



# Extractives and the Environment: Kenya's Legal and Institutional Framework

Jovia Bogere



© 2020, Extractives Baraza, Strathmore University

Copyright in this article as a whole is vested in the Extractives Baraza, Strathmore University. The article or part thereof shall not be reproduced, transmitted in any form or by any means, photocopying, electronic, recording or otherwise, without full attribution.

Image Source: [yorkimage.co.uk](http://yorkimage.co.uk)

## **EXTRACTIVES AND THE ENVIRONMENT**

### **KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK**

Natural resources are necessary for continuity of various industries including the medical industry, manufacturing industry and construction industry among others. Their need thus cannot be undermined. The global economy relies heavily on natural resource extraction, which has serious impacts on the environment and human health (UN Environment 2019).

The environment can be defined as a totality of surroundings like plants, animals, microorganisms, socio economic and cultural factors. It includes land, water, atmosphere, sound, odour, taste, biological factors of animals and plants and includes both the natural and the built environment (National Environment Policy, 2013). Extraction, if not managed well has the potential to alter the ecosystem including wildlife, and cause pollution in unprecedented ways. With growing population in Kenya, technology advancement and increased urbanization, extraction of minerals and resources will be on an upward trend. There have been a number of campaigns to discourage economies from excessive exploitation of resources for example [GreenPeace](#). Unfortunately, the need to extract and make money off the resources has in many instances superseded that to protect the environment. This trend is expected to rise in the future due to the growing global population which is expected to reach 8.5 billion by 2030, 9.8 billion by 2050 and 11.2 billion by the end of the century (UN Environment Programme 2020).

Better management of the extractives industry is thus crucial for social economic development and environmental sustainability through promoting social cohesion, inclusiveness and economic progress among low-income countries and the most vulnerable groups of the population (UN Environment Programme 2020).

Kenya has a rich stock of laws and policies aimed at protection of the environment. We provide a brief description of these statutes and policies below;

#### **1. CONSTITUTION OF KENYA**

Under the Preamble of the Constitution, the people of Kenya pledge to respect the environment and sustain it for the benefit of future generations. This undertaking informs the basis of the need and obligation to protect the environment from negative effects of activities carried out within the country.

Every person has the right to a clean and healthy environment under Article 42, including the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 and to have obligations fulfilled under Article 70.

Under Article 69, the state is under obligation to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring; eliminate processes and activities likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya among others.

The Constitution also puts in place legal remedies for violation, infringement, denial or threat to the environment under Article 70. An aggrieved person has the right to apply to court for redress and the court may grant directions or orders to prevent acts or omissions harmful to the environment, compel a public officer to take measures against environmental harm or provide compensation to a victim of a violation of the right to a clean and healthy environment. An applicant need not demonstrate personal loss or injury.

## 2. ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT (EMCA), 1999

The EMCA provides for the establishment of an appropriate legal and institutional framework for the management of the environment. It echoes Articles 69 and 70 of the Constitution under Sec 3 to the effect that all Kenyans are entitled to a clean and healthy environment as well as a right to redress for violations.

In addition, the High Court in exercising its jurisdiction is to be guided by principles of sustainable development (Sec 3(5)) for the benefit of future generations. These include the principle of public participation in development of policies, plans and processes for environmental management; cultural and social principles used by communities to manage the environment or natural resources consistent with justice, morality and written law; the principle of international co-operation in management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

The Act establishes a National Environment Restoration Fund under Sec 25, which is a supplementary insurance to mitigate environmental degradation where the perpetrator is not identifiable or exceptional circumstances require the Authority to intervene towards mitigation of environmental degradation.

Under the Second Schedule of the Act, mining, oil refineries, oil and gas pipelines, paved roads and road construction in environmentally sensitive areas, bulk storage of natural gas, petroleum and any combustible and explosive fuels as well as waste disposal are subject to submission of an environmental impact study report. Extractives are thus very much a subject of the EMCA.

EMCA governs a number of institutions including;

- a. **National Environmental Management Authority (NEMA)** (Section 7) which exercises general supervision and co-ordination over all matters relating to the environment. It is the principle instrument of government for implementation of environmental related policies.
- b. **National Environment Council** (Section 4) responsible for policy formulation directions. The Council also sets national goals and objectives, and determines policies and priorities for the protection of the environment.
- c. **Provincial and District Environment Committees** (Sec 29) in charge of decentralization of environmental management and enabling local communities to participate.
- d. **National Environment Complaints Committee** (Sec 31) which receives complaints on environmental disruption, makes investigations and provides administrative mechanisms for addressing environmental violations.
- e. **National Environment Action Plan Committee** (Sec 37) responsible for preparing a national environment action plan every five years for consideration and adoption by the National Assembly. The plan typically contains an analysis of the natural resources of Kenya, patterns of change in distribution and quantity over time, various uses and value of the natural resources and appropriate legal, fiscal and national awareness incentives to encourage environmental safeguards among other duties.

