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OFFICE OF THE AUDITOR-GENERAL

PERFORMANCE AUDIT REPORT
OF THE
AUDITOR-GENERAL
ON

ENFORCEMENT OF ENVIRONMENTAL LAWS IN KENYA



NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)
MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES

APRIL 2016

Foreword by the Auditor General

I am pleased to publish and publicize this performance audit report which examines the Enforcement of Environmental Laws in Kenya by the National Environmental Management Authority. My Office carried out the audit under the mandate conferred to me by the Public Audit Act, 2015. Section 36 (1) of the Act mandates the Office of the Auditor-General: to assess the economy, efficiency and effectiveness with which public money has been expensed. Further, Article 229 of the Constitution requires the Auditor- General to confirm whether or not public money has been applied lawfully and in an effective manner.

Performance audits together with financial and continuous audits form the three pillar audit assurance framework that I have established to give focus to the varied and wide scope of the audit work done by my Office. The framework is intended to provide a high level of assurance to stakeholders that public resources are not only correctly disbursed, recorded and accounted for, but that the use of the resources results in positive impacts on the lives of all Kenyans. The main goal of our performance audits is to ensure effective use of public resources and promote delivery to Kenyans of public services of outstanding quality.

The audit has an environmental conservation perspective given the importance of complying with Environmental Laws for sustainable development. Our environmental performance audits examine compliance with environmental policies and obligations, laws, regulations and standards, and whether the resources are managed in an environmentally sustainable manner. They may also examine the integration of social, economic and environmental concerns in public and other programs and activities. I am hopeful corrective action will be taken in line with our recommendations in the report. The recommendations will contribute towards the realization of the provisions of Articles 42, 69, 70 and 71 of Chapter Four of our Constitution, which calls for better management of the environment for the benefit of all Kenyans.

The report shall be tabled in Parliament in accordance with article 229 (7) of the Constitution. I have as provided in Section 30 of the Public Audit Act, submitted the original copy of the report to the Cabinet Secretary for Finance to remit to Parliament as required of him under Section 31 (1) of the Act, In addition, I have remitted copies of the report to the Cabinet Secretary and to the Principal Secretary, Ministry of Environment, Natural Resources and Regional Authorities.



FCPA Edward R.O. Ouko, CBS
AUDITOR-GENERAL

18 April, 2016

List of Abbreviations

CDE	- County Director of Environment
EA	- Environmental Audit
EIA	- Environmental Impact Assessment
EMCA	- Environmental Management and Coordination Act
INTOSAI	- International Organization of Supreme Audit institutions
KFS	- Kenya Forest Service
KWS	- Kenya Wildlife Service
NEMA	- National Environment Management Authority
NEP	- National Environment Policy
OAG	- Office of the Auditor General, Kenya
UNEP	- United Nations Environmental Program
WRMA	- Water Resources Management Authority
WSB	- Water Service Boards

Glossary of Terms

The following definitions apply for purposes of this report:

Authority: Means the National Environment Management Authority.

Compliance: The full implementation of requirements. Compliance occurs when the requirements as spelt out in EMCA (1999) and its regulations are met.

Controlled Audit: Environmental audit conducted by NEMA inspectors on regulated facilities (usually high risk facilities) to ascertain the level of compliance with the concerned EMCA regulations.

Enforcement: The set of actions taken by NEMA to achieve compliance within the regulated community.

Environmental inspector: Any officer of NEMA duly qualified and appointed in accordance with Section 117 of EMCA (1999).

Incident: an undesired, unplanned and uncontrolled occurrence or event which causes or may result in significant environmental damage and which is within NEMA's areas of responsibility.

Inspection: An organized examination usually undertaken by environmental inspectors to monitor compliance within the regulated community.

Lead agency: Any government institution (Ministry, Department, Parastatal, State Corporation or County government) in which any law vests functions of control or management of any element of the environment or natural resources.

Negotiated compliance: An approach in which NEMA negotiates with the regulated community to come up with the most appropriate standard for compliance incase the entity is not capable of achieving the stipulated requirements under EMCA and its regulations.

Regulated community: Any owner or operator of an activity for which the requirements of EMCA and its regulations apply.

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Executive Summary

Background to the Audit

1. The Auditor General undertook a performance audit on the enforcement of environmental laws in Kenya by the National Environment Management Authority (NEMA) as sound environmental governance through effective enforcement of laws is a necessity for the country in pursuit of socio-economic development.
2. Further, there have been public concerns in the media about unregulated quarrying activities, poor waste management, pollution of water bodies and unregulated sand harvesting. The concerns arise from weak enforcement of environmental laws in Kenya.
3. The number of gazetted environmental regulations and guidelines has been rising over the years yet no significant change has been noted in the environmental problems they are meant to address. Currently, NEMA has gazetted 7 regulations and several guidelines under Environmental Management and Coordination Act (EMCA). Despite this, pollution, over exploitation of natural resources, poor waste management, deforestation and human induced land degradation still remain rampant environmental challenges in the country.
4. Because of these concerns, the Auditor-General undertook a performance audit to assess the effectiveness of NEMA in enforcing the laws noting that NEMA is the principal government agent in enforcement.

Objective, Scope and Methodology

5. The purpose of the audit was to assess the measures put in place by NEMA to enforce EMCA and its regulations and sought to assess whether these measures are effective in ensuring compliance with EMCA and its regulations.
6. The audit covered a period of four financial years from July, 2010 to June, 2014. Data were collected through interviewing concerned actors, reviewing documents and direct observations (including taking photographs).

Summary of Findings

Supervision and Coordination activities carried out by NEMA are not effective in ensuring compliance

7. Interviews with NEMA staff, review of enforcement records and physical verifications revealed that supervision and coordination activities carried out by NEMA's Enforcement Section and County Offices are not effective in ensuring compliance with set environmental laws.

8. Although NEMA is mandated under Section 9(2)(a) of EMCA to coordinate the environmental activities of various lead agencies, NEMA is not firm in undertaking its supervision role. For example, NEMA has not been able to bring the concerned government lead agencies to compliance with EMCA (solid waste management) regulations as well as EMCA (Water Quality) regulation. NEMA has been lenient while environmental harm continues as evidenced by the poor state of solid waste management and water pollution across the country.
9. In addition, while Section 9(2)(i) of EMCA mandates NEMA to monitor activities to ensure that compliance is attained, NEMA does not also appear to be active in following up on enforcement actions issued during compliance monitoring. Only gross violations are followed up while the rest are assumed to have implemented the enforcement recommendations. As a result, compliance is never achieved and the environment continues to be degraded as most entities only implement the recommendations partially.

Enforcement of EMCA is further hampered by NEMA's weak enforcement policy and challenges emanating from the law

10. Enforcement of EMCA regulations is curtailed by a weak enforcement policy on one hand and challenges of clarity and harmonization of the law on the other.
11. Being an important source of reference for NEMA officers to guide enforcement activities, the enforcement policy should be comprehensive. In contrast, the policy focuses more on prosecution and fails to adequately address the other methods of enforcement like issuance of improvement orders, restoration/stop orders, site warnings, warning letters and caution.
12. Further, enforcement of EMCA can only be effective in an environment with functioning legal instruments in which related sectoral laws are harmonised. However, the audit revealed that EMCA is not harmonized with other sectoral environmental laws like the Water Act (2002), Forest Act (2005) and the Wildlife (Management and Conservation) Act (2013) leading to duplication of roles and confusion in application. The lack of harmony in law was attributed to inadequate multisectoral consultation during design of the laws.
13. In addition, EMCA and its regulations should have clear, precise, unambiguous and consistent requirements for them to be enforceable. But it emerged from the audit that some of EMCA regulations have unclear provisions that can lead to either misinterpretation or application of personal judgement during application. For example, EMCA lists some of the activities for which environmental impact assessment (EIA) is required in a general manner leaving room for personal judgement. This partly explains why EMCA (Environmental Assessment/ Environmental Audit) regulations of 2003 remains one of the most violated regulation in the country

NEMA's Prosecution of Environmental Crimes Faced with Investigation and Personnel Challenges

