



LAW  
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# LEAD

## FINANCING ENVIRONMENTAL MANAGEMENT IN KENYA'S EXTRACTIVE INDUSTRY: THE PLACE OF THE POLLUTER PAYS PRINCIPLE

G Omedo, K Muigua and R Mulwa

ARTICLE

VOLUME  
16/1



*LEAD Journal (Law, Environment and Development Journal)*  
*is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the*  
*Law, Environment and Development Centre of SOAS University of London*  
*and the International Environmental Law Research Centre (IELRC).*  
*LEAD is published at [www.lead-journal.org](http://www.lead-journal.org)*  
*[info@lead-journal.org](mailto:info@lead-journal.org)*  
*ISSN 1746-5893*

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This advance version of the article can be cited as  
G Omedo, K Muigua and R Mulwa, 'Financing Environmental Management in  
Kenya's Extractive Industry: The Place of the Polluter Pays Principle',  
16/1 *Law, Environment and Development Journal* (2020), p. 1,  
available at <http://www.lead-journal.org/content/a1601.pdf>  
DOI: <https://doi.org/10.25501/SOAS.00032457>

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# 1

## INTRODUCTION

The main aim of the Polluter Pays Principle (PPP) is to provide for the would-be polluter(s) to bear the full expenses of undertaking potentially polluting activities. This is done through measures that promote the allocation of adequate costs of pollution prevention and control for more environmentally sensitive processes, beyond their private costs of production.<sup>1</sup> It is widely recognized<sup>2</sup> that for the PPP to be effective, it needs to be effectively regulated and robustly promoted. Literature finds the PPP to have great potential to strengthen the economic, ethical and legal compliance mechanisms,<sup>3</sup> leading to good environmental management practices.<sup>4</sup> The polluter pays principle also avails the much-needed resources for environmental management, reducing the pressure on the available public finance,<sup>5</sup> while encouraging research and innovation within the private sector for pollution management. A shared approach to managing pollution between States and private sector players enhances sustainable development.

In Kenya, the polluter pays principle is defined in the framework Environmental Management and

Coordination Act of (Amended) 2015,<sup>6</sup> as ‘the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, and is to be paid or borne by the person convicted of pollution’<sup>7</sup>. But while these provisions propose that the convicted polluter is to squarely bear these costs thereof, there is little in terms of the demonstrable evidence of how this is implemented.

Globally, the PPP advances four key components required for effective regulation including the need for internalization of costs by the would-be polluter; the importance of proper identification of the cost-bearer; the definition of the means of internalization of pollution costs; and the delineation of the overall bounds within which such internalization has to take place.<sup>8</sup> The PPP was originally articulated by the OECD in 1975 as one of the guiding principles of international economic aspects of environmental policies,<sup>9</sup> and gained prominence during the global conference on sustainable development of 1992 in Rio de Janeiro, where it was adopted as the 16<sup>th</sup> principle for Sustainable Development. Consequently, national authorities were to ‘endeavour to promote the internalization of environmental costs and the use of economic instruments, considering the approach that

1 Priscilla Schwartz, ‘The Polluter-Pays Principle’ in M Fitzmaurice, D M Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 243-61.

2 Organisation for Economic Co-Operation and Development (OECD), ‘The Polluter Pays Principle: OECD Analyses and Recommendations’ (1992) <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En)>.

3 *ibid*.

4 Mizan R Khan, ‘Polluter-Pays-Principle: The Cardinal Instrument For Addressing Climate Change’ (2015) 4(3) *Laws* 638-653.

5 Alan Boyle, ‘Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Cost’ in F Franzioni and T Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991) 363.

6 Refers to the Preliminary Section of the EMCA 1999, Interpretation, where the polluter pays principle is defined. The next reference to the polluter pays principle is in Part II - General Principles, Section 3 (5) (e) where the High Court shall be guided by the principles of sustainable development, PPP included. Not much is available to guide how the interpretation of the PPP can be used to enforce good environmental practice.

7 Environmental Management and Coordination Act 2015.

8 OECD (n 2).

9 Edwin Woerdman and others, ‘Emissions Trading and the Polluter-Pays Principle: Do Polluters Pay under Grandfathering?’ (2008) 4(2) *Review of Law & Economics* 565-590; OECD, *The Polluter Pays Principle: Definition, Analysis, Implementation* (OECD 1975).

the polluter should, in principle, bear the cost of pollution, with regard to the public interest and without distorting international trade and investment'.<sup>10</sup> Because of this, many governments including Kenya integrated this principle, among the other soft-law principles within the legal framework enacted for environmental management.

However, many governments generally implement the PPP through the creative blend of both command and control and economic incentive instruments, such as market-based instruments.<sup>11</sup> For both command and control and economic instruments to work effectively, there needs to exist an effective regulatory system in relation to four important aspects. These are the rule of law, effective governmental authority, an effective and consistent fiscal system, and clear and consistent property rights.<sup>12</sup> For the purpose of this article, we analyse the place of the polluter pays principle within Kenya's robust laws, amidst the growing environmental challenges associated with a growing extractives industry portfolio in Kenya. The article reviews the PPP's implementation through a comprehensive review of the country's regulatory regime and some of the economic incentive/disincentive strategies applied for pollution management. The article is premised on the understanding that while Kenyans have legitimate expectations to benefit fully from the wide array of extractives resources that have been discovered recently (titanium, gold, oil and gas, etc), they equally deserve to be protected from the negative environmental impacts that are likely to result from any unsustainable

extraction. Hence, the effective application of the PPP is an important avenue of realizing this across the mining value chains, especially during the costly stages of mine closure and decommissioning requiring mine rehabilitation and restoration.

The main objective of this article is to critically analyse the implementation of the polluter pays principle in Kenya. To achieve this objective, a qualitative research design was adopted. This was achieved through a set of research questions covering each of the four categories for reviewing baseline legal and administrative conditions set in Kenya's legal edifice: (1) the rule of law; (2) efficient and effective property rights; (3) fiscal systems; and (4) effective governmental authority. To answer the research questions, data collection strategies involved rigorous content analysis of the relevant legal documents (laws, statutes, regulations etc.) and administration of an interview schedule to a carefully selected sample of respondents. The respondents were divided into four categories which included government agents, private sector players in the extractive industry, research and academic agents, and civil society representatives.

## 2 ENVIRONMENTAL MANAGEMENT IN THE EXTRACTIVE RESOURCE INDUSTRY

The main extractive resources in Kenya are minerals and petroleum (oil and gas) and these have a host of environmental problems associated with their exploitation, extraction and processing.<sup>13</sup> Such

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10 Jorge E Vinuales, *The Rio Declaration on Environment and Development* (Oxford University Press 2015).

