 Observations on Environmental Audit....10

1. Introduction

1.1 Environmental Assessment in Rwanda

Rwanda has recently adopted a new Environment Law (Law N° 48/2018 of 13/8/2018 on Environment), which regulates Environmental Impact Assessment for projects (EIA, in article 30) and Strategic Environmental Assessment for policies, strategies, plans and programmes (SEA, in article 31). The new law delegates detailed regulation of EIA and SEA to Orders of the Minister, which are still to be elaborated.

1.2 The Request

During the first two weeks of October 2018, the Ministry of Environment intends to collect initial inputs from diverse stakeholders on the draft Orders, on the basis of which new versions can be elaborated. On the 28th of September 2018, during a meeting at her offices, DG Environment and Climate Change Juliet KABERA requested the NCEA to also contribute advice on draft texts on EIA, SEA as well as Environmental Audit, and to do this from both a technical and a legal perspective. The short timeframe meant providing textual observations only, without face-to-face discussions with relevant parties in Rwanda. The NCEA made available relevant expertise through Ms Gwen van Boven (EIA/SEA expertise) and Mr Gijs Hoevenaars (EIA/SEA and Legal expertise).
The NCEA reviewed the following documents[1]:

- Law N° 48/2018 of 13/8/2018 on Environment
- Draft Ministerial Order on Strategic Environmental Assessment _ Last version
- Draft Ministerial Order governing Environmental Impact Assessment _ Last version
- Draft Ministerial Order governing Environmental Audit _ Last Version

Given its expertise, the NCEA focused on EIA and SEA. In the next chapter, the NCEA's overall observations on both SEA and EIA are provided. In chapter 2.3 some considerations on Environmental Audit are given.

1.3 Previously

Before the revision of the Environment Law, REMA already started 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 was momentarily put on hold until it would be adopted.

In August and November 2016, the NCEA provided observations and advice on the new Environment Law, which were later discussed extensively through Skype meetings (NCEA advisory reports of August 2016 and February 2017).

[1] Provided by email d.d. 28 September 2018 by Théophile DUSENGIMANA, Environment and CC Policy Specialist. The versions contained no date but were all named 'Last Version'.

2. Observations concerning Environmental Assessment

Overall conclusion

The new Environment Law regulates environmental assessments, in particular in article 30: environmental impact assessment (EIA), in article 31: strategic environmental assessment (SEA) and in article 32: environmental audit. The Law regulates the obligation of these instruments to be applied, and delegates all further power to provide procedures and instructions to the lower level of Ministerial Order.

This approach, in which the Environment Law allows for broad delegation of competence to the lower level of Ministerial Orders, means that several aspects of environmental assessment are no longer regulated on the level of the law. Previously, for example, the Organic Law detailed content and procedural requirements for EIA. At the stage of drafting the Environment Law, the NCEA recommended to regulate at least the key elements of each environmental assessment procedure in the law: 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. Now that this is not the case, the NCEA stresses the importance of regulating these aspects in the Ministerial Orders, in Order to give EIA and SEA the legal basis they require.

The NCEA recommends regulating content and procedural requirements for EIA and SEA at least at the level of the Ministerial Orders. More detailed recommendations are provided in the following paragraphs. The NCEA is available to assist with remedying the identified shortcomings and identifying suitable solutions, for example during a work session at the Ministry of Environment, with legal and technical experts from both the NCEA and the Ministry.

2.1 On Environmental Assessment overall

Upon studying the draft Orders on EIA and SEA, the NCEA noted several observations that are applicable to both instruments. For this reason, this chapter starts with observations on both EIA and SEA.

- *On the objective of EA* – EIA is defined as a process to identify, predict and evaluate the *environmental, social and economic impacts* of projects. SEA however seems limited to environmental consequences of PPP only. This is not consistent and moreover, not conform the idea that SEA should help advance the Government of Rwanda's objectives of (a) sustainable development, (c) preservation of cultural heritage, (e) economic benefits, as described in Article 7 of the draft Order on SEA.

The NCEA therefore recommends to bring SEA in line with EIA and include *social and economic* consequences into the definition.

- *On content requirements* – Apart from the requirement to develop ToR, there are no specific content requirements for EIA and few for SEA in the Ministerial Orders.

As the Environment Law also does not contain content requirements for EIA or SEA, the NCEA recommends to include minimal content requirements in the Ministerial Orders, including provisions on transboundary effects, climate change and gender equality;

- *On procedures* – Both draft Orders contain some procedural steps or phases, but do not appear complete. As explained above, at the stage of drafting the Environment Law, the NCEA recommended to regulate at least the key elements of each environmental assessment procedure in the law: screening, scoping, review, process (public involvement/participation), decision making, and transboundary application.