14. Prosecution should be punitive enough if its aim is to deter instances of non-compliance within the regulated community. For NEMA to achieve this, cases should be backed by watertight evidence and presented to court in a convincing manner to ensure that violations attract deterrent penalties.
15. According to NEMA's Enforcement and Prosecution policy, prosecution of environmental crimes should not be commenced by NEMA unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction.
16. Although an analysis of NEMA's criminal case records showed that prosecuted crimes has been declining over the years from 2011/12 to 2013/14, it was revealed that there were delays in gathering and collecting evidence. For example identified cases are forwarded to the police for investigation. They however take too long to perform investigations.
17. Again, in order to gather appropriate and relevant evidence, the scene of crime needs to be secured in a timely manner and exhibits taken as delay may lead to interference and tampering with the scene resulting in cases being lost. CDE's complained that getting assistance from Police in a timely manner is a big challenge.
18. Some cases have been lost due to lack of sufficient evidence while others ended up with non-punitive penalties. Analysis of NEMA's criminal case records showed that only 40% of all cases prosecuted during the period 2011/12-2013/14 were successfully completed while another 41% is still pending before the court as environmental damage continues. 9% of the cases were either acquitted/dismissed or withdrawn while another 7% and 3% did not go past warrant of arrest being issued and first mentioning respectively.
19. Interviews with NEMA staff revealed that most environmental violators receive low penalties compared to what is provided in EMCA and its regulations. This may have led to increased instances of violations since the regulated community can easily get away with environmental crimes. Besides, the non-punitive penalties awarded to violators may have a negative impact on compliance as the regulated community might find non-compliance less expensive compared with benefits from violations.

Ineffectiveness in Records Management and Information Sharing

20. A guiding principle of records management is to ensure that information is available when and where needed, in an organized and efficient manner, and in a well maintained environment.
21. During the audit, the team inspected NEMA's files and databases maintained both manually and electronically at the headquarters and selected County offices. It was revealed that files and records are not well maintained. For example, scrutiny of an

electronic database intended to capture inspections activities and incidents at headquarters revealed that the records were incomplete and had not been up dated for some time. At the same time it was revealed that information available in manual files for inspection and incidents had information gaps when compared with the electronic counterparts.

22. At the CDE Nairobi offices for example, it was revealed that reports and documents like warning letters, restoration orders, improvement orders and acknowledgment notes are loosely filed into files without indexing and therefore prone to damage, malicious destruction or accident or may be corrupted without users notice. Retrieving information is also difficult as the manual files are not indexed.
23. Further, during field verifications the team witnessed the officers issuing various orders to project developers. However, it was noticed that the orders were in form of loose papers which are issued without control, accountability and responsibility for their issuance. Cases were witnessed where developers informed the officers that they had previously been issued with the same order by other officers doing the rounds. As such the developers had more than one copy of the order which were issued by different officers at different times. The problem was attributed to the fact that the various orders are not designed in the form of controlled and accountable documents. Neither are they pre-numbered.

Conclusion

1.1.1 From the findings of the audit it is clear that the measures put in place to enforce EMCA, its regulations and guidelines are not effective in ensuring compliance. The enforcement of compliance with EMCA, its subsidiary regulations and guidelines is faced with a number of problems limiting NEMA's ability to deliver on its mandate:

- NEMA's supervision activities are characterised by leniency on government institutions, misplaced priorities in compliance monitoring and inadequate follow-up on recommendations/conditions all leading to laxity in compliance from the regulated community.
- Interrelated environmental sectoral laws are not harmonized with EMCA hindering its application. Besides, EMCA's provisions on EIA requirements are too general leading to confusion and NEMA lacks a comprehensive policy to guide its enforcement activities.
- NEMA's prosecution of environmental crimes does not deter future non-compliance given that NEMA lacks the capacity to investigate crimes and gather sufficient and reliable evidence, which can attract punitive penalties.
- Enforcement records are not properly managed as incomplete records and loose filing in non-indexed files is the norm making retrieval of information difficult.
- NEMA has been lenient while environmental harm continues as evidenced by the poor state of solid waste management and water pollution across the country. Further, it would appear from our findings that NEMA has consistently been

turning a blind eye to glaring urban environmental violations and omissions witnessed throughout our audit.

Recommendations

24. The Auditor General made the following recommendations to improve enforcement of environmental laws:

i) Supervision and Coordination

- To improve supervision and coordination, NEMA, through the Department of Compliance, Enforcement and Field Operations should establish mechanisms to ensure inflexibility when enforcing EMCA and its regulations on Lead Agencies and other Government departments
- To improve on compliance monitoring:
 - The Department of Compliance, Enforcement and Field Operations may consider establishing a clear guideline for following up with violators to verify that they return to compliance within the shortest time possible.
 - NEMA should consider reducing the emphasis on revenue as a basis for performance evaluation of County Directorates

ii) Legal framework challenges

- To strengthen the enforcement policy, NEMA may consider revising the enforcement and prosecution policy to address all methods of enforcement available.
- To minimise instances of overlapping mandates, the Ministry of Environment, Water and Natural Resources may consider undertaking a review of sectoral laws, which should also involve consultation with the affected Lead Agencies.
- To resolve ambiguity in certain EIA provisions, NEMA should review the EIA/EA regulations to ensure that activities for which EIA is required are clear, precise and unambiguous.

iii) Prosecution challenges

- To improve on efficiency of prosecution, NEMA may consider establishing a clear and effective working relationship with other Government departments like the National Police Service at the county level so as to enable easy coordination of activities.
- To improve on evidence gathering, NEMA should establish and implement guidelines to aid evidence gathering and investigations so as to improve on quantity, quality and timeliness of evidence and investigations to be used in prosecution.

iv) Ineffectiveness in records management

- To improve records management, NEMA, through the Department of Compliance, Enforcement and Field Operations should come up with mechanisms to ensure regular and timely updating of records, proper filing and also control movement and issuance of orders.

Chapter 1

Background of the Audit

Introduction

- 1.1 This report contains the findings and other relevant information of a performance audit conducted by the Office of the Auditor General on enforcement of Environment Management and Coordination Act (EMCA), its regulations and guidelines by the National Environment Management Authority (NEMA)
- 1.2 Kenya's pursuit for socio-economic development necessitates the need for sound environmental governance, through effective enforcement of available environmental laws¹. Similarly, Agenda 21 (adopted in the United Nations Conference on Environment and Development, 1992) recognizes environmental laws as important instruments for achieving sustainable development.
- 1.3 EMCA was enacted in 1999 to provide for environmental management in the country and harmonize the various sectoral issues touching on environment into one legal framework.
- 1.4 Enforcement of EMCA is undertaken by NEMA created under Section 7 of the same Act. Enforcement entails such actions taken to ensure compliance and is usually aimed at achieving the following:
 - Change of behaviour of the violator and deterrence of future non-compliance;
 - Restoration of the harm caused by ensuring that remedial action is taken to protect the environment;
 - Securing compliance with a regulatory regime; and
 - Preventing, stopping or restricting the activity.

