Netherlands Commission for
Environmental Assessment

NCEA Observations on Draft SEA Instructions

Memorandum by the NCEA

RWANDA

6 June 2016

Advice of the Secretariat

To	Rwanda Environmental Management Authority (REMA)
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From	The Netherlands Commission for Environmental Assessment (NCEA)
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Subject	NCEA Observations on Draft SEA Instructions Rwanda
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	Advice 7015-04

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1. Introduction

1.1 SEA in Rwanda

In Chapter IV of its Organic Law determining the modalities of protection, conservation and promotion of environment in Rwanda (N° 04/2005 of 08/04/2005), Rwanda regulates Environmental Impact Assessment for projects.

In Article 67, it also states that: *"Every project shall be subjected to environmental impact assessment, before obtaining authorisation for its implementation. This applies to programmes and policies that may affect the environment."*

Although not named as such, this refers to what is internationally known as Strategic Environmental Assessment (SEA). To guide implementation of SEA, in 2011 the Rwanda Environmental Management Authority (REMA) published General guidelines and procedures for SEA.

By 2015, REMA indicated to be in the process of developing an SEA regulation. This will be done in the form of Prime Minister's Instructions on SEA. This will serve as an instrument to ensure that all sectors carry out SEAs. REMA will have the Authority to monitor compliance with the regulation. According to REMA, the instructions themselves are intended to be simple and short, and keep the details for the (to be updated) Guidelines.

1.2 The Request

REMA has asked the NCEA to provide inputs on the draft Prime Ministers instructions on SEA (by Email dated 25/4/2016), 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
- Mr Roel Slootweg, external SEA expert

In the next chapter, the NCEA's overall conclusion and main technical and legal observations are given. In chapter 3, specific observations are provided for each article in the instructions.

2. General Observations

Overall conclusion

Overall, the NCEA feels that certain key elements of the procedure have not yet been described in the current instructions. It recommends to remedy this and include these elements, in order to give SEA the legal basis it requires. Aside from specific technical aspects, the main missing element is the link with decision making.

Technical observations

The draft instructions currently lack a number of provisions. For inspiration, please see relevant excerpts from the European directive in the footnotes:

- provisions related to the screening and notification to verify the need to do SEA;
- provisions with regard to scoping/Terms of reference (ToR) for the SEA[1];
- provisions on consultation[2]; and transboundary consultation[3];
- provisions on the review of the quality of the SEA process and contents. Will there be a formal review and approval of the SEA? Who will do this? How will this be organised? What if the SEA will not be approved?
- The most important part of the SEA procedure, the relation between SEA and decision making, is lacking in the current text. 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?[4]

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[1] For inspiration, see article 5(4) of the European directive that requires that relevant authorities shall be consulted when deciding on the scope and level of detail of the information in the report.

[2] For inspiration, see article 6 of the European directive. This article requires that the draft plan or programme and the report shall be made available to the relevant authorities and the public, and that they are given **an early and effective opportunity within appropriate time frames to express their opinion** on the draft plan or programme and the report before the adoption of the plan or programme or its submission to the legislative procedure.

[3] See article 7 of the European directive. If the implementation of a plan or programme is likely to have significant effects on the environment in another state, or where a state likely to be significantly affected so requests, the state in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft policy, plan or programme and the report to the affected state. Upon request of the affected state, both states shall enter into consultations concerning the likely transboundary environmental effects of implementing the policy, plan or programme and the measures envisaged to reduce or eliminate such effects. Where such consultations take place, the states shall ensure that the relevant authorities and the public in the affected state are informed and given an opportunity to forward their opinion within a reasonable time-frame.

[4] 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.

The NCEA recommends the inclusion of the above mentioned provisions in the SEA instructions.

Scope of SEA

In the definition of terms in article 2, it is clarified that SEA applies to policies, plans and programmes. Throughout the remainder of the instructions however, the text refers inconsistently to plans and programmes or policies, plans and programmes. Will SEA be applied to policies, or not?

It is not defined what is meant by policies, plans 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 inclusion of policies in the scope of application of SEA in Rwanda and recommends consistent use of policies, plans and programmes throughout the text. It also recommends to clearly define the terms policy, plan and programme and to specify whether some policies, plans and programmes are excluded from SEA and for which reasons.