Now that procedure is not regulated in the Law, it becomes even more important to regulate the above key elements in the Ministerial Orders. This is not always the case in the current drafts; the NCEA recommends to remedy this.

- *On notification* – neither of the Orders contains a provision on notification. How will the competent authority know of the intention to develop a project or a policy, plan or programme (PPP), for which an environmental assessment may be required? And how will other stakeholders be aware of this EIA/SEA in which they could play a role? 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 notification in both Ministerial Orders.

- *On differentiating forms of EIA and SEA* – The draft Orders introduce different forms or levels of impact assessment: full or partial EIA (2 levels), and full, partial SEA or Statements (3 levels). It is not clear what is meant by a partial EIA or SEA: when is it necessary and how is it conducted? Why not a full EIA? Why is screening needed for partial EIA and not for full EIA? The same goes for partial SEA and the ´Statement on PPP implications on environment and remedial actions´. The difference between and the purpose of having these different forms is not well explained. Moreover, the differentiation is not supported by a sound screening procedure, so that in reality, it will remain unclear which form should be applied. This will lead to confusion and debate. It may also lead to a tendency to do more partial than full environmental assessments. The NCEA also has a principal objection: the partial/statement forms do not seem to be conform what is internationally considered as environmental assessment. It would send the wrong message if these forms would be called EIA or SEA as well.

All in all, the NCEA recommends refraining from introducing different levels of EIA and SEA. Rather, it recommends keeping just EIA and SEA, and through a sound scoping process, allow for differentiation in content requirements through project or PPP-specific ToR. The result would be as intended: more thorough impact assessment for high-risk projects and PPP, but using one and the same procedure.

- *On screening* – in both EIA and SEA there is no clear screening procedure. Who decides which PPP and projects need to undergo SEA or EIA and on what grounds? No criteria are

provided, for EIA lists are provided but not for SEA, and the lists for EIA are such that they will not result in many projects excluded from EIA – making them ineffective.

The NCEA recommends including a solid screening procedure, which helps determine on the basis of clear criteria which projects/PPP should undergo EIA or SEA.

- *On scoping* – neither EIA nor SEA at this point contain scoping. Scoping is the procedural step in environmental assessment during which the scope (content, level of detail) and the process (whom to engage, and how) is defined. A result of scoping may be the Terms of Reference (ToR) for the assessment. Preparing ToR without scoping will lead to non-project/PPP specific ToR that may miss elements specific to the project/PPP or include elements not relevant to this particular project/PPP.
- *On the ToR* – at this point, both Orders are ambivalent on the preparation of the ToR. They state that they are prepared by the Competent Authority, but also state that they may be developed by the developer/responsible institution. This ambiguity should be taken away by regulating one option: either the developer/responsible institution or the competent authority develops the ToR. To reduce the administrative burden on the competent authority, it seems more appropriate to give the task of *preparing* the ToR to the developer/responsible institution (after a sound scoping process!) and the task of *approving* the ToR to the competent authority. To ensure consistent quality, guidelines or formats may be developed to guide the preparation and approval processes.

The NCEA recommends to include the phase of scoping for both EIA and SEA and make it a requirement for the developer/responsible institution to carry-out, resulting in a project or PPP-specific ToR to be approved by the Competent Authority.

- *On participation* – the Ministerial Order on EIA provides a definition of public participation, the one on SEA does not. Despite the definition for EIA being quite broad – '*a systematic way of involving public or relevant institutions in project planning, development and decision making process*', in the Order itself it is not clearly indicated when and how this should be conducted. It seems limited to the review stage only and narrowed down to public hearings. In the Order on SEA, no reference at all is made to stakeholder participation – aside from mentioning public consultation as part of the procedure. This is a serious omission for both instruments, and even more so for SEA, which by nature is characterised by its inclusive, transparent process in decision making.
- *On information* – The environment law in article 6 states that '*every person has the right to be informed of the state of the environment and to take part in strategies and activities aimed at conserving the environment'*. How is information about a specific EIA/SEA process distributed to the public? For example, how does one learn about the intention to develop a project/PPP, about the intention to apply EIA/SEA, about the possibility to be involved, about the approval of the project/PPP, where is it published?

The NCEA recommends including provisions on public participation as well as regulating access to information – a condition to effective public participation – throughout the EIA/SEA processes.

- *On EMP and Monitoring* – in neither procedure, for EIA or SEA, reference is made to the Environmental and Social Management Plan – a key result of environmental assessment and used for monitoring of the effectiveness of the proposed measures. Monitoring is also absent from both Ministerial Orders.

The NCEA recommends including provisions for EMP and monitoring for both EIA and SEA.