Motivation for the Audit

- 1.5 The following factors motivated the Auditor General to undertake the audit:
 - There have been concerns about weak enforcement of environmental laws in Kenya. For example, there have been public concerns in the media about unregulated quarrying activities, poor waste management, pollution of water bodies and unregulated sand harvesting. According to the draft National Environment Policy (NEP), weak enforcement of environmental laws remains a major issue of concern in Kenya's environment sector;
 - The number of gazetted environmental regulations has been rising over the years yet only minimal changes are being noticed in the environmental problems they are meant to address. Currently, NEMA has gazetted eight (8) regulations under EMCA. NEMA has also published a number of guidelines as listed in Appendix 1. Despite this,

¹ Environmental law is defined by the United Nations Environment Programme (UNEP) as a body of law that contains elements to control human impact on the environment and public health. Environmental laws can be regulative in nature, e.g. setting maximum levels of allowable pollution or requiring licenses/permits for certain activities, or preventive in nature seeking to assess possible impacts before projects are executed.

pollution, over exploitation of natural resources, poor waste management, deforestation and human induced land degradation still remain rampant environmental challenges in the country. There is therefore the need to undertake a performance audit to assess the effectiveness of NEMA in enforcing the laws noting that NEMA is the principal government agent in enforcement;

- A clean and healthy environment is the right of every Kenyan as spelt out both in Article 42 of the Constitution of Kenya, 2010 and Section 3(1) of EMCA. This right requires effective enforcement of the available environmental laws to ensure proper management of the environment; and
- The Kenya Vision 2030 development blue print aims to transform the country into a newly industrialized, middle income country providing a high quality of life to all its citizens in a clean and secure environment. Enforcement of environmental laws is therefore central in the process of providing a high quality of life in a clean and secure environment.
- The deterioration of the environment being of worldwide concern has also seen the United Nations Environment Programme (UNEP deliberate the importance of promoting the rule of law related to sustainable development, and the Linkages on Environmental conservation and the advancement of justice, governance and law for environmental sustainability were discussed) at the " **1st Africa Colloquium on Environmental Rule of Law – Towards Strengthened Environmental Governance, Justice and Law**"

Chapter 2

Design of the Audit

Objective of the Audit

- 2.1 The audit assessed whether the measures put in place by NEMA to enforce EMCA, its regulations and implementation of the guidelines are effective in ensuring compliance. Specifically, we looked in to:
- Whether NEMA's supervision and coordination activities ensure compliance with EMCA and its regulations;
 - Whether there are legal challenges to enforce EMCA, its regulations and monitor the implementation issued guidelines;
 - Whether NEMA's prosecution of environmental crimes is effective in deterring reoccurrence; and
 - Whether NEMA has adequate systems to manage enforcement records.

Scope of the Audit

- 2.2 The audit focused on the enforcement of EMCA, its regulations and guidelines with respect to implementation by NEMA's Enforcement and Field operations sections. Verification of enforcement activities was performed via site visits in selected urban areas as most of the activities regulated by EMCA and its regulations are located in urban areas. Further, the audit focused on the activities of NEMA during the period between July, 2010 and June, 2014.

Methods Used to Gather Evidence

- 2.3 We conducted the audit in accordance with Performance Auditing Guidelines and the International Standards for Supreme Audit Institutions (ISSAIs) as set by the International Organization of Supreme Audit Institutions (INTOSAI) and audit policies and procedures established by the Office of the Auditor-General (OAG).
- 2.4 To understand and assess the performance of Enforcement and Field Operations sections in enforcing EMCA and its regulations, we used the methodology outlined in the table below:

Table 1: Methods used to gather evidence

Methodology	Why the methodology	Information obtained
Interviews	To understand the operations of NEMA's enforcement section and the county offices	Understanding of the audit area, functions, activities and processes. Details are shown in Appendix 2(a)
Documents review	To understand the mandate, strategy, funding, budgets, rules,	Background information, activities, functions, processes

	regulations and procedures in providing compliance and enforcement to EMCA and its regulations	and problems from sources listed in Appendix 2 (b)
Physical Observation	To verify enforcement of compliance with EMCA and its regulations	The level of compliance with the various conditions on the ground listed in Appendix 2 (c)

Assessment Criteria

2.5 Our main assessment criteria were obtained from:

- i) For supervision and coordination, that; Enforcement Section and NEMA county offices undertake supervision and coordination of regulated activities in accordance with NEMA's statutory mandate outlined in Section 9(2)(a,i) of EMCA(1999)
- ii) For legal framework challenges, that; EMCA and its regulations have clear provisions, is harmonized with sectoral environmental laws and that NEMA has a comprehensive policy to guide its enforcement of the same
- iii) For prosecution of environmental crimes, that; NEMA undertakes prosecution of environmental crimes in a way that deters future violations
- iv) For records management, that; enforcement information is available when and where it is needed, in an organized and efficient manner, and in a well maintained environment.

Chapter 3

Description of the Audit Area

Administrative System for the Enforcement of EMCA and its Regulations

- 3.1 The Constitution of Kenya, 2010, Article 69 obligates the State to protect the environment through sustainable management practices geared towards safeguarding the citizens' right to a clean and healthy environment.
- 3.2 The responsibility of supervision, coordination and management of the environment is vested on NEMA, which is established under Section 7 of the EMCA and mandated in Section 9 "to exercise supervision and coordination over all matters relating to the environment and to be the principal instrument of the government in the implementation of all policies relating to the environment."
- 3.3 NEMA is therefore charged with the responsibility of enforcing EMCA's provisions as well as other subsidiary legislation gazetted under EMCA. NEMA is a state corporation in the Ministry of Environment, Water and Natural Resources responsible for issuing and enforcing standards, guidelines and regulations on environmental management in the country.
- 3.4 NEMA envisions "to be a world-class Environmental Authority that ensures a clean and healthy environment for all." As such NEMA's mission is to "safeguard the quality of the environment through coordination, research, facilitation and enforcement, while encouraging responsible individual, corporate and collective participation towards sustainable development."
- 3.5 Since its establishment in 2002, NEMA has spearheaded the development and gazette of the following regulations:
- i. Environmental Impact Assessment and Audit (EIA/EA) regulations of 2003
 - ii. Water Quality regulations of 2006
 - iii. Waste Management regulations of 2006
 - iv. Biodiversity and benefit sharing regulations of 2006
 - v. Fossil fuel emissions regulations of 2006
 - vi. Controlled substances 2007
 - vii. Wetlands, River Banks, Lake Shore and Sea Shore management regulations of 2009
 - viii. Noise regulations of 2009
- 3.6 Enforcement of EMCA and its regulations is undertaken by the Enforcement and Field Operations sections, which fall under the Department of Compliance, Enforcement and Field Operations.
- 3.7 The strategic objective of the department is to ensure compliance with environmental legislation and policies in order to maintain a clean, healthy and sustainable environment. The department is thus mandated to perform regulatory functions including:

- Monitoring and inspection of activities to ensure that regulations, standards and guidelines requirements as well as license or permit conditions are adhered to;
- Identifying projects and programs, plans and policies for which environmental audit or environmental monitoring must be conducted under EMCA;
- Taking appropriate enforcement actions in case of non-compliance;
- Ensuring that EIAs and EAs are conducted to guide development activities; and
- Initiating and evolving procedures and safeguards for the prevention and remedy of environmental accidents as well as promoting cleaner production technologies.

Methods used to Enforce EMCA and its Regulations

3.8 Enforcement tools used by NEMA include:

Inspection: Undertaken by environmental inspectors to determine compliance status and detect violations among the regulated community and take appropriate enforcement actions. Given the high number of regulated activities and limited resources, NEMA uses a risk based approach in which activities are categorized into high, medium and low risk based on their potential and actual impact on the environment, impact on NEMA's resources and public concern. Only high risk activities are considered for planned inspections while medium and low risk activities are mainly monitored through environmental auditing (submitted to NEMA annually) incident management or other routine inspections.

3.9 In cases where violations are detected, the following tools are used to restore compliance:

- a) Restoration orders:** Issued by NEMA to a violator of environmental law requiring him to do any or all of the following:
- Restore the environment as near as it may be to the state it was before the violating action.
 - Compensate people whose environment or livelihood has been harmed by the action which is the subject of the order.
 - Pay for the costs incurred by an authorized person or organization in restoration of the environment.
- b) Improvement orders:** issued by NEMA to improve on certain aspects of a project to ensure compliance.
- c) Cancellation of licenses:** A written document issued to the violator to stop the activity in cases where the license conditions are not adhered to. It can also be issued when the impacts of the activity on the environment and human health turns out to be severe.