Legal observations

The NCEA wonders whether the legal basis for the instructions on SEA is arranged solidly enough:

- The preamble refers to article 7 of the Organic law, but this article does not contain a basis for delegation to the prime minister. If there is a general delegation of mandate to the prime minister to regulate procedures through this type of instructions, it is possible, but the NCEA cannot judge this at this point. It would be good to check;
- The preamble refers to articles 7 and 67 of the Organic Law, though neither article refers by name to SEA, only EIA. If the Organic Law will be revised at some point in time, the NCEA recommends this to be repaired;
- The instructions do not cover all the steps in the procedure. This is important given the context, in which REMA intends to keep the instructions themselves simple and short, and keep the details for the (to be updated) Guidelines. Short doesn't mean that they should not encompass all the steps of the procedure. A governmental body isn't bound by the guidelines, so the framework of the SEA procedure should be laid out in the instructions.

In the preamble several articles of the Constitution are mentioned. It is not clear why these specific articles are relevant to the subject of SEA.

Observations on the structure

The NCEA has several observations on the structure of the document, currently:

- Chapter I: general provisions (articles 1-3)
- Chapter II: Strategic environmental assessment development
    - Section 1: principles and responsibilities (articles 4-7)

    - Section 2: Compliance requirements (articles 8-9)
- Chapter III: Final provisions (articles 9 (!) – 10)

The structure could be adapted as follows:

- The NCEA considers the technical requirements of the SEA report to be part of SEA development and therefore recommends to move article 8 Environmental report to become article 5, as part of Chapter II, Section 1;
- Monitoring and assessment on the other hand (article 9), are not considered part of SEA development. The NCEA therefore recommends to take this article out of Chapter II;
- As indicated above, provisions related to decision making and the justification of the use of SEA results are currently lacking. This could be resolved by creating Chapter III: Decision making & compliance requirements, in which these new provisions could be included, and in which article 9 on monitoring and assessment could get its logical place. This would make the Sections under Chapter II redundant. These could therefore be abolished;
- The recommended provision on review could also be included in Chapter II SEA development, as final step in that phase of the SEA;
- Check the numbering of the articles: currently, there are two articles 9.

3. Observations per article

3.1 Article 1

The purpose of the instructions 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. It might be an idea to further stress why environmental considerations should be integrated (f.e. by referring to principles in the Organic 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[5].

The NCEA recommends to clarify further why environmental considerations should be integrated in decision making for (policies), plans and programmes and to focus on policies, plans and programmes that are likely to have significant effects on the environment.

The NCEA observes that in the current text, SEA refers to the integration of environmental considerations in policies, plans and programmes only. This is not in line with current EIA practice in Rwanda, which also addresses social and economic impacts. Rwanda's Ministerial Order **N° 003/2008 of 15/08/2008** relating to the requirements and procedure for environmental impact assessment states in its article 1 that an '*Environmental impact study is a systematic way of identifying* ***environmental, social and economic impacts*** *of a project before a decision of its acceptance is made*'.

The NCEA recommends to bring the SEA instructions in line with the EIA instructions and to include the integration of social and economic considerations in its purpose and definition of SEA.

3.2 Article 2

The NCEA does not find logical the distinction and definition of competent authority and responsible authority:

- Internationally, the *competent authority* is considered the authority mandated ('competent') to take the decision on the policy, plan or programme. The authority in charge of the environment is commonly called the *environment authority*. Defining the competent authority as the authority in charge of environment therefore creates confusion;

[5] "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**."

Also, the definition of the authorities could be more precise. In the understanding of the NCEA, the competent authority (as above) decides on the policy, plan or programme, prepares the related SEA and carries out the monitoring. The environment authority approves the ToR and the SEA process and report.

The definition of SEA could be refined:

- there is no mention of the way results of the report should be incorporated in the plan or programme. Where article 1 explicitly mentions the aim of integrating environmental considerations in the policies, plans and programmes, the definition only seems to focus on the making of the report itself;
- in line with above, should the definition of SEA include social and economic considerations?

Furthermore, the NCEA misses some definitions that could be included in article 2:

- Shouldn't a definition of 'policy', 'plan' and 'programme' be included? What makes a plan a plan?
- Is there need for definitions of 'public' and 'report'?

The NCEA recommends the inclusion and refinement of the above definitions in article 2.