11 Ondřej Vácha, 'The Polluter-Pays Principle in OECD Recommendations and its Application in International and EC/EU Law' [2011] 2 (Czech Society of International Law) *Czech Yearbook of Public & Private International Law* 57-67.

12 United Nations Environment Programme (UNEP), 'Training Resource Manual: The Use Of Economic Instruments For Environmental And Natural Resource Management' (2009) <<https://www.unpei.org/sites/default/files/PDF/Training-Resource-Manual-DEPI-ETB-DTIE.pdf>>.

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13 Philip Otieno, Interview with Obadiah Mungai, Chief Economist, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (NEMA Offices, Nairobi, 15 February 2018).

environmental problems include; effects on ambient air, soil, landscape, vegetation, habitats, and water.<sup>14</sup> The environmental and social impact assessment report for the titanium mining project in Kwale Kenya enumerates various environmental impacts such as de-vegetation in the mine area expected to 'produce a significant change in the' flora and fauna 'species' population, 'including impacts on species diversity and loss of special habitats such as those used for breeding, resting, food, or migratory sites'; mining activities at the primary plant requires 'a large volume of water and electrical power'.<sup>15</sup> This can lead to over abstraction of ground water and a general decline of environmental reserve flows if streams and rivers are diverted or dammed.<sup>16</sup> Indeed, the downstream community at the confluence of River Mukurumudzi and the Indian Ocean reported a near total water loss due to damming of the river for titanium mining and sugar production in Kwale county which might have long term effects on the productivity of the mangroves.<sup>17</sup> Other challenges noted in the environmental impact assessment study include the need to put in place measures of 'handling of suspended solids and dissolved heavy metal substances' which may seep into water courses; and dust leading to 'suspended particulate matter in the air' with their 'associated environmental health risks to the workers and' neighbouring 'communities'.

Other challenges that were expected during the environmental impact assessment included problems linked to tailings disposal dams especially the fear of

leakage from such sludge dams, 'risk of seepage, leaching or breakage of tailings' dams, with the dust erosion from dried tailings during drought exposing works and 'people living in' the neighbourhoods to 'potentially harmful dust'.<sup>18</sup> Other environmental effects related to supportive infrastructural development may include acid rain and greenhouses due to air pollution from diesel-powered plants to generate electricity.<sup>19</sup> These challenges are not just for the mining sector, but extraction of oil and gas is equally associated with several negative environmental consequences.<sup>20</sup>

Environmental protection is therefore a critical factor across the entire mining value chain, and Kenya's legal framework does well in anticipating the need for a robust management regime.<sup>21</sup> Of critical importance is the subject of financing environmental protection, where innovative tools such as the polluter pays principle would provide the much-needed resources to complement the scarce public resources available through the public finance management avenues.

## 2.1. Review of the Regulatory Environment for Polluter Pays Principle in Kenya

Kenya's principal environmental management law is the Environmental Management and Coordination Act (Amended) 2015.<sup>22</sup> The EMCA's robust environmental management ideals are to be realized

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14 Interviews with Edward Wabwoto, Legal Officer, NEMA 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, 28 March, 15 August, 2018 & Mombasa, Jan 2019).

15 Base Titanium Ltd, 'Kwale Mineral Sands Project: Environmental and Social Impact Assessment Summary Report' (Base Titanium Ltd 2012).

16 *ibid.*

17 Interview with Local Community Focused Group Discussion (Mukurumudzi in Kwale County, 10 March, 2018).

18 JOZ Abuodha, 'Environmental Impact Assessment of the Proposed Titanium Mining Project in Kwale District, Kenya' (2002) 20(3) *Marine Georesources & Geotechnology* 199-207.

19 *ibid.*

20 Elanders Novum, *Guidelines for the Review of Environmental Impact Assessments* (SIDA Environmental Policy Division 2003).

21 Interview with Faith Pesa, Ministry of Mining, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, 19 April 2018).

22 Omedo (n 17).

through the over 13 regulations<sup>23</sup> that have since been enacted.<sup>24</sup> All these define the various environmental management standards as well as the accompanying offenses for non-compliance, including the prescribed penalties, deemed appropriate for enforcing best practices in environmental management, and for discouraging shirking from these responsibilities.<sup>25</sup> These are the direct control measures which impose an absolute obligation for individuals and entities to comply with process and product standards, as well as fees or charges fixed by law at national or county levels for potentially non-compliant entities to follow.<sup>26</sup> By and large, the prescribed standards define the legally enforceable thresholds, whereby the accompanying regulatory function limits directly or indirectly the quantity of residuals that each actor must generate or

that must be generated from each source. This regulatory limitation is based on the level of control that can be achieved-either in reliance of an appropriate technology, setting environmental quality targets, or setting aggregate limits on pollution loading.<sup>27</sup> The EMCA (Amended) 2015 and its plethora of regulations and guidelines have embedded polluter pays principle provisions, through proscribed penalties for non-adherence of the set standards, as well as offences for breaches of the law.<sup>28</sup> However, these penalties and offences can only be levied by the courts, once convictions have been secured after due process.

Table 1 below shows some of the standards stipulated in the law as well as the proscribed fees for non-adherence to the law.

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23 Regulations that have been enacted to support EMCA include the Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing Regulation 2016; the Environmental Management and Coordination (Water Quality) Regulations 2006; the Wetlands Regulations 2009; the Waste Management Regulations 2006; the Revised Environmental Impact Assessment Regulations 2003; the Noise and Excessive Vibration Pollution Control Regulations 2009; the Toxic and Hazardous Industrial Chemicals and Materials Management Regulations 2013; the Controlled Substances Regulations 2007; the Prevention of Pollution in Coastal Zone and Other Segments of the Environment regulation, 2003; the Air Quality Regulations, 2014; the Waste Tyre Management Regulations 2013 among a host of other regulations that are still in draft form.

24 Interview with Oceanic Sakwa, Compliance Officer, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Mombasa, 30 Jan, 2018).

25 Interview with Zephaniah Ouma, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).

26 Interview with Peter Odhengo, National Treasury, 'Performance Deposit Bonds in Kenya's Extractive Industry' (Nairobi, 20 April 2018).

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27 Interview with Joyce Imende, Compliance Officer, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, August 2018).