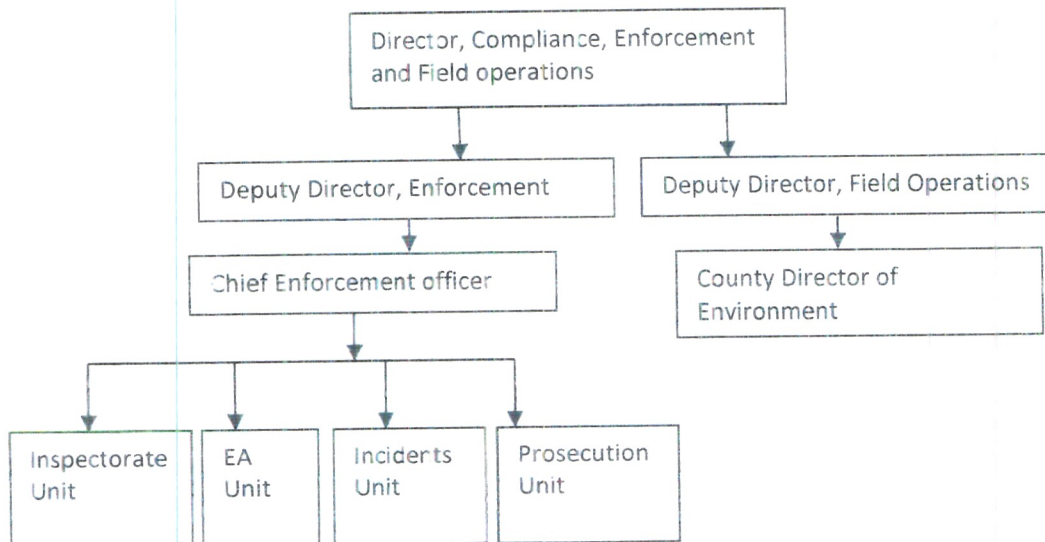
3.10 **Investigations:** Used to establish facts and relevant evidence about certain occurrence/incidents in relation to environmental crime. Based on the nature of evidence gathered, NEMA can prosecute the violator in instance where compliance can only be achieved through legal action. Otherwise, NEMA can also issue improvement or restoration order to compel violators to comply.

Organizational Structure

3.11 Both the Enforcement and Field Operations sections are headed by a Deputy Director reporting to the Director in charge of Compliance, Enforcement and Field Operations. The Enforcement

Section is further divided into 4 units of; Inspectorate, Environmental Audit (EA), Prosecution and Incidents. The Field Operations Section consists of several county offices across the country. The Organogram of the sections is illustrated in Fig. 1

Figure 1: Organization Structure of the Department of Compliance, Enforcement and Field operations²



Source: NEMA's procedures file (File: NEMA/1300/07)

Functions of Various Units of Enforcement and Field Operations Sections

3.12 The functions of the various units in the Sections are discussed below:

- **Inspectorate Unit:** Carries out inspections to determine compliance status and detect violations among the regulated community. The unit carries out both scheduled inspections for high risk activities as well as reactive inspections in response to incidents or issues identified in EIA and EA reports.
- **Environmental Audit (EA) Unit:** Receives and reviews EA reports and classifies activities under EMCA (EIA/EA) regulations of 2003. After the review, the unit issues improvement orders and compliance letters (acknowledges compliance). The unit also carries out controlled audits to determine compliance status of activities.
- **Incidents Unit:** Deals with management of environmental incidents. The unit receives incident information from the public and classifies them according to risk. The unit also carries out inspections to gather information to guide their enforcement actions in managing the incidents.
- **Prosecution unit:** The unit comprises of NEMA's gazetted prosecutors and police officers seconded to NEMA by the National Police Service. The unit investigates and takes legal action against environmental violations.

² The current strategic plan (2013-2018) has a comprehensive organogram of the organization as illustrated in appendix 3

- **County Environment Offices:** Represents NEMA at the county level. Performs both compliance and enforcement functions of NEMA within the county.

Other Key Actors in Enforcement of EMCA and its Regulations

3.13 Enforcement of EMCA falls within the jurisdiction of various institutions including:

a) Environment and Lands Court

3.14 The Environment and Lands Court is created under Section 4 of the Environment and Lands Act, 2011. The core business of the court is litigation of “disputes relating to the environment and the use and occupation of, and title to, land” as provided for in Article 162 (2) (b) of the Constitution.

3.15 The court has the same status as that of the high court, but also has an appellant power to review judgments of subordinate courts. The court mainly deals with civil cases initiated either by individuals or NEMA.

3.16 According to the Act, the court has powers to hear and determine disputes as follows those:

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and
- e) any other dispute relating to environment and land.

b) National Environment Tribunal

3.17 Sustainable development dictates that environmental conservation should not compromise economic development. Hence, the National Environment Tribunal is created under Section 125 of EMCA to provide an avenue for the regulated community to make an appeal should they be denied a license by NEMA or feel aggrieved by NEMA’s enforcement actions imposed on their activities.

c) Magistrate Courts

3.18 Prosecution forms a significant component of NEMA’s enforcement actions. As such, NEMA works with the magistrate courts to prosecute environmental crimes.

d) Kenya Wildlife Service (KWS)

3.19 Kenya Wildlife Service is a state corporation in the Ministry of Environment, Water and Natural Resources established under Section 6 of Wildlife (Conservation and Management) Act, 2013 to conserve and manage wildlife in Kenya, and to enforce related laws and regulations.

3.20 Sections 51 and 52 of EMCA allows NEMA to work with relevant lead agencies in the development and enforcement of regulations and standards concerning conservation of biodiversity both in-situ and ex-situ.

e) Kenya Forest Services (KFS)

3.21 Kenya Forest Services is a state corporation established under Section 3 of the Forest Act, 2005 and is mandated with the conservation, development and sustainable management of forest resources. NEMA works in collaboration with KFS to enforce regulations and standards affecting forest resources.

f) Water Resources Management Authority (WRMA)

3.22 WRMA is an authority established under Section 7(1) of the Water Act, 2002 and mandated with management of water resources in Kenya under Section 8 of the Act. NEMA works in collaboration with WRMA to enforce regulations and standards relating to water issues.

g) National Land Commission (NLC)

3.23 NLC is created by Article 67 of the Constitution of Kenya, and is mandated with ensuring sustainable management of State land for future generations. NEMA works with NLC to enforce EMCA, its regulations and guidelines where land issues are involved.

h) Water Services Boards (WSB)

3.24 WSB is established under Section 51 of Water Act, 2002 and is mandated with efficient and economical provision of water services under Section 53 of the Act. WSB develops infrastructure for drinking and waste water management. Hence WSB is an important stakeholder in the implementation of EMCA (Water Quality) regulations.

i) County Governments

3.25 The Constitution of Kenya provides for a devolve system of governance and creates County Governments in Article 176 to bring services closer to the people. Functions such as waste management and control of air and noise pollution are devolved under the Fourth Schedule of the constitution. Hence County governments are key stakeholders in enforcement of EMCA and its regulations.

j) The National Police service

3.26 The National Police Service is created in Article 243 of the Constitution and is charged with maintaining law and order. Since NEMA does not have the powers of arrest, NEMA has been cooperating with the police to arrest and prosecute environmental law violators.

Funding for the Department

3.27 The department is funded through budgetary allocation process of the National Treasury. During the period between Financial years 2010/11 and 2013/14, the department of Compliance, Enforcement and Field operations expenditures on operations and administration exhibited an increasing trend as shown in Table 2. The department's expenditure increased from Kshs. 17,456,786 in 2010/11 Ksh. 104,950,291 in 2013/14.