3.3 Article 3

The NCEA observes that the scope for SEA is extremely wide: the instructions apply to all policies, plans and programmes, only limited by the themes that they are prepared for. This raises some questions:

- At the level of article 1, the NCEA recommended to focus on policies, plans and programmes that are likely to have significant effects. There is another important reason to do so: without that focus, a high number 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. Should the scope not be further limited with regard to 'significant effects on the environment'? See also chapter 2: general observations, scope of SEA;
- Do the themes cover all relevant sectors that may have an impact on the environment? Does the list include the extractive industries such as oil and gas, and mining for ores and minerals[6], for example?

The NCEA recommends to consider to focus SEA on (policies) plans and programmes that are likely to have significant effects. It recommends to first build a good SEA practice based on a number of high-impact policies, plans and programmes, and to decide in a later stage whether to extend the scope of SEA or not.

[6] See also Rwanda's recently published State of the Environment and Outlook report 2016, in which mining is specifically mentioned as sector to promote sustainable development, in the context of greening the economy by 2020. SEA would be an appropriate took to help achieve this.

In other cases, the competent authority can 'request' an SEA. This also raises some questions (see also 3.6 in this document for further details):

- How will the competent authority know about a new policy, plan or programme? Shouldn't there be a provision on notification of new policies, plans and programmes?
- To whom is this request directed, and on which grounds will the request be granted?

The NCEA recommends to consider the above questions and include provisions in the instructions to deal with them.

3.4 Article 4

This article lists some principles on which SEA shall be based, some of which the NCEA finds ambiguous and can be explained in different ways. Also, responsibilities are not made clear:

- principle 4.2: '*Consideration of all feasible alternatives[…]*': it does not seem realistic to ask for ***all*** feasible alternatives. Key will be to describe alternatives that describe the range of options in terms of environmental impacts and with sufficient detail that allows for equal comparison of implications for decision makers. An option could be to ask for alternatives that try to avoid expected major problems or better serve the objectives of the policy, plan or programme;
- 4.3: '*Openness and transparency in Government decision-making*': what exactly does this mean? Does this mean that every step in the SEA process and all documentation involved should be open to the public? Who is responsible for this task, how will this be organised?
- 4.4: *'Documentation and assessment of results of the Strategic Environmental Assessment'*: does this mean that there should be a (digital) library that includes all SEAs that have been carried out? Who is responsible for this task? Is it the competent authority, see art. 6(d)?
- 4.5: '*Open access to information generated or compiled by the agency*': does this mean that all information that is gathered with regard to SEAs should be (digitally) accessible to the public? Who is responsible for this task? And what is 'the agency'? This term is not specified in these instructions.
- 4.6: '*Accountability to the public and the Government of Rwanda*': this principle should be further specified. For inspiration, see article 9 of the European directive (see foot note 4, p.3). This article requires the responsible authority, when a plan or programme is adopted, to ensure that the relevant authorities, the public and any affected State are informed of:
    - the plan or programme as it is adopted;
    - a statement summarising how environmental considerations have been integrated into the plan or programme and how the report, the opinions

and the results of transboundary consultations have been taken into account and the reasons for choosing the plan or programme in the light of the other reasonable alternatives,
    - and the measures decided concerning monitoring.
- The article does not mention participation. A good SEA process is a process that is participatory, and enables participation of all relevant local and institutional stakeholders. Subs 4.3 and 4.5 do touch upon the lowest level of ambition for participation (one way, passive information), but this is not considered sufficient in a good quality SEA process.
- A common principle in SEA is to make use of existing information as much as possible (as long as it is up to date). In Rwanda, may relevant existing information on environmental effects obtained at other levels of decision-making or other legislation be used for the report (see art. 5(3) of the European directive)? If so, the NCEA would recommend to include this as a principle, as it would render SEA more efficient, cheaper and feasible.

The NCEA recommends the formulation of more precise, non-ambiguous principles for SEA in Rwanda, clarifying responsibilities. It also recommends a limitation in the number of alternatives required, and the inclusion of the principle of participation and on the use of existing information.

3.5 Article 5

The NCEA has some questions in relation to this article:

- Why does this article speak of '*governmental agency*'? Article 1 does not define 'governmental agency'. Shouldn't it be 'responsible authority'?
- The duty of the responsible authority is not clearly specified yet; the article only states '*shall perform a Strategic Environmental Assessment'*. This is rather implicit, and should be clarified. What does this entail? What is expected of the responsible authority
- '*The responsible authority shall include financial provisions*': does this mean that the responsible authority shall bear the costs of carrying out the SEA, including costs for publication/consultation and costs for the competent authority or only of making the SEA? And who will pay for the mitigating measures at the policy, plan or programme level?
- Isn't it more logical to include financial provisions in the final provisions?
- Does '*mitigation measures where deemed necessary'* mean that it is up to the competent authority to deem it necessary? If so, this should be explicitly indicated.