- *On link to decision making* – Environmental assessment is designed to support and influence decision making. The NCEA makes two observations in this regard:
  - Currently the relation between EIA/SEA and decision making, is lacking in the draft Orders. In other words, what should the responsible institution do with the results of the SEA process? To what extent will they need to consider the results of the SEA in the PPP, and justify the use of these results?[2]
  - For EIA, the law states that it should be done before obtaining authorisation for the implementation of a project (article 30), but it is not specified for SEA that PPP cannot be adopted without a prior SEA. The law only states at the level of the definition (not at the article 31 on SEA) that it should be done at the earliest appropriate stage of decision making, without specifying what would be appropriate. Because of its importance, this should remedied at the level of the Order on SEA.

The NCEA recommends including a provision in both Orders on the link between EIA/SEA and decision making, and the justification of the use of the results of EIA/SEA.

- *On certification* – Both Orders assume a system of certification of experts that prepare the reports, but this system is not elaborated. Who can be expert, on what grounds are they included on the list, what is the procedure to be included, is it limited to Rwandan experts, can they be taken from the list, etc.? The Orders do not make reference to Law N° 36/2016 of 08/09/2016 establishing Rwanda Association of Professional Environmental Practitioners (RAPEP). Will that be the organising body for certified experts? If so, why not refer to it?

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

- *On terminology* – both draft Orders appear to be inconsistent in their use of terminology. Even when definitions are provided, the use of terms later on in the text changes. Moreover, different terminology is used for the same things across the Orders. Some examples (not exhaustive):

[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.

- *Competent authority* is already defined in the law, and different from the one used in the Orders. This should be made consistent. Moreover, the term is used inconsistently throughout the Orders, which are mixing competent authority, environment authority and authority all together. This should be made consistent.
- The same applies to *responsible institution*, which is defined in the Order on SEA but not on the one on EIA. It is also inconsistently used: sometimes it is responsible institution, sometimes responsible authority. This is confusing and should be made consistent throughout the different Orders.
- *Public participation* is defined for EIA but not for SEA. In EIA it refers to involving '*public or relevant institutions*' rather than '*stakeholders*', the term defined in that Order. *Stakeholders* in turn are not defined for SEA.

The NCEA recommends to clarify definitions used and to verify the correct and consistent use of each authority throughout the Orders.

2.2 Specific observations on EIA

- *On using experience gained in Rwanda* – The NCEA observes that the current draft Order on EIA is largely similar to the old regulation of 2008. By 2018, the practice of and experience with EIA has grown considerably over the years.

The NCEA recommends making good use of this experience and redefining the EIA system (procedures and processes) accordingly. This may require letting go of the old regulation and first consider what should be elements of a good EIA procedure tailored to the current Rwandan EIA context.

- *On principles for EIA* – The Ministerial Order on SEA differs from the one on EIA by including an article on the principles of SEA. This is helpful as it sheds light on the vision of the Government of Rwanda on SEA and its purpose. It is currently lacking for EIA.

The NCEA recommends including a similar article on principles in the Ministerial Order on EIA.

- *On screening* – in general, screening for EIA can be done in two ways: using criteria related to characteristics of the projects, or criteria related to the surroundings in which the project will be implemented. The current Order does not include any criteria for screening, no thresholds for projects and no provisions on activities in environmentally sensitive areas, such as wetlands

The NCEA recommends considering the above mentioned screening approaches and develop those for EIA in Rwanda. This should help achieve a better application of the EIA tool for specifically those projects that will have significant impact on the environment or socially.

- *On the project brief* – article 6 mentions a project brief without defining what it is. It refers to EIA guidelines for further information on what should be included. By referring to these guidelines in the Ministerial Order, they are granted force of law. Was this the intention?

And if so, is this desirable? Why not providing information in an annex to the Ministerial Order?

The NCEA recommends including a definition of project brief in the Order on EIA. It also recommends including information or format requirements in an annex to the Order.

Some more specific observations

- EIA is already defined in the law, legally it is therefore redundant to define it again at this level.
- The Order contains no definition of developer/proponent, project brief, EIS (report) and Terms of reference?
- Public participation: what is meant *the* public or public institutions? Why is there no reference made to stakeholders (which is a term defined in the Order)?
- Public hearing definition is rather vague.
- Article 5: ´*necessary and evident*´, what does that mean? Why only a request instead of an obligation?
- Article 6: when should the Project brief be submitted?
- Article 7: the word ´days´ is missing. Rather vague that the developer can choose to prepare the ToR himself. Does he have to indicate this in the Project brief? Is there a lower fee to pay when you make your own ToR? See also above in 2.1. on scoping/ToR
- Article 8: doesn´t the expert have an interest in the project the moment he is selected by the developer?
- Article 9: what is meant by '*due consideration of the opinion of all the relevant stakeholders*´?
- Article 10 speaks of ´*the facts that are not provided for under the Terms of Reference* `. What does this mean?
- Article 11: with how many days can the hearing be increased?
- Article 11: who decides to hold a public hearing and on what grounds? Should this be decided within the twenty working days?
- The article on public participation (article 12) is practically limited to public hearing, and the organisation of this process. It does not cover other aspects of public participation, nor does it describe how the public hearing is conducted and how views should be taken into account.
- Article 13: what is the decision mentioned here? Decision that the report is okay or approval of the project? Is the decision only communicated to the developer?
- Article 14: who decides that an independent expert is needed, and on what grounds? Can this be appealed?