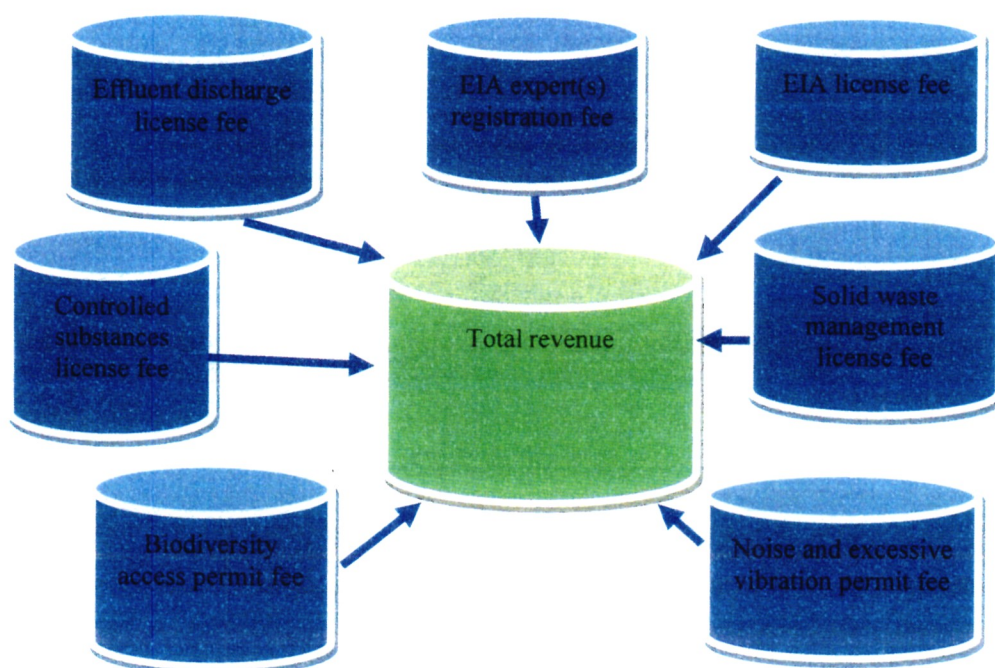
Table 2: Expenditure for the department of Compliance and Enforcement

	2010/11	2011/12	2012/13	2013/14
Compliance and Enforcement	16,681,036	37,431,522	25,038,304	30,591,059
Field Operations	775,750	113,250	47,378,138	74,359,232
Totals	17,456,786	37,544,772	72,416,442	104,950,291

Source: Analysis of NEMA records

- 3.28 The department generates revenue through issuance of licenses from sources illustrated in Figure 2. The funds generated by the department are deposited in the Exchequer Account at the National Treasury.

Figure 2: Department of Compliance, Enforcement and Field Operations Revenue Collection Basket



Source: Analysis of NEMA'S record

- 3.29 Within NEMA, licencing is performed by the Compliance section. Thus it is the Compliance Section that generates revenue for NEMA. However, the Enforcement Section is the one that ensures that the licencing conditions are complied with before the licences are issued and also follow up to ensure compliance with licencing conditions.
- 3.30 According to available records, the revenue collected from the various sources increased by 84% between 2010/11 and 2013/14 as shown in the Table 3. Interviews with the staff revealed

that the financial reports are prepared in the format developed by the National Treasury. Therefore a breakdown of revenues below the department level may not be available.

Table 3: Revenue of Compliance and Enforcement Department

Item Description	2010/11 (Ksh.)	2011/12 (Ksh.)	2012/13 (Ksh.)	2013/14 (Ksh.)
EIA registration fee	7,931,207	10,530,389	15,847,650	17,460,820
Water quality	41,432,311	30,953,100	49,367,700	55,462,298
Liquid & solid waste	12,476,690	9,833,200	11,571,463	14,442,370
Biodiversity	140,000	595,000	245,000	369,932
Ozone depleting substances	179,500	219,000	802,250	310,121
Noise pollution	21,164,449	22,991,428	22,707,295	9,889,226
EIA project report income	182,856,135	232,584,422	216,601,508	392,148,330
Total	266,180,292	307,706,539	317,142,866	490,083,098

Source: Analysis of NEMA records

Process Description

3.31 In its bid to enforce EMCA, its regulations and guidelines, the Enforcement Section in collaboration with Field Operations Section performs several functions including inspection of facilities, management of environmental incidents and enforcement of environmental crimes. The procedures for carrying out these functions are as discussed below.

a) Inspection

3.32 NEMA undertakes both planned and unplanned (in case of incidents) inspections. Inspections are carried out by NEMA gazetted inspectors, who visit regulated activities to monitor their level of compliance and take appropriate enforcement actions where violations are detected. The procedure for planned inspections begins with the preparation of inspection schedule followed by constitution of an inspection team which then establishes the purpose and scope of the inspection. As part of the background study, the team previews facility files available at NEMA and reviews the existing inspection checklist to align it with the findings of the preview. The team then prepares inspection plan and organizes for the necessary logistics to complete the work. The inspection plan is executed by visiting the facilities in question. Once the inspection is completed the team prepares a feedback report and undertakes appropriate enforcement actions. In case the team is denied access into the facility a warning letter is issued to the facility. A detailed inspection process is presented in Appendix 4.

b) Incident management

3.33 In the event of an incident, the public informs NEMA's Incident Unit either through verbal or written communication. The incident is then acknowledged, registered, classified into either high, medium or low risk and mode of response identified. Incidents within NEMA's mandate are either forwarded to the County Directors of Environment (CDEs) or the Inspectorate Unit for action while those outside NEMA's mandate are forwarded to the relevant lead agencies. Class A (high risk) incidents are mainly managed at the headquarters while Class B (moderate risk), C (minor risk) and D (little risk) are forwarded to CDEs for action.

3.34 The officers charged with the responsibility of managing the incidents (CDEs/inspectorate) undertakes site visits and prepares a report of action (ROA) which is then submitted to the incidents unit for further reclassification of incidents, in some instances, and entry into the incidents register. The Incidents Unit then undertakes enforcement actions based on ROA and enter the status of the incident in the register. The unit submits quarterly incidents report to the Chief Enforcement Officer. A flow chart illustration of the incident management process is provided in Appendix 5.

c) Enforcement of environmental crimes

3.35 NEMA'S enforcement of environmental crimes is driven by either incident occurrence or breach of license conditions. The responsible officer (inspectorate) investigates the crime and considers enforcements response in accordance with NEMA'S enforcement and prosecution policy. Enforcement can either take the form of improvement orders, restoration orders, stop orders, prosecution, caution, warning letter or site warning as illustrated in Appendix 6. Where restoration/stop order is issued, future monitoring of compliance is undertaken to ensure that the conditions are adhered to. In case of prosecution, the prosecutors collect further evidence and compile a case file which is then presented to compliance and enforcement committee in consultation with the legal office at NEMA. The prosecutor is then given the go ahead to file the case in court. The offender is then summoned to appear in court or issued with a warrant of arrest.

Chapter 4

Audit Findings

4.1 NEMA enforces EMCA and its regulations through inspections, incidents management and environmental auditing, which together provide an avenue for compliance monitoring and reporting. NEMA also enforces EMCA and its regulations through prosecution in instances where compliance can only be achieved through legal means. Interviews and records availed for audit revealed that NEMA received and reviewed environmental audits, conducted controlled environmental audits on facilities, undertook inspections, managed environmental incidents and prosecuted environmental crimes during the years 2010/11-2013/14.

4.2 However, the audit revealed that these activities aside, improvements in compliance with EMCA and its regulations was still hindered due to a number of reasons as discussed below.

Supervision and Coordination activities are not effective in ensuring compliance

4.3 NEMA is mandated under Section 9(1) of EMCA (1999) to exercise general supervision and coordination over all matters relating to environment. As the supervisor and coordinator, NEMA is mandated to perform various functions outlined in Section 9(2) of EMCA, two of which touch directly on enforcement: i.e. coordination of environmental management activities being undertaken by the lead agencies and monitoring of compliance to identify and correct violations. However, coordination and supervision activities carried out by NEMA are not effective as discussed below:

i. NEMA is not firm in supervising government institutions

4.4 NEMA is mandated to co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and activities as provided for in Section 9(2)(a).

4.5 While Section 9(2)(a) of EMCA gives NEMA the power to supervise and coordinate the various environmental management activities being undertaken by lead agencies, NEMA is not firm in discharging this role. Out of the 17 government facilities verified during the audit, only 2 were fully compliant while 6 were non-compliant and the remaining 9 were partially compliant. In comparison, 11 out of the 37 private facilities were fully compliant while 14 were non-compliant. NEMA is flexible on the government institutions, which often cite resource constraints as an excuse for not complying as discussed in the sub-sections (a) and (b). Interviews with NEMA officers revealed that attempts to prosecute County Governments over poor management of the designated waste disposal sites ended in out of court settlements taking the form of negotiated compliance, which is never fully complied with.

