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## **ENFORCEABLE COMMITMENTS AND MORE ACCOUNTABILITY IN ESIA FOLLOW-UP**

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### **Introduction**

A key challenge in ESIA implementation is the translation of commitments identified in the ESIA process into enforceable conditions. Another challenge is the lack of accountability mechanisms in the implementation process, such as public and stakeholder engagement (IAIA FasTip Compliance and Enforcement 2023). The wish to address these two issues has also come forward as priorities in the recent ESIA follow-up needs assessment carried out in the Eastern African region<sup>1</sup>. The needs assessment was carried out by East African Network for Environmental Compliance and Enforcement (EANECE) with support from the Netherlands Commission for Environmental Assessment (the NCEA).

This paper is written against the background of this needs assessment. In this paper, EANECE and the NCEA share lessons and insights from two cases in Uganda and Kenya on ESIA follow-up. Specifically, the two cases attempt to illustrate and draw lessons on:

- The process of ESIA/ESMP review and improvement.
- Translating the ESIA/ESMP into binding instruments before the start of a project.
- The role of environmental authorities in enforcement and compliance with ESIA/ESMP conditions.
- Accountability through the empowerment and engagement of local groups in monitoring throughout all phases of a project.

It should be noted that the case studies are written based on desk review, exchange with relevant stakeholders and some engagement in the ESIA process (in the Uganda case). The authors did not conduct any field work to evaluate the effectiveness of the compliance and enforcement on the ground. The paper mainly focuses on institutional and organisational context and conditions for compliance and enforcement (but their effectiveness on the ground requires further investigation).

### **Case Uganda**

#### *Background*

Since the first oil discoveries in 2006, the promotion of this sector has been high on the agenda of the Government of Uganda. While some consider these discoveries as an opportunity to develop the Ugandan economy, others are concerned because the commercially viable oil reserves are mainly located in the Albertine Graben region. This region contains high biodiversity values and is home to communities who highly depend on natural resources. Therefore,

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<sup>1</sup> The text is forthcoming.

exploitation of oil resources which will start in 2025, is expected to influence amongst others the biodiversity and the lives of many people<sup>2</sup>.

The Ugandan legislation requires ESIA for plans and projects in the petroleum sector and appoints the National Environmental Management Authority (NEMA) as the mandated institution to review and decide on ESIA's. First a Strategic Environmental Assessment was conducted (2010-2013) for the Albertine Graben, followed by 3 ESIA's for projects to exploit and to transport oil. These ESIA's have been finalised and approved in 2019 and 2020, and the projects are currently in the preparation/construction phase.

#### *The review and improvement of the ESIA and ESMPs*

In the case of all three ESIA's, ample attention was paid by NEMA to the review of the ESMPs and their sub-management plans that were part of the ESIA. The review included internal workshops dedicated to evaluate the ESMPs by NEMA itself and the gathering of inputs from a broad range of stakeholders and institutions through written contributions, workshops with representatives from lead agencies and public hearings and independent advice (including from the NCEA and the Norwegian Environmental Agency through their Oil for Development Programme). In these reviews explicit attention was paid to ensuring that the ESMPs cover mitigation of key impacts at all project stages, clarifying and distributing institutional roles and responsibilities and providing realistic timeframes, cost estimates and funding sources. The review findings were consolidated by NEMA and submitted to oil companies with requests for revisions and improvements **to make relevant parts of the ESMPs more concrete and actionable**, through observations and comments like:

- *'The components of biodiversity that will be impacted should be quantified so the biodiversity offset outcome is measurable' and 'a baseline should be in place to enable monitoring and measuring the delivery of conservation outcomes from the offset intervention' and 'the methodology to measure outcomes should be clearly stated with clear performance indicators'.*
- *'In the tourism management plan, the monitoring of impacts is not included as an objective and mitigation measures are not SMART..... therefore the tourism management plan must include the objective to monitor impacts and mitigation measures should be refined and made smart (e.g. potential reduction of tourists visiting Murchison Falls National Park).*
- *The Hazardous Chemical Management Plan does not present key performance indicators which makes it hard to monitor. Provide an inventory for the chemicals and translate this into KPIs and monitoring and control systems.*
- *In the Wetlands Management Plan the KPI indicators are not very clear, and provisions to obtain permits not indicated..... KPIs should be clearly defined and permits must be obtained before undertaking works across wetlands.*