## 3. ENVIRONMENTAL (IMPACT CITATION ASSESSMENT AND AUDIT) REGULATIONS, 2003

These Regulations promote the requirement of environmental impact assessments before a permit is issued and ensure that no one is allowed to carry out activities that can negatively affect the environment. Essentially, no licensing authority under any law in force in Kenya is allowed to issue a licence for any project for which an environmental impact assessment is required under the Act or for a project activity likely to negatively impact the environment unless the applicant produces an environmental impact assessment license (Regulation 4(2))

**4. ENVIRONMENTAL MANAGEMENT AND COORDINATION (NOISE AND EXCESSIVE VIBRATION POLLUTION) (CONTROL) REGULATIONS, 2009**

These Regulations prohibit production of any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. "Noise" is defined under Sec. 2 as any undesirable sound intrinsically objectionable or that may cause adverse effects on human health or the environment.

Under Reg. 11(b), any person who wishes to engage in any commercial or industrial activity that could emit noise or excessive vibrations is required to carry out the activities within prescribed restrictions. This includes noise from mining or quarrying sites whose operations must be carried out within levels permitted under the Act (Reg. 14). Activities under the Act are subject to Environmental Impact Assessments.

**5. THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (WETLANDS, RIVER BANKS, LAKE SHORES AND SEA SHORE MANAGEMENT) REGULATIONS, 2009**

A developer intending to undertake a project which may have significant impact on wetlands, river banks, lake shores or the sea shore is under obligation to carry out an environmental impact assessment in accordance as provided under the Regulations (Reg. 21). Extractives Activities many times have an impact on lake and sea shores through spillage and are therefore governed by these Regulations.

The Regulations also give power to an environment officer within whose jurisdiction activities are likely to degrade river banks, lake shores or the sea shore to ensure that the communities living near such areas participate in conservation activities and assist them in implementing these Regulations and any other law related thereto (Reg. 23).

**6. ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (WATER QUALITY) REGULATIONS, 2006 ARRANGEMENT OF REGULATIONS**

These Regulations apply to drinking water, water for industrial, agricultural and recreational purposes, water for fisheries and wildlife, and water for any other purposes. There are various uses of water resources in the extractives industry for example, water flooding where water is pumped into an oil reservoir to push oil out of rocks (Fossil Energy Study Guide-P.3).

Under Reg. 6, any person who discharges effluent from sewage treatment works, industry or other sources into the aquatic environment without a valid effluent discharge license issued in accordance with the provisions of the Act commits an offense.

**7. ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (WASTE MANAGEMENT) REGULATIONS 2006**

These Regulations apply to all waste including; Industrial waste, hazardous and toxic waste, pesticides and toxic substances, biomedical waste and radio-active substances. They outline requirements for handling, storing, transporting, and treatment/ disposal of all waste categories.

Any person whose activities generate waste is required to collect, segregate and dispose of such waste in the manner provided under the Regulations and such person must ensure that the waste is transferred to a person who is licensed to transport and dispose of such waste in a designated waste disposal facility. The Regulations also provide guidelines for waste treatment and disposal (Reg.6).

**8. PETROLEUM ACT 2019**

This Act provides a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they

apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations and for connected purposes. It is the main legislation for petroleum activities in Kenya.

The Act in dealing with environmental activities follows Article 69 of the Constitution as well as the EMCA (2009). As such, under Sec. 59, a contractor is required to carry out upstream petroleum operations in accordance with all the applicable environment, health, safety and maritime laws and best petroleum industry practices. These include; ensuring safety, health and welfare of people engaged in operations; preventing escape of waste, drilling fluid or petroleum in the contract area; keeping separate each petroleum reservoir and water sources discovered in the contract area; preventing pollution of soil, air, biodiversity, brine, water well, spring, stream, river, lake, reservoir, sea, forest, wildlife and marine, estuary or harbour by the escape of petroleum, salt water, drilling fluid, chemical additive, gas (not being petroleum) or any other waste product or effluent; treating pollution in an environmentally acceptable manner; furnishing the Energy and Petroleum Regulatory Authority (EPRA), prior to drilling any well, a detailed report on the technique to be employed, estimate of the time to be taken, material to be used and the safety measures to be employed, in drilling the well; and preventing flaring or venting of oil and natural gas by undertaking all reasonable steps including the harnessing or re-injecting of the gas.

Furthermore, under Sec.63, a person engaged in a petroleum agreement should notify the EPRA within forty-eight hours in writing, of any accident or incident causing loss of life, personal injury, explosion, oil spill, fire or damage to the environment within Kenya's Economic zone. This helps minimize loss through fast response from the disaster preparedness, prevention and management unit.