28 Focus Group Discussions with EGP Project Technical Committee, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).



Table: PPP Tools: Some Penalties as Proscribed in various Regulations for Breaches in established Standards for Environmental Management (Waste Management, Noise and Vibration Standards, Air Quality and Water Quality

Standards and Charges	Acts and Regulations	The standards and charges set	Applicable Penalty Fees
1. Waste Management Standards	The Environmental Management and Co-Ordination (Waste Management) Regulations 2006	Provide standards for the transportation and disposal of industrial waste, toxic waste, pesticides, biomedical waste, and radioactive waste. A license is required for producing and transporting these types of waste. A waste disposal site should be licensed and operate in an environmentally sound manner	Upon conviction, to imprisonment for a term of not more than eighteen months or to a fine of not more than <b>three hundred and fifty thousand shillings (3500 USD)</b> or to both such fine and imprisonment
2. Noise and Vibration Standards	Environmental Management and Coordination ( <i>Noise and Excessive Vibration Pollution</i> ) ( <i>Control</i> ) Regulations, 2009	Provides maximum permissible noise levels for construction sites, maximum permissible noise levels for mines and quarries. It also provides for application for licenses to emit noise and vibrations in excess of permissible levels and associated fee	A fine not exceeding more than <b>three hundred and fifty thousand shillings (3500 USD)</b> or to imprisonment for a term not exceeding eighteen months or to both.
3. Water Quality Standards	<b>Water Quality Regulations of 2006</b>	<b>Water quality standards for discharging effluents into the external environment and abstraction of water resources for different categories of water users</b>	Any person who contravenes any of these Regulations commits an offence and shall be liable on conviction to a fine not exceeding <b>five hundred thousand shillings (5000 USD)</b> .
4. Air Quality Standards	Air Quality Regulations of 2014	Emission limits for various areas and facilities have been set, with a total of 12 Ambient Air Quality Tolerance Limits for Industrial, Residential and Controlled areas.	A penalty of <b>ten thousand Kenya shillings (100 USD)</b> for every parameter not being complied with, per day, until such person demonstrates full compliance with the relevant standard related to such parameter.

Source: Study Findings

As demonstrated in Table 1 above, these penalties are rather low, as they range from a paltry 350,000 KES (equivalent to 3500 USD) to 500,000 KES (equivalent to 5000 USD) which in the view of many respondents is not a sufficient disincentive for firms or individuals not to pollute. It is noteworthy to add here that the law does proscribe the penalties in both financial terms and jail sentence, which is a blend of both 'command and control'.<sup>29</sup> Although the financial amounts stipulated across the various standards are low, especially for a large conglomerate operating in Kenya within the extractives sector, the additional threat of a jail-term for the directors of the companies is considered to be a more significant threat that would realize enforcement of the required environmental standards of the law.<sup>30</sup> The overall implication of this situation is that, without the additional 'sting' of a jail term, the low amounts of the stipulated fines, fees and penalties for non-adherence to the set environmental standards demonstrate a weakening PPP culture in Kenya's legal framework.<sup>31</sup>

On their own, the fines, fees, and the financial penalties tied to the environmental standards encapsulated in the myriad of regulations enacted to breathe life into Kenya's EMCA Act (Amended) 2015 are not considered to be effective for environmental management in the extractive sector. Only the use of restoration orders embedded in the EMCA (Amended) 2015 whereby the law envisages the convicted polluter to subsequently fully meet the costs of the environmental restoration provides an array of hope for realizing the PPP's ideals.

However, the article finds that restoration orders have not been fully utilized in Kenya, and the lack of strong enforcement due to a variety of factors<sup>32</sup> has impacted the success levels of their application. In EMCA's (Amended) 2015 Section 146 (1), (2), (4) and (5), the

court has the powers to request the forfeiture of the polluting 'substance, motor vehicle, equipment and appliance or other things for disposal, as well as ordering the costs of disposal to be borne by the convicted person, and that the person further meets the restoration costs to the environment through the restoration orders'.<sup>33</sup> Many companies operating in Kenya fear such restoration orders as if effectively enforced by the regulatory authorities, would result in expensive ventures whereby potentially polluting companies would be considerably impacted financially.

This article finds that the proper use of restoration orders would enhance the full realization of the PPP in Kenya, through the existing legal avenues.

# 3

## THE ROLE OF THE COURTS IN THE ENFORCEMENT OF ENVIRONMENTAL MATTERS

An effective regulatory function, guided by public education, strong enforcement and compliance is only one side of realizing the ideals in the polluter pays principle. The courts equally play an importance role as well. It is instructive to note here that Kenya's Constitution 2010 removed the hitherto prohibitive locus standi requirement allowing for any would-be litigant to sue on environmental matters in the interests of public good.<sup>34</sup> While this provision is without doubt transformative, as it reverses the prior jurisprudence that had been set by Kenya Times,<sup>35</sup> whereby opposition to construct Kenya's then tallest skyscraper in the middle of Nairobi's largest open space

<sup>29</sup> Omedo (n 24).

<sup>30</sup> *ibid*.

<sup>31</sup> Interview with Joanne Vwamu, UNDP, 'Performance Deposit Bonds in Kenya's Extractive Industry' (United Nations Office in Nairobi, 11 May 2018).

<sup>32</sup> Some of the factors are varied, including lack of awareness, weak enforcement capacity, long and winding court processes, and jurisprudence from the courts that is inimical to environmental justice and accountability deficits among many other factors.

<sup>33</sup> Environmental Management and Coordination Act 2012, s 146.

<sup>34</sup> The Constitution of Kenya 2010, art 70.

<sup>35</sup> Kenya Times v Wangari Maathai Civil Case 5403 of 1989 (High Court of Kenya at Nairobi, 11 December 1989) <<http://kenyalaw.org/caselaw/cases/view/53011>>.

Uhuru Park was dismissed by the courts due to a failure by the proponent to prove her locus standi in the matter.

Unfortunately, even with such progressive edicts in Kenya's Constitution, most of the respondents interviewed for this article felt that Kenyan courts still dispense of court cases touching on contentious environmental matters based largely on the influence of private or powerful individuals' interests.<sup>36</sup> The respondents further aver that the environmental issues in the current regulatory framework are not sufficiently covered and expose the country to environmental harm especially in the sensitive area of mine decommissioning where mine rehabilitation and restoration is an emerging area of interest.<sup>37</sup> In their view, the infusion of taxes, penalties, fees and charges within Kenya's legislations and their regulations is aimed not to realize the polluter pays principle aspirations, but rather as a source of revenue generation for cash-strapped State institutions through duplicitous and elaborate permits, license fees, fines and charges.<sup>38</sup> As a result, we find multiple related fees embedded in separate legislations, all serving to make the ease of doing business for Kenya even more difficult.<sup>39</sup>

## 4

### **REVIEW OF ECONOMIC STRATEGIES FOR THE POLLUTER PAYS PRINCIPLE IN KENYA**

As highlighted previously, the effective implementation of the PPP relies on four key factors, which are: (1) the rule of law; (2) effective government authority; (3) fiscal systems in place; and (4) a functional property rights administration regime. Realization of the PPP requires a creative application of economic principles which covers internalizations, incentives, initiatives and innovations. In internalization, all economic activity which impinges upon the environment should be fully accounted for in the economic pricing system of the goods and services produced by such activity. It starts with incorporation of the cost of prevention, reduction and control in planning, processing and production and is complete when the polluter takes responsibility for all the costs arising from pollution. The tools and instruments for enforcing internalization are mainly charges, taxes, fees, geared to realize burden sharing between the State and the private sector actors.