#### *Translating ESMPs into enforceable conditions*

After their approval, NEMA issued the *Certificate of Approval* for each of the ESIA's for the three oil development projects. At around the same time, the Petroleum Authority of Uganda (PAU) issued Petroleum Exploration and Development Licences for the projects.

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<sup>2</sup> For example, according to their Resettlement Action Plans, the 296km EACOP pipeline in Uganda passing through 10 districts and 171 villages requires the resettlement of 3792 persons and the Tilenga project of around 4864. Adverse effects are also expected in protected areas with high biodiversity values like the Murchison Falls National Park, River Nile, Lake Albert, Budongo Forest Reserve, Bugungu Game Reserve.

Previously, the Certificate of Approvals issued by NEMA were mainly a general list with standard conditions which did not clearly reflect the findings and conclusions of an ESIA. In the case of the 3 ESIA's for the oil projects, NEMA made deliberate efforts to design the Certificate of Approval and its conditions<sup>3</sup> in such a way that the ESIA/ESMPs were translated into concrete conditions. The Certificate included a general provision that the commitments in the ESIA and the ESMP must be implemented, complemented by specific conditions that can be verified during monitoring and inspections. For example the requirement to 'provide alternative access routes for communities', and to 'bury the pipeline at a depth of at least ten meters below the ground' (stated in the EACOP's certificate).

#### *Compliance and Enforcement (and role of authorities)*

Monitoring large scale developments such as in this example is a complex task requiring clear roles and responsibilities, budgets, good coordination between authorities and ability to deal with the large amounts of information and data.

NEMA is the principal authority to monitor the ESIA's Certificate of Approval. NEMA is also responsible for monitoring conditions outlined in several licences and permits they issue such as, for dealing with hazardous chemicals, noise, wetland use, pollution control and waste management. NEMA's supervision takes place through reviewing the quarterly and yearly reports they receive from the proponent. Findings in these reports are verified during quarterly site inspections, NEMA jointly carries out with the relevant local government department staff such as from the District Natural Resources Office (DNRO), the District Environmental Officer (DEO) and the Ugandan Wildlife Authority (UWA) and also during their annual environmental audits. DEO and DNRO also conduct (monthly) environmental and social monitoring of subprojects and report to NEMA.

PAU is the lead authority to regulate and monitor the oil sector. According to the Petroleum Regulations (2016) the operator must submit monthly production statements to PAU and report within 7 days in case of any leaks. PAU undertakes quarterly monitoring, separate from NEMA, to check upon the proponent's operations.

Ministry of Water and Environment (MWE) is the licencing and permitting authority for water abstraction and waste water discharge, while UWA is the licencing and permitting authority for operations in protected areas. UWA placed wards on project sites for daily monitoring and established a dedicated unit to monitor gas and oil at their headquarters. UWA joined NEMA in their quarterly site inspections and annual environmental audits. In these compliance exercises, various aspects are looked into such as noise, vibration and biodiversity management requirements in NEMA's Certificate of Approval. The daily and monthly inspection findings are communicated directly to the operator, to ensure that corrective measures are taken when necessary. UWA undertakes separate and dedicated monitoring of the biodiversity action and management plans. These plans were improved with clearer targets, baseline and indicators, against which monitoring now can take place. Specifically for the Murchinson Fall National Park, UWA, the Wildlife Conservation Society (WCS) and the oil companies undertake joint monitoring of the biodiversity impacts and effectiveness of the applied mitigation measures.