A contractor who fails to carry out the set obligations to protect the environment is liable for damage from pollution without regard to fault from whichever source related to the upstream petroleum operations of the contractor when the damage occurs in Kenya or within its territorial waters (Sec.72).

The Act goes on to require similar environmental protection obligations for midstream and upstream activities and encourage conservation of natural resources through upholding international Maritime laws under Section 75 (b) before a license can be issued. Such license must further be accompanied by an environmental liability policy under Section 79.

Furthermore, under Section 86(2) (f), anyone undertaking construction of a pipeline, refinery, bulk storage facility, retail dispensing site, centralized gas reticulation system or designated parking place for petroleum tankers must apply for a permit to do so before construction begins and such application must be accompanied by an environment and social impact assessment license.

Environmental health and safety laws under the Act must be fully complied with by anyone engaged in petroleum business under Section 97(1). Failure to comply with the set environmental health and safety measures in place is under Section 99 (1) (b) is punishable by a fine not less than ten million shillings, or a term of imprisonment of not less than five years, or both.

## **9. MINING ACT 2016**

Environmental laws under the Mining Act prevail over any mineral right, licence or permit granted under the Act. A holder of a mineral right (license or permit) must therefore strictly adhere to existing laws on the protection of the environment.

Under Sec. 176 (2), obtaining an environmental impact assessment license and approved social heritage assessment and environmental management plan are pre-requisites to grant of a mining licence. Likewise, a contractor seeking a license must submit site mitigation and rehabilitation or mine-closure plans for approval (Sec. 180). These plans

entail restoration of sites to their state before mining activities commenced and an environmental protection bond is required to cover rehabilitation costs.

#### **10. KENYA MARITIME AUTHORITY ACT 2012**

This is an Act of Parliament that establishes the Kenya Maritime Authority, to monitor, regulate and coordinate activities in the maritime industry.

Among the functions of the Authority includes developing, coordinating and managing a national oil spill contingency plan for both coastal and inland waters as the “competent oil spill authority” under Section (5) (1) (f). The Act is further supported by the National Energy Policy (2018) under Section 6.1.7 that deals with Land, Environment, Health and Safety, as well as Section 6.5.2 which requires planning and management against oil spills and sabotage through terrorism. The maritime industry is also supported by Sec 97(2) of the Petroleum Act 2019 which requires compliance with environmental health and safety laws through cleaning the damaged or polluted environment in case of oil spills, fires, explosions and related accidents. Any person engaged in storage, transportation or sale of petroleum and petroleum products is required to have in place an oil clean-up plan in compliance with the National Oil Spill Policy, relevant environmental health and safety Regulations or guidelines.

#### **11. NATIONAL ENVIRONMENT POLICY 2013**

The National Environment Policy Kenya focuses on the fact that the environment and natural resources in Kenya are valuable national assets that must be sustainably managed for present and future generations.

The policy was created to solve the many environmental degradation challenges facing the country as a result of poor waste disposal, industrial and transport pollution which affect air, water, human health and soil quality and in so doing, seeks to provide the framework for an integrated approach.

#### **CONCLUSION**

Kenya has a robust legal framework for the protection of the environment from hazardous effects arising from various industries. There however still remains a great need to sensitize enforcement agencies, production companies as well as consumers of the need to protect and spare the environment for present and future needs.

In the words of Nobel Laureate Peace Prize winner, the Late Prof. Wangari Maathai, *“You cannot protect the environment unless you empower people, you inform them, and you help them understand that these resources are their own, that they must protect them.”* The wide availability of legal framework for protection of Kenya’s environment is without a doubt commendable. We now need to ensure that it actually works to fulfil its purpose to secure a home for ourselves and the future generations.

Be on the lookout for further insight into Kenya’s performance in the bid to utilize resources in a way that is sustainable for the environment.

## **BIBLIOGRAPHY**

1. Kenya National Environment Policy (2013)
2. Greenpeace, 2020, “Kenyans face growing threat of flash floods amidst COVID-19 pandemic”, available at: <https://www.greenpeace.org/africa/en/press/9359/kenyans-face-growing-threat-of-flash-floods-amidst-covid-19-pandemic/>
3. UNEnvironment (2020), “How minerals and metals companies can help achieve 2030 Agenda for Sustainable Development” available at: <https://www.unenvironment.org/news-and-stories/story/how-minerals-and-metals-companies-can-help-achieve-2030-agenda-sustainable>
4. Fossil Energy Study Guide-Oil, available at: [https://www.energy.gov/sites/prod/files/2013/04/f0/HS\\_Oil\\_Studyguide\\_draft2.pdf](https://www.energy.gov/sites/prod/files/2013/04/f0/HS_Oil_Studyguide_draft2.pdf)