In the review of the prevalent conditions governing the application of polluter pays principle in Kenya, the article reviewed the following three main factors that affect institutionalization of the PPP:

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<sup>36</sup> Omedo (n 17).

<sup>37</sup> Interview with Moses Njeru of the Kenya Chamber of Mines, 'Performance Deposit Bonds in Kenya's Extractive Industry' (Naivasha, 27 March 2018).

<sup>38</sup> Interview with Wambua Kituku of Amkeni Wakenya, 'Performance Deposit Bonds in Kenya's Extractive Industry' (United Nations Office in Nairobi, 24 August 2018).

<sup>39</sup> Ashley Stedman and Kenneth P Green, 'Annual Survey of Mining Companies: 2017' (Fraser Institute 2018) <<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017>>.

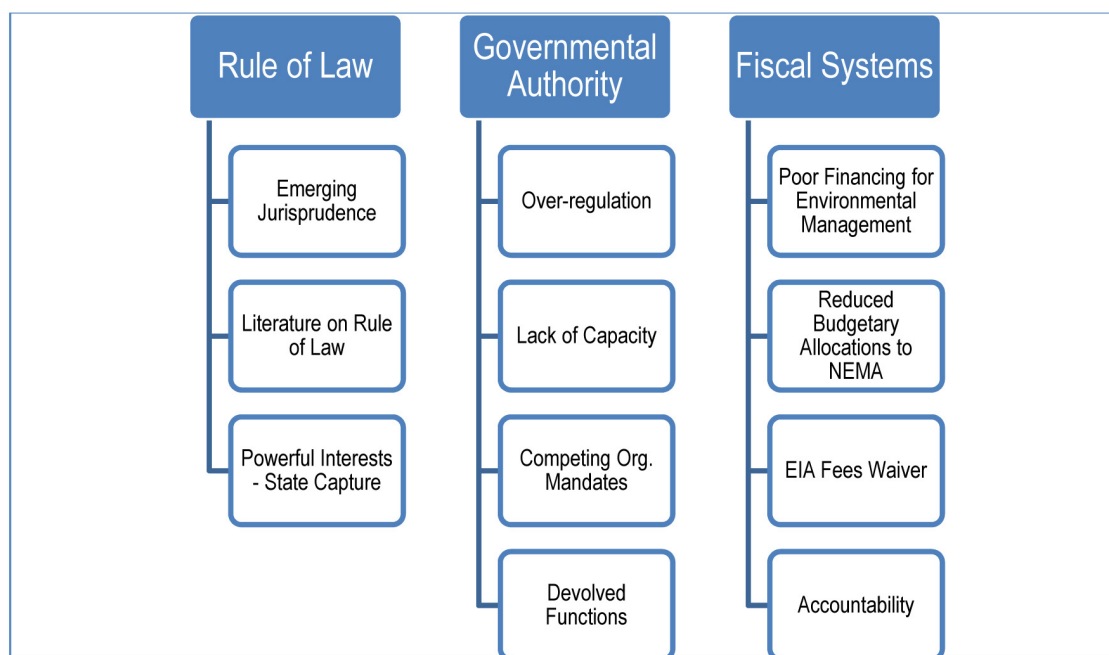


Figure 1: Diagrammatic illustration of the elements of successful application of polluter pays principle in the extractive industry (Source: Collated field-work data)

#### 4.1. the Rule of Law and the Polluter Pays Principle Implementation

An analysis of the jurisprudence emerging from Kenya's courts on environmental matters around the extractive area presents a mixed picture. Several transcendental decisions have been taken, which affirm the sustainable development principle enshrined in Article 9 of Kenya's progressive Constitution.<sup>40</sup> However, the majority of the respondents interviewed for this article were of the view that many decisions taken by Kenyan courts have been motivated by the need to protect extractive companies, under the

supposed influence from powerful interests in the business and political fields. The adherence to principles of the rule of law in environmental matters requires that legal decisions are taken according to the strict interpretation of the law, and in the public interest, since the environment is an acknowledged public good.<sup>41</sup>

An analysis of Kenya's mining cycle finds an emphasis on the environmental impact assessments and the annual environmental audits as the main entry points of environmental protection. The associated environmental management plans are therefore important in ascertaining compliance by the companies

<sup>40</sup> The Constitution of Kenya 2010, art 9.

<sup>41</sup> Omedo (n 14).

to good environmental practices. At this point, rule of law considerations are broad, and range from regulatory enforcement, observance of fundamental rights, order and security, absence of corruption, limited government powers, to a functional criminal justice system and civil justice.<sup>42</sup> For environmental compliance and enforcement, 'rule of law' interventions are 'measured by the extent to which agents have confidence in and abide by the rules of society, including the quality of property rights, the police, and the courts'.<sup>43</sup> Generally, in terms of rule of law tenets, a project on governance by the World Bank and Transparency International shows that between the years 2000 and 2014, Kenya had negative scores indicating poor governance as far as the rule of law is concerned.

A review of the jurisprudence in Kenya emanating from environmental case law touching on the impartiality and quality of the rulings particularly those that are related to the implementation of the polluter pays principle was undertaken:

In *Rodgers Muema Nzioka*, the plaintiffs sought an injunction to restrain a mining company from carrying out acts of titanium mining in Kwale District. On the grounds that they were not adequately compensated for their lands; they were also concerned about various environmental health problems that would be caused by mining activities, hence desirous that their environmental health be first secured as enshrined in the law. The defendant, *Tiomin Kenya Limited* argued that there was no evidence thus far that there were ill effects from the expected mining of titanium. The court granted the injunction. Relying on the polluter pays principle and sustainable development as provided for in the Environmental Management and Coordination act of 1999 and section 3 (1), (3) and (5) of the same Act.<sup>44</sup>