UWA is also responsible to monitor the impacts on tourism. The oil companies are required to monitor and report on the indicators specified in the Tourism Management Plan, which was specified at the request of NEMA (on indicators like the number of tourists, their satisfaction,

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<sup>3</sup> With support from Norwegian legal experts under the Oil for Development Programme.

revenue generated and the frequency of wildlife sighting). There are quarterly meetings with UWA, PAU, local government, private tourism stakeholders amongst others, to discuss these quarterly reports.

#### *Accountability, role of CSOs and local groups*

CSOs and media were and are closely watching the developments in the oil sector. Several of them have formed a coalition called the Coalition of Civil Society Organisations (CSCO). CSCO was actively invited to provide their comments on the ESIA/ESMPs, upon which they carried out detailed evaluations and reported their findings on the ESMP and sub-management plans<sup>4</sup>. CSCO also monitored to what degree their comments were taken into account and concluded that they had a significant contribution considering the number of their recommendations adopted in the final ESMPs. The CSCO states to be committed to monitoring the compliance of operations by oil companies. It is however not clear how active this coalition still is and whether they still have sources of funding.

A number of CSOs, whose work was also picked up by the media, was closely watching the ESIA process and informed and helped mobilising communities in the ESIA processes and later on in the issues around resettlement. They are currently also undertaking activities to organise and prepare communities to undertake monitoring at the exploitation phase, or are undertaking monitoring in the field<sup>5</sup>. Some of these CSOs also filed lawsuits against NEMA and PAU arguing that agreements with the oil companies were signed without due regard to Ugandan national laws. They particularly used the argument that Certificates of Approval were issued before the ESMPs were fully approved<sup>6 7</sup>. This is indeed a factor that may complicate the monitoring during the operations phase due to unclarity about which version of the ESMP is binding and should be used in monitoring. Is it the one on Total's website dating February 2020<sup>8</sup>, or the one which was revised and approved by NEMA after August 2021?

## **Case Kenya**

### *Background*

Since the discovery of titanium in Kwale there was an attempt to extract it by Tiomin Inc, which later surrendered the mine to Base Titanium due to challenges they encountered in the initial stages of their project. The controversies included, but were not limited to, the preparation of the ESIA report that revealed inadequacies in their ESMP. Some critical aspects such as relocation, compensation, need for continuous rehabilitation of the mining site, effect of radiation and toxic substances on indigenous people and general environmental impact on ground water and soil erosion were insufficiently addressed (Abuodha, 2002). There were assertions that due the lack of local expertise in ESIA studies for the extractive industry in Kenya, a multinational consulting company had to be engaged who had bias towards the multinational proponent. This led to court battles and activism that hampered the project and finally led to the proponent exiting the project

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<sup>4</sup> See Link <https://enrcso.org/wp-content/uploads/2020/08/CSCO-Review-of-the-Tilenga-ESMPs.pdf>  
Afterwards, CSCO also evaluated in detail to what degree their inputs had been taken into account <https://www.acode-u.org/uploadedFiles/CSCO-RP8.pdf>.

<sup>5</sup> See for example [CSCOs field monitoring report](#) in 2023

<sup>6</sup> For example the ESIA for the Tilenga project was approved in April 2019 whilst the ESMP was still not approved and a last revision by NEMA took place after August 2021.

<sup>7</sup> EACOP court case was rejected by the East African Court Nov 2023

<https://www.independent.co.ug/eacop-east-african-court-rules-oil-pipeline-can-go-ahead-throws-out-civil-society-case/>

<sup>8</sup> [Microsoft Word - 10 EACOP Tilenga ESIA ESMP Rev2.docx \(totalenergies.ug\)](#)

and later on selling the mines to Base Titanium (Chelagat, 2015). Worth noting is that the ESIA was prepared prior to Kenya developing the EIA regulations 2003.