4.6 Of great concern was enforcement of EMCA (waste management) and (Water Quality) regulations of 2006. Compliance with these regulations has not been achieved as poorly managed designated solid waste dumpsites and pollution of water bodies by waste water, sewerage discharges, sewer bursts and poorly treated waste water were common occurrence as discussed below.

a) Enforcement of EMCA (Waste Management) regulations

4.7 During the audit, we visited 5 County Government designated dumpsites and none met NEMA's minimum requirements for management of solid waste disposal sites³. All the sites were not properly fenced and manned at the gate. Waste was not also properly managed in all the sites as haphazard dumping was observed. For example, at Kachok dumpsite in Kisumu, the fence was broken down and the gate was not manned. The site looked overwhelmed and waste was spilling over to the nearby road and the sports stadium. Waste burning as well as flowing of leachate to the storm drains was observed with livestock feeding on the waste.

4.8 Interviews with NEMA officers revealed that the town clerk was prosecuted in 2010 and the court ruled that the site be moved to an alternative location but this has not been done. Similarly, the Rosterman dumpsite in Kakamega was not fenced though there was someone manning the site. There was uncontrolled dumping with waste dumped at the edge of the road. Medical waste was also observed at the site. Gioto dumpsite in Nakuru was also not fenced and manned. There was uncontrolled dumping at the site. Besides, pigs were observed feeding on the leachate.

Picture 1: Kachok Dumpsite in Kisumu



Notice the dilapidated fence allowing waste to spill over to the storm drain and the adjacent road. Also notice leachate flowing into the storm drain.

³ NEMA minimum requirements for the management of solid waste disposal sites include: Securing the site with functional fence; provide entry and exit gates which should be manned; provide access routes within the site; provide a weighbridge; segregation of waste at the site; compacting of waste; and provide mechanisms for controlling fires within the site.

Picture 2: Gioto Dumpsite in Nakuru



Notice pigs feeding on the waste and leachate

b) Enforcement of EMCA (Water Quality) regulations

- 4.9 During the audit, the team visited 9 government operated waste water treatment facilities. Only 1 was fully compliant while the rest were partially compliant. At Nakuru Water Services and Sewerage Company (NAWASSCO) treatment plant located in Lake Nakuru National Park, the storm water filth retention point was not functioning. The treatment plant was also not fenced hindering any maintenance activity and also allowing wild animals to graze and drink the sewage. Interviews revealed that NEMA, KWS and WRMA have been following the case but NAWASSCO cited resource constraints as a challenge. Nevertheless, NAWASSCO had a current environmental audit and an effluent discharge license from NEMA despite the risk posed by this plant to the wildlife and the pollution of Lake Nakuru.
- 4.10 Similarly, the Limuru sewerage treatment plant was not properly maintained. The plant's capacity was exceeded and waste is only partially treated before discharging to the nearby river. NEMA prosecuted the operator, but they opted for an out of court settlement after which they paid for an effluent discharge license, but did not proceed with the application for the license. There was no indication of NEMA following on the case after receiving the payment and it appeared like NEMA was only interested in the revenue generated from license fee.

Picture 3: NAWASSCO Waste Water Treatment Plant in L. Nakuru National Park



The retention point is broken down and there is no dislodging of waste from storm water. There is also mixing of storm water with sewage

- 4.11 On the positive note, we observed an example of adherence to conditions set out in an improvement order issued by NEMA to Kodiaga Prisons waste water treatment plant. To solve the problem of effluent discharge to the environment, the facility has developed a biogas digester to manage part of human waste while the remaining is naturally treated through a compartment of 4 oxidation ponds. The treated effluent is used for irrigation on farms within the facility before being released to River Saka. However, the facility had not submitted an environmental audit to NEMA and did not also have an effluent discharge license for the plant. Further, the facility had not conducted an EIA for the biogas digester.
- 4.12 In comparison, private companies' effluent treatment plants were well maintained and the required compliance documents were in place. Kibos Sugar Company, for instance, had a modern waste water treatment plant where waste water is recycled and reused in the facility. The facility had a current Effluent Discharge Licence (EDL) and an environmental audit and had won the 2013 environmental award of the East African Lake Region in Cleaner Production. Compliance was also noted at Leather Industries of Kenya in Thika among others.
- 4.13 NEMA's leniency on government institutions may be attributed to lack of political good will to address environmental problems. Besides, some government institutions (county governments) feel that NEMA is unnecessarily bulldozing them in complying with the solid waste management regulations.

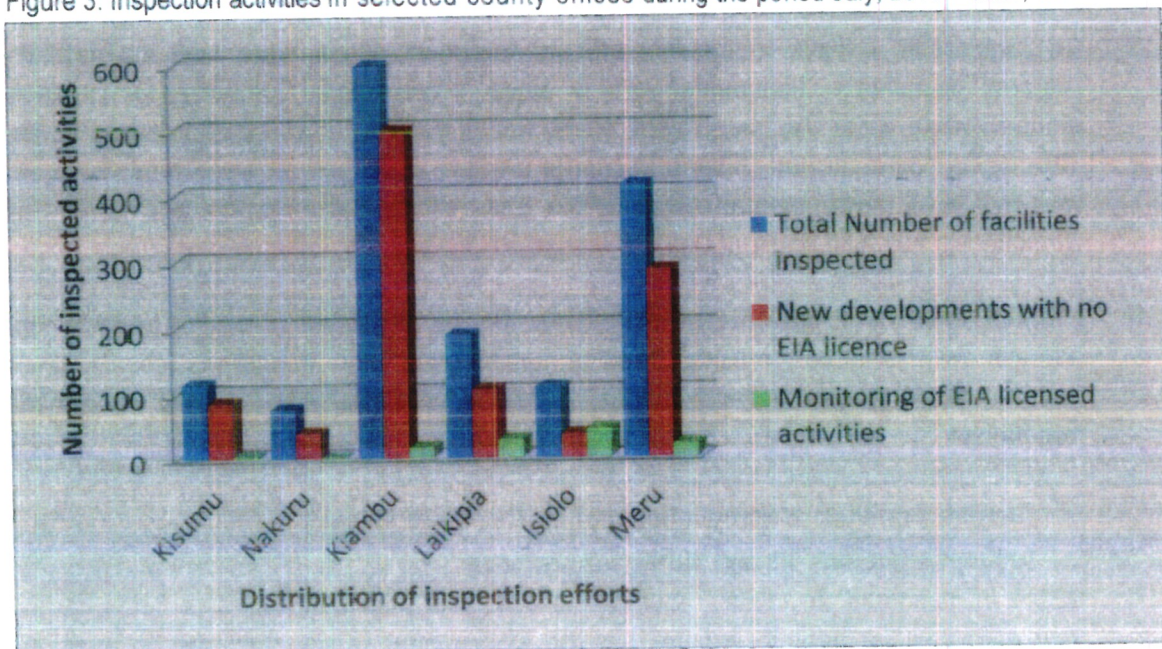
ii. Despite evidence of compliance monitoring, there is lapse in follow-up on enforcement recommendations issued during inspections

- 4.14 NEMA is mandated to monitor and assess activities, including activities being carried out by lead agencies, in order to ensure that the environment is not degraded by such activities,

environmental objectives are adhered to and adequate early warning on impending environmental emergencies is given as provided for in Section 9(2)(i).

- 4.15 Given the high number of regulated activities and limited resources, NEMA uses a risk based approach in which activities are categorized into high, medium and low risk based on their potential and actual impact on the environment, impact on NEMA's resources and public concern. Only high risk activities are considered for planned inspections while medium and low risk activities are mainly monitored through environmental auditing (submitted to NEMA annually), incident management or other routine inspections.
- 4.16 However, from the scrutiny of the records availed, there was no evidence to show that NEMA is vigilant in undertaking follow-up to ensure that the recommendations and/or conditions specified in the licences, improvement orders and restoration orders are implemented. A review of the records revealed that NEMA follows up on cases of gross violation or emergencies like the breakdown of sewerage trunk line but does minimal routine follow-up for other cases, for example where EIA licences have been issued.
- 4.17 Further, a review of inspection records provided at the county offices visited revealed that inspections carried out were more focused on activities with high potential for NEMA's revenue generation and not environmental impact as should be the case. Efforts were mainly directed towards new development activities with no EIA licenses (building constructions) as demonstrated in Figure 3. Bringing new developments to compliance means acquiring EIA license hence generating revenue for NEMA. While it is NEMA policy that CDEs should monitor at least 20% of EIA licensed activities to ensure their adherence to the license conditions and also avert possible environmental impact, monitoring of EIA licensed facilities was much low compared to efforts directed towards new development activities.