The NCEA recommends a more precise formulation of this article. It also recommends to take the financial provisions out of this article and include them under 'final provisions'.

3.6 Article 6

The NCEA has several questions and observations in relation to article 6:

- What is the difference between guidelines (sub b) and guidance (sub e)?
- What instruments does the competent authority have to ensure that the responsible authority/authorities have followed the provisions of the instructions and guidelines (sub c)?
- Sub f relates to the need to determine whether an SEA is required. This step in the procedure is normally called screening. Is this within sectors defined in art. 2? Is there a screening mechanism? There are currently no provisions for this. The NCEA deems screening a very important part of the SEA process because it is in screening that the need to do an SEA is determined. Without a proper screening mechanism there is a huge risk that policies, plans and programmes will not be submitted to an SEA.
- Sub f specifically refers to the need to submit a notification of the development of a policy, plan or programme (through a 'description statement'). It should be the primary responsibility of the plan owner to inform the competent authority (REMA) of its intentions. The competent authority should not have to ask for it. Moreover, how will the competent authority know of the intention to develop a policy, plan or programme? In other words, the NCEA considers this a requirement for the responsible authority instead of a duty for the competent authority. As such, it should be moved from article 6 to article 5: Duty of the responsible authority.
- Likewise, the obligation to provide additional information to the description statement, if needed, should be with the responsible authority, and should be included in article 5 as well. In an annexe to the instructions a draft 'policy, plan or programme description statement' could be included[7].
- Sub g requires the competent authority to audit the quality of an SEA '*to provide third party input into securing the true quality*': what does this mean? When should this audit take place, on the basis of which criteria (SEA requirements) and what happens if the quality is insufficient?
- If the recommendation to include provisions for scoping/ToR (see chapter 2 of this advisory report) is followed, provisions on the quality control/transparency of the scoping/ToR phase, prior to assessment, would be required;
- The current article does not explicitly contain duties for the competent authority (REMA) related to the review of the quality of the SEA process and contents. Will the competent authority conduct a formal review and approval of the SEA process and report?

The NCEA recommends to clarify the above elements of article 6 and to adjust sub f, making it a requirement for the responsible authority.

[7] The notification of the intent to develop a policy, plan or policy that may need to undergo an SEA is so important that it merits the provision of such draft or format, even given the wish to keep these instructions short and simple. If the REMA will not be notified that a PPP is under development and is not given sufficient information to judge whether an SEA will be required, the whole SEA system will collapse. It should not just be a request from REMA to the authority concerned, but should be an obligation of that authority to inform REMA correctly. Hence these recommendations.

3.7 Article 7

The NCEA has the following questions about article 7:

- Who hires the experts to conduct Strategic environmental assessment? Is it the responsible authority? This should be made explicit;
- How will professionals be 'certified'? Does the certification concern individuals or agencies? On the basis of which criteria? What happens if a professional no longer fulfils the certification requirements?
- Who will be responsible for the management of the certification system? How will this system be kept up to date, transparent and clean?

The NCEA recommends to be more clear on who will be responsible for hiring and certifying SEA experts and how the certification system will work and be managed.

3.8 Article 8

This article seems to entail the substantial requirements of an SEA. We find it very short and complicated to read. It seems to based on article 5(1) of the European directive. This article also refers to an annexe for a more detailed description. It requires the following in an SEA:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance (…);

(e) the environmental protection objectives, established at international or [national] level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring (…);

(j) a non-technical summary of the information provided under the above headings.

Furthermore, article 5 of the European directive stipulates that a report '*shall include the information that may reasonably be required taking into account* ***current knowledge and methods*** *of assessment, the* ***contents and level of detail*** *in the plan or programme,* ***its stage in the decision-making process*** *and the* ***extent to which certain matters are more appropriately assessed at different levels in that process*** *in order to avoid duplication of the assessment.'*

The NCEA recommends to include similar SEA requirements in the Rwandese instructions (in the text or in an annexe).

3.9 Article 9

The article stipulates: '*Where a policy, plan or program may have significant negative effects on the environment, it shall include a system for monitoring and mitigating such effect*.'

The NCEA finds it more logical to include this phrase in the substantial requirements of the SEA report in article 8.