Base Titanium's approach to environmental and social issues was a game changer and contributed to the success of their project later on. They proactively engaged with the National Environmental Management Authority (NEMA) to inquire about regulatory requirements before engaging in the project. In July 2002, NEMA conditionally approved the Environmental Social Impact Assessment and the EIA License was received in June 2005. After Base Titanium Company bought the mines from Tiomin Limited, several supplement reports were prepared and approved by NEMA (NEMA, 2012). A number of specialist studies was undertaken over the last decade. These studies include assessments of the ecosystems services, soils and land use, ground and surface water, vegetation and floristics, terrestrial and aquatic fauna, air quality, radiation, noise, social and health. Base Titanium Company adopted international best practice, in the absence of EIA regulation, when initiating the project. It is the only project that paid a deposit for an environmental bond without relevant legislative framework. Currently Base Titanium mining in Kwale contributes to over 65% of Kenya's mineral earnings (NEMA, 2021).

#### *The review and improvement of the ESIA/ESMPs*

The ESIA process involved community consultation and raising awareness of the potential impacts of the proposed project. It is important to note that Tiomin Inc faced challenges for not fully acknowledging this issue. As the project involved relocation of settlements, it was essential to conduct a survey and develop a resettlement action plan in cooperation with the line agencies in charge of land and various natural resources in the determined project area. NEMA required the proponent to also prepare supplement reports, informed by specialist studies and submit them for review and approval before commencing the mining activity. The initial ESIA/ ESMP by Tiomin was criticised for not addressing the handling of radioactive waste, heavy metals that may spill/find their way in water resources, ecological damage from the establishment of a mineral processing plant, use of surface and ground water and benefit sharing; how would the local communities benefit from the project (Abuodha & Hayombe 2006). This created a "push" for Base Titanium and NEMA to undertake a trustworthy ESIA study and review process. Issues raised by stakeholders ranging from communities, researchers, regulatory authorities amongst others, had to be conclusively addressed before the start of mining activities. As per the EIA/EA regulation of 2003, the study was classified as a comprehensive assessment study. It involved the public release of the ESMP for feedback as well as the organisation of public hearings by NEMA, to gather the views of stakeholders. The concerns raised during the public hearing **influenced the conditions of licence issued by NEMA.**

NEMA also received feedback from lead agencies in charge of mining, land, water and physical planning among others, which **influenced the issuance of the licence.** Overall, the process of ESIA/ESMPs involved robust stakeholder engagement, public consultation and feedback, which informed the development of the grievance redress mechanism, subject to continuous improvement. This achievement can be attributed to the proponent's (Base Titanium) attitude and willingness to ensure environmental concerns are identified and addressed in the Environmental and Social Management Plan.

#### *Translating ESMPs into enforceable conditions*

NEMA issued approval for the project, subject to conditions clearly outlined in the approval. These conditions were based on feedback from the lead agencies and extensive public consultation conducted by both the ESIA expert and NEMA. Comments from residents in the mining area were also considered when formulating the approval conditions. The inclusion of

provisions for submitting specialist reports and plans, with specific environmental indicators, contributed to enhancing the enforceability of the approval conditions.

#### *Compliance and Enforcement (and role of authorities)*

To ensure compliance and enable enforcement, Base Titanium, allocated resources that would ensure monitoring, relocation and established grievance redress mechanisms are operational. The NEMA and specialists from lead agencies are continuously involved in monitoring the project to ensure compliance. The company has a dedicated department that focuses on environment. The focus is generally on environment, specifically, biodiversity, wetland restoration, land rehabilitation, waste recycling, environmental education with specific listed indicators. The company has established an indigenous tree nursery and an arboretum to conserve and propagate trees for conservation. To ensure sustainability, the company in collaboration with specialists from lead government agencies, NGOs and communities, carry out regular habitat surveys to improve knowledge of the area's rich biodiversity.

NEMA has specifically appointed the County Director of Environment and relevant specialists in the authority to monitor the mining activities. They developed a schedule for frequent monitoring to ensure compliance and have implemented an independent incident reporting mechanism, separate from the company's established reporting mechanism. This allows the community or the public to raise concerns about the operation of the mining company without undue influence. Additionally, the authority utilises stakeholder engagement and surveys as monitoring tools, to enhance compliance and ensure enforcement.