*Friends of Lake Turkana Trust* arose out of a memorandum of understanding which the Government of Kenya entered into with the Government of Ethiopia for the purchase of electricity from the Gibe III dam as well as the grid connection between Ethiopia and Kenya. The Gibe III dam is being built on River Omo which flows from Ethiopia into Lake Turkana in Kenya. The petitioner's case was that the Government of Kenya had violated the constitutional rights of the communities around Lake Turkana by executing the said memorandum of understanding with Ethiopia whose long-term effect would endanger the environment around Lake Turkana without having conducted an environmental impact assessment. The government's response was that it had no control over the construction of the Gibe III dam which was being undertaken by the Government of Ethiopia within the territory of Ethiopia which is outside the jurisdiction of the court. The government argued that although the construction of the Gibe III dam could pose environmental challenges for Lake Turkana, 'the court was not the proper forum for their resolution as it had no jurisdiction to rule on the actions of' the Government of Ethiopia.<sup>45</sup>

The court held that the parties before it were all Kenyan entities and that the subject matter concerned the alleged violation of the petitioners fundamental rights under the Constitution of Kenya. The court held that the alleged violations arose in a trans-boundary context and did 'not, on its own, operate to limit access to the court's jurisdiction'. The court granted the Petitioner 'an order of mandamus directed at the Government of Kenya' to make available information on the power purchase agreements it had 'entered into with the Government of Ethiopia'. The court also made an order directing the government of Kenya to 'take steps to ensure that natural resources around Lake Turkana are sustainably managed, utilized and conserved in any engagement' it enters with the Government of

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42 'WJP Rule of Law Index® 2016 Report' (World Justice Project 2016) <[https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf)>.

43 *Principles Of Environmental Compliance and Enforcement, A Handbook* (2009) <[http://www.themisnetwork.eu/uploads/documents/Tools/incec\\_principles\\_handbook\\_eng.pdf](http://www.themisnetwork.eu/uploads/documents/Tools/incec_principles_handbook_eng.pdf)> 11,12.

44 *Rodgers Muema Nzioka v Tiomin Kenya Ltd Civil Case No 97 of 2001* (High Court of Kenya at Mombasa, 2001).

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45 *Friends of Lake Turkana Trust v The AG & Others Nairobi ELC Suit No 825 of 2012* (2014), para 37.

Ethiopia. As concerns the obligation to undertake an environmental impact assessment study of the project, the court stated that this would involve the Government of Ethiopia and 'Kenyan courts were not the appropriate forum to determine what obligations existed in this regard'.<sup>46</sup>

Peter Makau Musyoka and Others concerned the matter of the award of mining concessionary rights to the Mui Coal Basin Deposits with respect to prospecting for and extraction of coal deposits in the Mui Basin in Kitui County.<sup>47</sup> In this case, the petitioners sought among other matters to get the court to affirm that there was a breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42, 69 and 70 of the Constitution. In addition, they claimed a threat to their right to health contrary to Article 43 from the effects of the coal mining which would also lead to environmental degradation. An additional petition asked the court to declare the failure to seek and obtain an environmental impact assessment as required by Article 69 of the Constitution and section 58 of the EMCA before the grant of the concession rights to render the concession invalid.

The petitioners argued that 'it is incontrovertible that coal mining is a pollutant necessitating very careful and robust environmental regulation and management'.<sup>48</sup> The petitioners averred that harmful impacts of coal mining through preparation, combustion, waste storage and transport require a robust regime to meaningfully mitigate the environmental impacts. In its wisdom however, the Court disagreed with the petitioners on these points, noting that before issuing conservatory orders, harm or threatened harm must first be proved by the petitioners, and hence the claim was yet to ripen since the petitioners did not provide sufficient material to trigger invocation of the precautionary principle and

stop the ongoing exploration. The court made this ruling, noting well that an environment impact assessment was still being undertaken, yet an environmental impact assessment was supposed to precede any actual exploration. The court therefore dismissed the injunctions, and active exploration of coal in the Mui basin is currently ongoing.<sup>49</sup>

Save Lamu concerned a proposal to establish a coal power plant in Lamu County to raise over 1050 MW of electricity.<sup>50</sup> The community representatives then decided to sue the National Environmental Management Authority (as the 1<sup>st</sup> Respondent) and Amu Power Company, the company that had successfully won the bid to put up this facility. It is important to note here that this project was one of the main Vision 2030 Blue Print projects envisioned by the Government to deal with the rising energy deficits in Kenya.<sup>51</sup> The grounds for the appeal as advanced by Save Lamu included allegations of poor analysis of alternatives and economic justification for the proposed coal power project, insufficient scoping process without proper public participation as well as contentions that continued activities in an economically sensitive area would lead to adverse effects on the marine environment through the discharge of thermal effluents through the use of a poor and outdated cooling system. Additionally, other grounds included allegations of a flawed environmental impact assessment report characterised by 'omissions, inconsistencies and misrepresentations',<sup>52</sup> and the alleged failure to include mitigation measures for addressing coal pollution in the environmental impact assessment among other reasons, basically questioning the viability of the project.

In its ruling, the Tribunal noted that as long as proper and sound ESIA's are conducted, coal energy remained a lawful means of energy in Kenya and could realize Kenya's sustainable development aspirations. On the

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<sup>46</sup> *ibid* para 137.

<sup>47</sup> *Peter Makau Musyoka & others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & others* [2014] eKLR, Constitutional Petition 305 of 2012, High Court of Kenya, para 37.

<sup>48</sup> *ibid*.

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<sup>49</sup> *ibid* para 37.

<sup>50</sup> *Save Lamu & others v National Environmental Management Authority (NEMA) & another* [2019] eKLR, National Environmental Tribunal, 26th June 2019, para 4.

<sup>51</sup> Government of Kenya, 'Second Medium-Term Plan 2013-2017' Kenya Vision 2030.

<sup>52</sup> *ibid* para 4.

process of obtaining the environmental impact assessment, the court deliberated extensively on the adequacy of the public participation in the environmental impact assessment process, and found that 'wide public participation was undertaken during the scoping stage of the environmental impact assessment process'.<sup>53</sup> The court however found that these meetings were only of introductory nature value, and that even the experts undertaking the environmental impact assessment were awaiting more specialist studies especially of the coal plants to the marine environment. The courts found the project proponent to have relied only on the 'information obtained prior to the environmental impact assessment study as the basis for justifying the environmental impact assessment study',<sup>54</sup> and that widespread public consultation on the foreseen impacts of the plant did not occur as expected by Section 17 of the Environmental Impact Assessment Regulation.