Figure 3: Inspection activities in selected county offices during the period July, 2013 – June, 2014



Source: OAG analysis of NEMA inspection records

- 4.18 As a result, compliance with the affected regulations is never achieved as the regulated community only partially implement the license conditions and/or order recommendations because of perceived notion of inadequate follow up. Out of the 39 facilities that had either been issued with a license, an improvement or restoration order during the period July 2013 to June 2014 verified during the audit, only 11 were fully compliant while 20 were partially compliant . The remaining 8 were non-compliant. In Kisumu most petrol stations did not have the relevant compliance documents on site despite NEMA's previous visits. Instances of license conditions not being adhered to were also observed. For instance, a visit to Mitunguu in Meru revealed that an EIA license issued to Meru Stone Miners Limited was transferred to a company named ERS without NEMA's knowledge. ERS had completed mining on the licensed parcel of land and had moved to a new parcel in a riparian reserve without NEMA's knowledge. Most of the waste transportation vehicles we observed in Nairobi and Nakuru had expired licenses and did not have waste transportation tracking document as required by the registration or licencing rules.
- 4.19 There were also instances of facilities not implementing the recommendations outlined in the improvement and restoration orders. For example, Kagunduini slaughter slab in Nyeri had been advised to construct a pit to drain their waste water in 7 days instead of discharging it into the neighbouring plot but our visit one month later revealed that they had not constructed the pit and were still discharging waste water in the neighbouring plot. Similarly, a mall construction in Limuru was issued with a stop order since they had not submitted an EIA to NEMA, but the team found construction ongoing when visiting the site despite the stop order.

Picture 4: Quarrying Activity in Mitunguu, Meru



Notice the threat caused by the quarry to the adjacent River Thingithu. Dumping of debris is done on the riparian reserve.

- 4.20 Scrutiny of NEMA's procedure file revealed that the office only recognizes follow-up in case a restoration or stop order was issued. Again, NEMA's enforcement and prosecution policy does not have any provision for follow up on compliance actions. It was also not clear as to whether

the licenses require to be followed up on except for EIA licences. Further, it was revealed that CDEs are given revenue targets on which they were evaluated as part of the annual performance appraisal.

- 4.21 NEMA officers also complained about the lack of critical monitoring equipment such as mobile laboratory tools and personal safety equipment (capable of monitoring air, water and soil quality), limited number of enforcement staff and vehicles, and of inspection resistance and insecurity challenges from facilities and individuals all hindering compliance monitoring. NEMA relies on WRMA's laboratory for water quality analysis, but this sometimes delays the monitoring process. For example, there was an incident where a river was polluted and NEMA submitted samples for analysis to Government Chemist which took 8 months to get the results. The officers also complained about the limited number of vehicles and office computers at the county offices. Resistance to inspection and insecurity is common in slum areas where residents may deny officers access to certain areas.

Enforcement hampered by challenges emanating from the legal framework

- 4.22 Agenda 21 (adopted during the 1992 UN conference on sustainable development) emphasizes the need for developing and implementing integrated, enforceable and effective laws and regulations. It also stresses the need for developing workable programmes to enforce compliance with the existing laws, regulations and standards.

i. NEMA's enforcement policy focuses more on prosecution, despite it being the last resort in enforcement, and ignores other methods of enforcement

- 4.23 For NEMA's enforcement and prosecution policy to be effective it would be expected to consider all aspects of enforcement. It was noted from the review of NEMA's enforcement and prosecution policy that NEMA applies internationally accepted enforcement principles including: proportionality, consistency, transparency and targeting. The policy, however, focuses on prosecution and fails to adequately address the other methods of enforcement like issuance of improvement orders, restoration/stop orders, site warnings, warning letters and caution. Ordinarily prosecution comes as the last resort in enforcement after all other methods of enforcement have been exhausted. The policy does not also provide any criteria for decision making when applying the other enforcement methods except for prosecution.

- 4.24 As a result, the office lacks a clear guideline on the other methods of enforcement. The weakness can be attributed to the design of the policy, which overlooked the consideration of the other methods.

ii. Sectoral Environmental Laws are not harmonized with EMCA (1999) Making it Difficult to implement EMCA and its regulations

- 4.25 Functioning legal instruments are necessary conditions. Interviews with NEMA officers revealed that EMCA is not harmonized with related sectoral environmental laws, which make enforcement of EMCA and its regulations difficult.

- 4.26 The audit team reviewed some of the laws to ascertain these allegations. It emerged that the laws are unharmonized and have conflicting provisions. For example, EMCA mandates NEMA to supervise utilization of genetic resources and as such Section 9 of EMCA (Biodiversity and Benefit Sharing) regulations (2009) mandates NEMA to grant access permits for any person intending to access genetic resources in Kenya. However, this same mandate is granted to KWS which issues wildlife activity use license under Section 79 of Wildlife Conservation and Management Act (2013) and KFS which grants license for utilization of forest resources under Section 52 of Forest Act (2005).
- 4.27 Similarly, Section 75(1-2) of EMCA (1999) mandates NEMA to license effluent discharges, but this mandate is also given to WRMA under Section 25(1)(c) of the Water Act (2002) which mandates WRMA to issue permits for "the discharge of a pollutant into any water resource". Further, EMCA mandates NEMA to regulate waste management in the country. As such NEMA has developed and gazetted waste management regulations which outline how waste should be handled within the country including license requirements. However, the Fourth Schedule of the Constitution of Kenya mandates county governments to provide waste management services at the county level and hence county governments are at liberty to come up with their own laws to regulate waste management at the county level which might then overlap or conflict with EMCA provisions.
- 4.28 A significant conflict from sectoral laws was noted in the provision for riparian width, which ranged from a minimum of 6 metres as provided for in EMCA and Water Act, 2002 to a minimum of 30 metres as provided for in the Survey Act, 2012.
- 4.29 As a result of the unharmonized laws, there has been overlap/duplication of roles from various Lead Agencies, which does not only make enforcement of EMCA and its regulations difficult, but also makes compliance confusing and expensive to the regulated community. The conflicting provisions from different sectoral laws has also made application of EMCA and its regulations difficult as was witnessed in an attempt to secure the riparian reserve of Nairobi rivers where it was difficult to demolish structures within the reserve as well as relocate people and businesses. The lack of harmony in the provisions could be attributed to lack of multi-sectoral consultation during the design of laws.

iii. Some of the provisions in EMCA are unclear leading to confusion in application

- 4.30 Laws should have clear, precise, unambiguous and consistent requirements for them to be enforceable.
- 4.31 We reviewed EMCA and its regulations to ascertain whether the requirements are clear and unambiguous. It was revealed that some of EMCA's EIA requirements are unclear, which can be confusing in its application. For example, Parts V, VI and Second Schedule of EMCA outline the policies, programmes, projects and activities for which an EIA must be undertaken in a general manner, leaving room for application of subjective judgment on which activities are exempted.

- 4.32 Further some activities are listed in the Second Schedule in a general manner thus leaving room for subjective judgement. For example section 1 (a) talks of activities out of character with surrounding, 7 (b-e) talks about agricultural activities in a general manner which leaves room for subjective judgement by the implementing officer or the proponents.
- 4.33 An analysis of civil cases revealed instances of projects and activities commencing without an EIA license with proponents claiming that the activities do not warrant an EIA. A review of the 18 EIA related civil cases, reported during the financial year 2012/2013, revealed that 39% had filed civil cases against NEMA to court for stopping their projects for operating without EIA licences believing that they are not supposed to undertake an EIA study of the proposed projects.
- 4.34 Further during the document review and field verifications we observed instances where project proponents started projects without conducting an EIA as required.
- 4.35 The lack of clarity and ambiguity in EMCA and its regulations can be attributed to failure to consider finer details while developing laws.