The company submits annual reports on environmental audits which are reviewed by NEMA and orders are issued when improvements are needed. So far, the company/ proponent puts considerable efforts to comply with improvement orders are issued. These include improvement orders focusing on water, quality & quantity, radioactivity, occupational health and safety, biodiversity, conditions for shipping loading and infrastructure, and rehabilitation of mined and affected areas. Base Titanium has developed a suite of Environmental Management Plans (EMPs) and programmes to guide the environmental management of the operations. These EMPs are documents that are continually reviewed and updated in response to evolving circumstances identified through Environmental and Social management System established by the company (Britt, 2020).

#### *Accountability, role of CSOs and local pressure groups*

The CSOs, local pressure groups and media have been active in the whole process from initiation of the mining idea to the operation and decommissioning process. These pressure groups were part of the movement that discouraged operation of Tiomin Inc through court cases for their lack of transparency and observance of environmental and social integrity. When Tiomin Inc sold the mines to Base Titanium, activism from the CSOs and local pressure groups played a crucial role in monitoring the activities of the new proponent. They actively provided feedback that influenced the formulation of the ESMP and Licensing conditions. Currently, they continue to participate actively in the environmental monitoring conducted by both Base Titanium and NEMA through their representatives and coalitions.

Civil society and local communities have continuously voiced their concerns. This has however not been a guarantee for their concerns to be adequately addressed, both by the proponent and regulators. It has been reported that inconsistent participation of community members and limited collaboration between lead agencies poses a threat to local livelihoods and has diverse implication on local development (Brit, 2020).

## Overarching lessons

In both the case of Kenya and Uganda, deliberate efforts have been made to improve the ESIA/ESMPs, including the collection of inputs from a broad range of stakeholders including CSOs. This played an important role in improving the quality of the ESMPs, making them more actionable and clarifying the roles and responsibilities of different authorities. In both cases the ESMPs have been translated into plain, enforceable conditions, with clear indications of institutions and their specific mandates and responsibilities in monitoring.

In the case of Uganda an institutional structure of monitoring is well established with clear reporting mechanisms and communication among agencies, such as the joint missions conducted by NEMA, UWA and DNRO. However, these institutions may face greater challenges when actual oil exploitation starts in 2025, and stronger coordination mechanisms may become necessary, both in horizontal (for example between NEMA, the lead authority and sector authorities) as vertical terms (for example between NEMA and environmental offices at decentral levels). Also, it is important to assess whether the existing structures and number of personnel are still sufficient to carry out the extensive monitoring task during the exploitation phase. In the Kenya case, community structures are established and incorporated into the formal monitoring system including grievance redress and reporting mechanisms established to ensure accountability. However, the inconsistent participation of community members and limited collaboration between lead agencies weakens compliance and enforcement. Thus failure in attaining sustainability.

Both cases highlight the crucial role of scientifically backed, well organised and capacitated civil society and media in holding government institutions accountable for adhering to existing laws and regulations, including the conditions following from ESIA/ESMPs. In the case of Kenya, the advocacy from civil society, communities and media appears to have been instrumental in prompting the proponent to implement robust self-regulation. Self-regulation based on an organisation's value system, contributes to compliance and enforcement despite limited resources available to a regulatory authority like NEMA. The transparency and accountability of project operations have enabled the mining company to gain overall confidence of the community and regulatory authorities, thus creating an environment conducive to promoting compliance, negotiated compliance and effective enforcement – thereby working towards achieving sustainability. Through this process, the CSOs have also played a key role in the entire ESIA and subsequent follow-up processes.

So far, the transparency created in the ESIA processes in Uganda (e.g. through public hearings, the publication of ESIA/ESMPs and the Certificate of Approvals) were enabling factors for CSOs and the media to play a role in monitoring. They can only continue with playing this role, if transparency and disclosure of monitoring reports are safeguarded in the future.

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