To the acclaim of many environmental crusaders, the finding by the court that 'lack of accurate information cannot be a basis for proper and effective public participation',<sup>55</sup> as well as a clear breach of the subsidiarity principle, led to the declaration that public participation in Phase II of the environmental impact assessment study 'was non-existent and in violation of the law'. The environmental regulator was also found to have bungled Phase III, by allowing the proponent to undertake public consultations, not following the guidance on the 30-day public submissions of the memoranda period by advertising in the 4 newspapers on different dates, thereby confusing the public on when the 30 days period would lapse, holding a premature public hearing within the 30-day period, and basically deliberately subjecting the public to conflicting dates and timelines. In the court's view, this was a ploy to hurry the process and lock out members of the public from the process. The court makes the following submission on the public participation failure in this case:

In our view, public participation in an environmental impact assessment study process is the oxygen by which the environmental impact assessment study and the report are given life. In the absence of public participation, the environmental impact assessment study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the environmental impact assessment study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value.<sup>56</sup>

In the end, the Court annulled the Environmental Impact Assessment License NEMA/ESIA/PSL/3798 issued to Amu Power Company and ordered for a repeat of the environmental impact assessment following the requirement of the environmental impact assessment regulations. NEMA was ordered to fully comply with the regulations during this second fresh environmental impact assessment process.<sup>57</sup>

As demonstrated in the first three cases above, there is clearly a pattern, where courts are timid in upholding the progressive environmental protection edicts available within Kenya's environmental protection laws, regulations and policies. This finding is consistent with that of many stakeholders interviewed for this article. The fourth case (Save Lamu Case) is however a clear win for the principle of Sustainable Development as enshrined in Kenya's law. The court applied fully the available laws, and strictly interpreted them,

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<sup>53</sup> *ibid* para 43.

<sup>54</sup> *Save Lamu & others (n 50)* para 45.

<sup>55</sup> *ibid* para 47.

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<sup>56</sup> *ibid* para 73.

<sup>57</sup> Tribunal Appeal Net 196 of 2016, Para 153.



including the regulations, and made some transcendental decisions in terms of how environmental impact assessments need to be undertaken, and the thresholds for public participation that would guarantee sustainable extraction. It even referred to the Climate Change Act of 2016, which had not been properly integrated in the flawed environmental impact assessment exercise.

Nevertheless, many respondents interviewed for this article feel that many court decisions on environmental or community matters around extractives continue to be influenced by powerful interests in business and politics, and the subjective bias to facilitate mineral exploitation at the expense of the environment.<sup>58</sup> The respondents also noted that over 90 per cent of extractive resource industry players operating in Kenya do not abide by existing environmental standards and would easily shirk on their responsibilities to protect the environment if enforcement and compliance is not done by the regulating authority.<sup>59</sup> The reasons provided for this are wide, including laxity in enforcing compliance by regulators, negligence, weak monitoring, political interference in the sector and a pervasive culture of impunity due to corruption induced aura of invincibility.<sup>60</sup>

#### 4.2. Governmental Authority for the Polluter Pays Principle Implementation

A strong regulator, operating within a clear regulatory regime is a vital indicator of sufficient governmental authority required for a well-functioning PPP regime. A strong regulator ensures that adequate coherent legal frameworks are in place and are used to protect the environment. The findings of this article posit that in Kenya, over-regulation characterized by numerous sectoral laws motivated purely by demands on State

Agencies, Ministries and Departments to increase their revenue generation complicates governmental authority required for the effective enforcement of environmental protection within the extractive industry.<sup>61</sup> Most of the key informants interviewed noted that even with these numerous laws, regulations and policies in place, government institutions were ineffective in monitoring environmental compliance by extractive resource industries in Kenya.<sup>62</sup> Reasons provided for this were many, especially the lack of capacity due to inadequate staffing, politically motivated decisions, weak technical know-how, turf wars between government agencies, and a general poor monitoring and evaluation culture.<sup>63</sup> Others include a lack of clear redress mechanisms in Kenyan courts due to a weakening jurisprudence in environmental matters in Kenya.<sup>64</sup> This is despite acknowledgement by the respondents that Kenya has a progressive Constitution that enshrines various principles of international environment governance including the polluter pays principle.

Another critical challenge to governmental authority in enforcing adherence to the relevant environmental protection requirements in Kenya's law is the finding that law-making in Kenya is motivated by the demands on State Agencies, Ministries and Departments to raise revenue.<sup>65</sup> The numerous regulations and laws, some clearly in competition, are interlaced with requirements for licenses, permits, fees, charges and costs. For instance, effluent discharge fees are payable to both the Water Regulatory Authority<sup>66</sup> and the Environmental Regulatory Authority and with varying discharge standards.<sup>67</sup> Similarly, both the Wildlife Protection Agency (the Kenya Wildlife Service), Ministry of Mining, and the Environmental Management Authority (NEMA) all require extractive resource investors to deposit environmental protection bonds before the commencement of mining practices

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58 Omedo (n 36).

59 Omedo (n14).

60 Omedo (n 24).

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61 Omedo (n 14).

62 *ibid.*

63 Omedo (n 28).

64 *ibid.*

65 Omedo (n 36).

66 Water Resources Management Rules 2007.

67 Water Quality Regulations 2006 (Legal notice No. 121).



(exploration and extraction). There is therefore a need for urgent coordination of all these institutions, especially to reduce the pervasive feeling that all these increase the cost of doing business in Kenya, further jeopardizing the effective application of the polluter pays principle for environmental management.<sup>68</sup>

In some instances, government agencies have taken each other to court as a result of overlapping mandates and turf wars which make enforcement of existing legal provisions for environmental management difficult. A good example is the case which pitted the Kenya Forest Service & 2 Others against the National Environmental Management Authority.<sup>69</sup> In this case, NEMA took the Kenya Forest Services to court for harvesting trees in Mt. Kenya and Aberdares forest ecosystem without conducting an environmental impact assessment as required by the law.<sup>70</sup> Other government departments, especially County Governments, have publicly clashed with NEMA in relation to the environmental impact assessments and environmental audits that have been done on projects which have been later found to be harmful to the communities and the environment.

In a surprising move, the Attorney General in 2016 moved to court to sue the National Environment Tribunal for stopping the construction of Kenya's signature Standard Gauge Railway infrastructure project through the Nairobi National Park, one of the only wildlife sanctuaries that is found on the outskirts of Nairobi, Kenya's capital city. The cases where NEMA has been taken to court for what stakeholders decry to be irregular issuance of environmental impact assessment certificates especially for major infrastructure projects fronted by the Government such as the

Standard Gauge Railway project,<sup>71</sup> the coal mining project in Mui Basin in Kitui County, the approval of an environmental impact and social assessment for a coal project in Lamu County, as well as the off-shore prospecting for oil and gas within the Indian Ocean are sufficient evidence that the governmental authority on environmental management, may be greatly disempowered.