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

2.3 Specific observations on SEA

On the definition of SEA, the NCEA commends the use of the term 'flexible' in relation to the definition of SEA. Flexible design and application is at the core of effective SEA: SEA is most effective when tailor-made to the PPP it intends to influence, and will therefore take as many forms as there are different PPP.

The NCEA also appreciates the inclusion of an article on the principles of SEA. This is much appreciated by the NCEA as it sheds light on the vision of the Government of Rwanda on SEA and its purpose.

- *On the purpose of SEA* – Article 21 of the Environment law states that *"every socio-economic sector must mainstream environment and climate change in the development and implementation of policies, strategies, plans and programmes".* This is exactly what SEA is meant for, yet it is not as currently mentioned in the law or in the Order that the mainstreaming should be done by SEA;

The NCEA recommends to further clarify the purpose of SEA in the Ministerial Order 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.

- *On the scope of SEA* – several observations can be made:
  - At this point, the Order states that SEA should be done for the formulation of any PPP, as well as for its renewal, modification and implementation (see art. 9). In reality, this is likely to lead to a large number of SEAs being developed, including many that will have relatively little effect on sustainable development. And these will all need to be assessed and approved by the competent authority. In a relatively young SEA system such as in Rwanda, it seems better to first ensure coverage of the most important PPP that will have a significant environmental and social impact, 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 Order on EIA determines a list of projects that shall undergo EIA. For SEA, such provision has not been included in the draft Order.
  - In article 31 of the Environment Law, it is stated that SEA applies to policies, *strategies*, plans and programmes. In article 2 of the Order on SEA however, the text does not refer to strategies. Will SEA be applied to strategies, or not?
  - The Order does not refer to exclusion of PPP. Are there specific policies, plans and programmes that Rwanda would want to exclude from SEA, for example for security reasons?

The NCEA recommends to focus SEA on those PPP that may have a significant social and/or environmental impact. See also article 1 of the European directive[3]. It is also recommended to bring the SEA instructions in line with the EIA instructions and provide a list of PPP in the Order that will require SEA.

Some more specific observations

- SEA is already defined in the law, legally it is therefore redundant to define it again at this level.
- The Order contains no definition of PPP (brief), SEA report and Terms of reference?
- Article 3(2) and 7(3): why not reasonable instead of feasible alternatives?
- Article 4: is the enumeration seen as consecutive steps of the procedure?
- Article 5: Why not choose one system in the Ministerial Order: ToR by responsible institution OR by the authority?
- How does the system of ToR (article 5) relate to article 4(4) on the contents and level of details in the SEA report? What is the Order of things?
- Article 7(6): the legal and policy framework is not only needed to check compliance of the proposal but also of the alternatives.
- Article 8(6): what is meant by third party input? Who is the third party?
- Article 9: Why is there no approval of the report? What kind of comments can be given and should they be followed?
- Article 9: formulation is less clear than the enumeration of article 8. It misses the duty mentioned in article 11.

The NCEA recommends clarifying/remedying the above points in the relevant articles of the Ministerial Order on SEA.

2.4 Observations on Environmental Audit

As explained above, the main expertise of the NCEA lies in the field of EIA and SEA and less so on environmental audit. We will therefore not provide detailed observations on the draft Order on environmental audit. We do however have some key observations and questions to consider:

- The Environment Law does not clarify the relation between environmental audit and EIA and SEA, or the difference or relation between environmental audit and inspection. 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. If it is the case, why not simply submit these projects to the EIA procedure?

[3] 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**."

- 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. If it is indeed similar to inspection, than it should be clarified what the relation is to inspection, which is also mentioned in the Environment Law (Chapter VII). It should be clarified what the role of environmental audit is in Rwanda;
- At this point, the proposed procedure on environmental audit seems more or less similar to the one on EIA – this seems hardly appropriate if, following the reasoning above, it's role is more like that of inspection.

The NCEA recommends to clarify what the role of environmental audit is in Rwanda and how it related to EIA, SEA and inspection.