The application of the polluter pays principle in environmental management in Kenya is endangered by the views of many stakeholders interviewed in the study. They noted that Kenya's mining sector is over-regulated, and by extension already overly expensive.<sup>72</sup> In fact, the Fraser Institute's Annual Mining Investment Attractiveness Index ranks Kenya second last in the bottom 10 countries, ranked 90 out of 91 countries behind Argentina and alongside Mendoza, Chebut, Mozambique, Bolivia, Venezuela, Romania, China and Nicaragua.<sup>73</sup> It is instrumental to note that most of these countries in the bottom 10 have featured prominently within countries with a significant rule of law and democratic accountability deficits.

Effective implementation of the polluter pays principle in Kenya's rubric of environmental and mining laws will rely on consistent, clear and unambiguous legal provisions entrenched in the law.<sup>74</sup> This article cites the arbitrary decision to abolish environmental impact assessment fees by the Executive through a Presidential Executive Order in 2016 after a series of meetings with private sector partners, even before amending the EMCA statutes which provide the legal basis for the fees as a clear evidence of an authority in disarray. Once the fiat to waive the environmental impact assessment fees was issued by Presidential decree, the

68 Interview with Gregory Kituku, Ministry of Mining, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).

69 High Court Petition No. 221 (2011).

70 Munene Kamau, 'Nema and KFS Locked in Legal Tussle Over Tree Harvesting in Forest' (Standard Digital 2011) <<https://www.standardmedia.co.ke/article/2000044140/nema-and-kfs-locked-in-legal-tussle-over-tree-harvesting-in-forest>>.

71 Republic v The National Environmental Tribunal and others Miscellaneous Application 82 of 2016 (High Court of Kenya at Nairobi, 2016) <[kenyalaw.org/caselaw/cases/view/123610](http://kenyalaw.org/caselaw/cases/view/123610)>.

72 Philip Otieno, Interview with Kabaka Mukonyi, Kenya Wildlife Service, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Kwale, 9 March 2018).

73 Ashley Stedman and Kenneth P. Green, 'Annual Survey of Mining Companies: 2017' (Fraser Institute 2018) <<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017>>.

74 Omedo (n 21).

Environmental Management Authority was tasked to regularize this through supporting amendments to the environmental impact assessment regulations and the EMCA. This is yet to be done, three years later!

#### 4.3. Fiscal Systems for Polluter Pays Principle Implementation

Fiscal systems are instruments that are used by the state to raise revenues, direct expenditures and broadly aim at advancing the social welfare of its citizens. Such instruments may include taxes, subsidies, and budgetary allocations. A review of the various fiscal instruments in relation to environmental protection in the mining industry considering polluter pays principle application in Kenya presents interesting results.

The Government budget is one of the most important economic policy instruments for implementing environmental protection initiatives. It is through the government budgets that funds for environmental

protection are allocated, incentives (both good and perverse) such as subsidies and tax relaxation and tightening are set forth all of which have effects on environmental protection. The budget allocations to NEMA also support the regulator's day to day activities, which includes the inspections and enforcement work. The budget is normally ratified through the passage of annual finance laws.

Without a strong polluter pays principle regime, where investors operating in Kenya will be required to internalize the costs for their pollution, the government will have to fund the environmental protection costs fully. This is through the annual budget policy statements. An analysis of the funds allocated to NEMA over the years shows that the Government has been reducing its allocations to the environmental regulator.<sup>75</sup> This was not such a major challenge previously, since NEMA was collecting significant resources in terms of environmental impact assessment fees, which had at one point even outpaced the government allocation from exchequer funds through the national budget allocation.

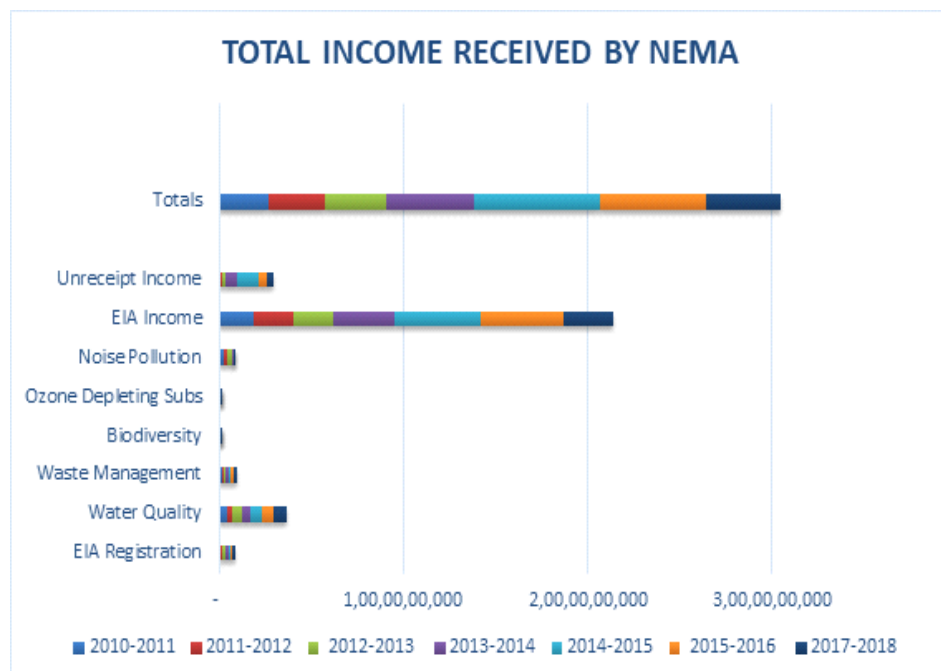


Figure 2: Total income received by NEMA (Source: Collated and analysed data from field work)

75 Omedo (n 24).

However, the decision by the Executive to waive the environmental impact assessment fees has impacted on the funding situation for the regulator, as the funds from environmental impact assessment fees have fallen by more than a half. As these collected fees are falling, government allocations have increased from 400,000,000 KES (approximately 400,000 USD) in the 2016/2017 Financial Year to 900,000,000 KES (approximately 900,000 USD) in the 2017/2018 Financial Year. The budget for 2018/2019 increases the allocation to NEMA from 900,000,000 KES (approximately 900,000 USD) to 1,200,000,000 KES (approximately 1,200,000 USD) implying a cumulative 60 per cent increment of NEMA's budget in a three-year period to compensate for lost revenues.<sup>76</sup> This has however attracted hue and cry from many stakeholders including Parliamentarians, who term the move as a case of the taxpayer being forced by the government to subsidize the private sector, a clear indication that the environment is not conducive for the polluter pays principle in Kenya.

While government efforts to increase budgetary allocation to NEMA is laudable, the challenge associated with delayed release of exchequer funds to government institutions, continues to plague operations at NEMA. Previously, NEMA had immediate and direct access to the funds collected from the environmental impact assessment fees. Delayed disbursements from government, the quality of inspection by the environmental regulator is bound to suffer, therefore impacting the environment negatively. Financial data from NEMA covering 2010 to 2017 indicates that the largest revenue earner to the regulator was fees levied by NEMA on environmental impact assessments, followed by water quality and waste management fees. The environmental impact assessment incomes however dwarf all these other incomes by a factor of 7, implying that environmental impact assessment fees were the oxygen that drove the regulators expansive environmental management agenda. The environmental impact assessment fees waiver decision therefore drastically suffocated the regulator.

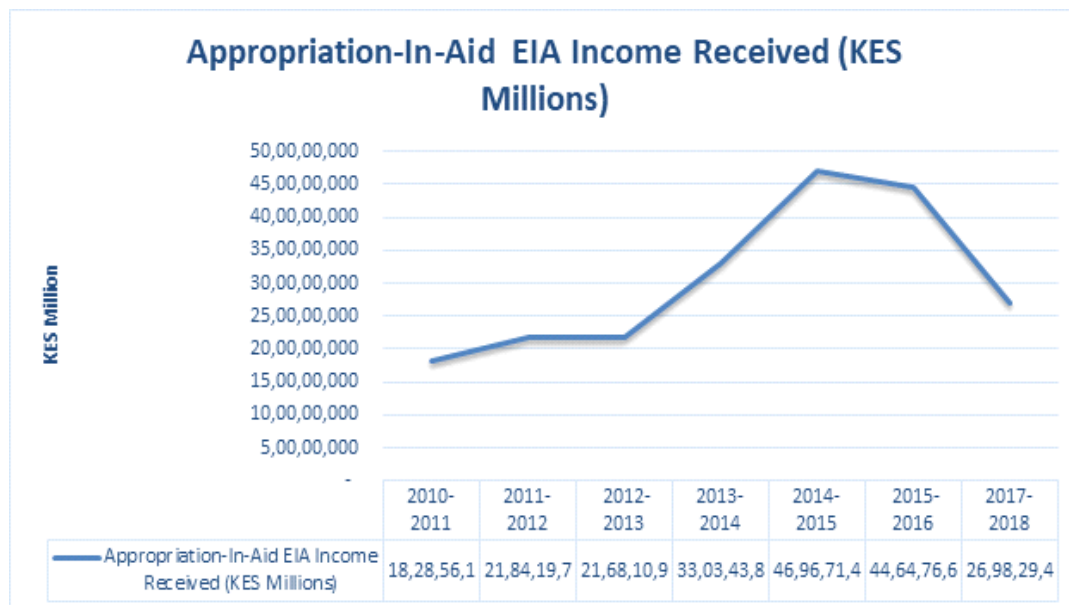


Figure 3: Incomes to NEMA have fallen drastically after the decision by the Executive to abolish the environmental impact assessment fees (Source: Collated and analysed data from field work)

<sup>76</sup> Edwin Mutai, 'Burden of Sustaining NEMA, Building Agency Shifts to Taxpayers', Daily Nation (2018) <<https://www.nation.co.ke/business/Sh1-3bn-taxpayers-burden-to-keep-Nema-running-/996-4548078-tnv6y2/index.html>>.

As a result, Kenya's environmental regulator is now completely cash-strapped, as the fall in revenues has impacted negatively on the normal day-to-day operations of the vital institution. The budgetary allocation from the Treasury to NEMA is now mostly committed to funding the recurrent budget of the institution, and in some cases staff at NEMA have gone for close to three months without salaries.<sup>77</sup> With a staff complement comprising of around 400 nationally, and around 150 environmental inspectors expected to cover all the 47 Counties in Kenya, a fall in revenues to such magnitudes implies that even resources for normal enforcement are unavailable. In the current Financial Year 2018/2019, the compliance and enforcement has received a paltry 60,000,000 KES (approximately 60,000 USD) with 20,000,000 KES (20,000 USD) expected to be utilized at the national Headquarter level and the remaining 40,000,000 KES (40,000 USD) to be shared across the 47 County NEMA Offices.<sup>78</sup> The national compliance and enforcement areas cover all of Kenya's Multi-Lateral Environmental Agreements (MEAS), high risk inspections and general control audits, which are critical for Kenya's environmental management regime, including the extractive sector management plans. These now lack adequate resources for implementation.

## 5 CONCLUSIONS AND RECOMMENDATIONS

A weakening polluter pays principle regime in Kenya portends only grave impacts for environmental management. In the prevailing circumstances, the government is fully subsidizing environmental management, with the private sector not being encouraged to internalize environmental costs within their production cycles. The environmental regulator

(NEMA) now relies heavily on the over-stretched public finance system. As a result, it is adopting a reactive strategy where environmental monitoring visits are few and not as robust as would be required. For costly mine decommissioning, involving complex environmental rehabilitation and restoration, the use of public finances will be an intricate balancing act that is unsustainable both in the short and long term.

From the findings of this article on the application of the polluter pays principle in Kenya, three main conclusions and recommendations are drawn in relation to the extractive resource industry.

These are:

- (1) There is a continued struggle between business (profit maximization) and environmental protection interests, with the environment subsidizing the business interests due to a weakening regulatory regime. The noble objectives enshrined under the polluter pays principle in Kenya's framework legislation will remain a mirage, unless Kenya adopts a robust sustainability driven approach to boosting investment in the extractive industry. This will be realized if all extractive companies operating in Kenya are made to internalize the costs associated with their pollution, through strengthening of the polluter pays principle.
- (2) The fall in revenues for the regulator due to the waiver of the environmental impact assessment fees by the Executive in 2016, the inadequate budgetary allocation and the slow release of funds by the national treasury mean that the regulator cannot effectively enforce involuntary compliance. The cash strapped regulator is left to watch as the weakening environmental management culture manifests in the drop in the quantity and quality of environmental impact assessment reports filed by investors. This implies that, without a monetary incentive or charge, many private firms are altogether shirking on their legal requirement to file the environmental impact assessment reports, a further demonstration that the weakening

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<sup>77</sup> Omedo (n 25).

<sup>78</sup> Omedo (n 24).

of the polluter pays principle invariably leads to reduced environmental compliance by investors.

- (3) The numerous pieces of legislations and regulations seeking to implement the polluter pays principle such as penalties, effluent discharge fees, water license fees, product taxes, solid waste disposal fees, performance bonds, user fees among others seems to be motivated more by the need by Government Agencies to raise revenue, rather than the need to protect the environment. It is important for a proper re-think of Kenya's regulatory framework for the polluter pays principle to support sustainable financing of Kenya's environmental management strategies.

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the  
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