Prosecution of Crimes Faced with Investigation and Personnel Challenges

- 4.36 Prosecution should be punitive enough if its aim is to deter instances of non-compliance within the regulated community. For NEMA to achieve this, cases should be backed by watertight evidence and presented to court in a convincing manner to ensure that violations attract deterrent penalties.
- 4.37 According to NEMA's Enforcement and Prosecution policy, prosecution of environmental crimes should not be commenced by NEMA unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction.
- 4.38 Analysis of NEMA's criminal case records showed that prosecuted environmental crimes have been declining over the years from 59 cases in 2011/12 to only 23 cases in 2013/14 as shown in Table 4. However, Data for the financial year 2010/11 was not provided.

Table 4: Trend in Crimes Prosecuted during the Period 2011/12 – 2013/14
Source: Analysis of NEMA prosecution records

	2011/12	2012/13	2013/14	Total	%
Finalized	33	10	4	47	40
Pending before court	11	19	18	48	41
Dismissed/Acquitted/Withdrawn	4	5	1	10	9
Warrant of arrest issued	8	0	0	8	7
Mentioned	3	0	0	3	3
Total	59	34	23	116	100

- 4.39 Although the decline in number of cases during the period may indicate positive performance by NEMA, interviews revealed that NEMA has changed its strategy to focus more on compliance

promotion instead of prosecution given the inherent challenges of prosecution. For example identified cases are forwarded to the police for investigation. However, the police take too long to perform searches. Again, in order to gather appropriate and relevant evidence, the scene of crime needs to be secured in a timely manner and exhibits taken as delay may lead to interference with the scene of crime.

- 4.40 Interviews revealed that delays in gathering and collecting evidence by the police results in interference with the scene of crime thus affecting the quality of evidence obtained. CDE's complained that getting assistance from Police in a timely manner is a big challenge.
- 4.41 We noted that NEMA has faced instances of lack of watertight evidence derailing its prosecution efforts in the past. Some cases have been dropped due to lack of sufficient evidence while others ended up with non-punitive penalties.
- 4.42 Analysis of NEMA's criminal case records showed that only 40% of all cases prosecuted during the period 2011/12-2013/14 were successfully completed while another 41% is still pending before the court as environmental damage continues. 9% of the cases were either acquitted/dismissed or withdrawn while another 7% and 3% did not go past warrant of arrest being issued and first mentioning respectively.
- 4.43 Interviews with officers revealed that most environmental violators receive low penalties compared to what is provided in EMCA and its regulations. This may lead to increased instances of violations since the regulated community can easily get away with environmental crimes. Besides, the non-punitive penalties awarded to violators may have a negative impact on compliance as the regulated community might find non-compliance less expensive hence high instances of violations.
- 4.44 NEMA officers attributed the lack of watertight evidence to hurried investigations driven by the pressure to urgently restore compliance as well as non-availability of the necessary tools and equipment. The officers interviewed stated that critical equipment for evidence capture and analysis such as mobile laboratory (equipped with sampling and storage tools such as sampling bottles, cooler boxes, freezers and augers for soil sampling) and personal safety equipment are lacking.
- 4.45 Further, since NEMA prosecutors do not have the powers of arrest, NEMA has formed a police unit comprising of 10 seconded administrative police officers. However, the police unit is based at the head office and officers only go to the county offices if their service is sought for. This problem is further complicated by the fact that the deployment of NEMA prosecutors at the county offices is highly skewed. Interviews revealed that more staff is needed in this area to enable NEMA to perform effectively.

Table 5: Deployment of NEMA Prosecutors across the Country

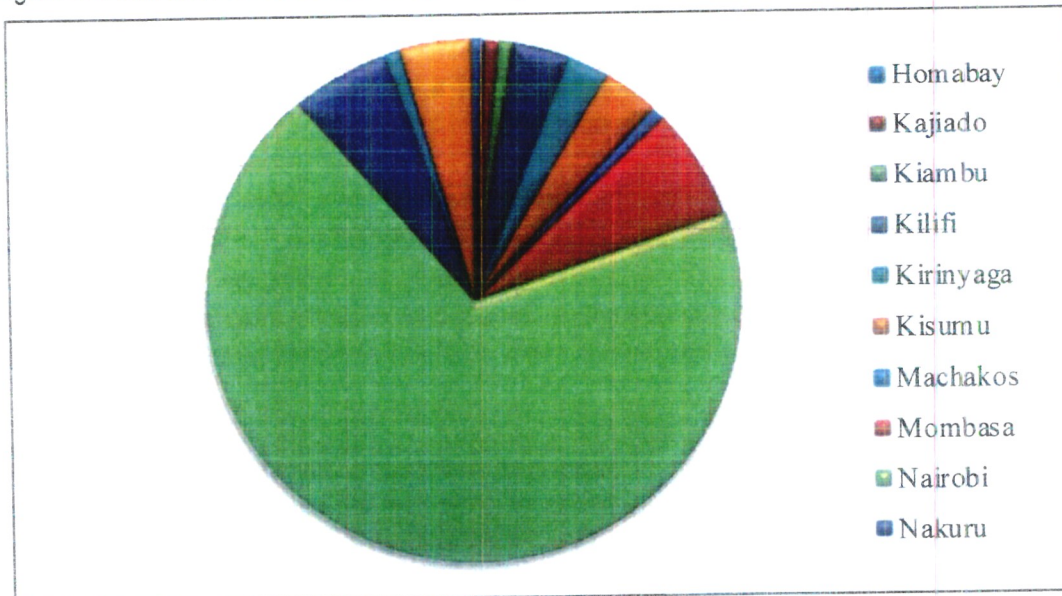
Region	Number of Prosecutors
HQs/Nairobi/Central	12

Rift Valley	5
Eastern	2
Nyanza/Western	2
North Eastern	2
Coast	1
Total	24

Source: Analysis of NEMA records

- 4.46 This explains why prosecution of environmental crimes is only active in Nairobi County as 69% of the crimes prosecuted between 2011/12 and 2013/14 were from this County. Besides, NEMA prosecutor stated that the regulated community's awareness of their absence on the ground affected their compliance.

Figure 4: Distribution of Cases Prosecuted during the Period 2011/12 -2013/14 by County



Source: Analysis of NEMA's prosecution records

Ineffectiveness in Records Management

- 4.47 A guiding principle of records management is to ensure that information is available when and where it is needed, in an organized and efficient manner, and in a well maintained environment.
- 4.48 During the audit, we inspected NEMA's files and databases maintained both manually and electronically at the headquarters and selected county offices. We observed that files and records are maintained in a haphazard manner. Scrutiny of an electronic database intended to capture inspections activities and incidents at headquarters revealed that the records were incomplete and had not updated regularly. For examples, incidents forwarded to CDEs were captured as still ongoing at the headquarters incidents register, whereas records availed at the county level revealed the same incidents had been concluded. At the same time it was revealed

that information available in manual files for inspection and incidents had information gaps when compared with the electronic counterparts.

- 4.49 At the CDE Nairobi offices, for example, it was revealed that reports and documents like warning letters, restoration orders, improvement orders and acknowledgment notes are loosely filed into files without any indexing and therefore can be prone to destruction by any malicious person or by accident or may be corrupted without notice by the users. Retrieving information is also difficult as the manual files are not indexed.
- 4.50 Further, during field verifications the team witnessed the officers issuing various orders to project developers. However, it was noticed that the orders were in form of loose papers which are issued without accountability and responsibility for their issuance. This may provide a loophole for fraudulent activity. Cases were witnessed where developers informed the officers that they had previously been issued with the same order by other officers doing the rounds. As such the developers had more than one copy of the order which were issued by different officers at different times. The problem is attributed to the fact that the various orders are designed not in the form of controlled and accountable documents or pre-numbered.
- 4.51 During the audit, it was observed that retrieval of information from NEMA's records was challenging. We were not able to obtain information on inspections, incidents management, EIA monitoring, environmental audits and prosecution for the entire period under audit. Further, uncontrolled issuance of orders results into confusion from the regulated community since they are at times issued with multiple orders by different NEMA officers.
- 4.52 The poor management of records may be attributed to failure to consider authority, responsibility and accountability elements when designing records management system.

Chapter 5

Conclusion

5.2 From the findings of the audit it is clear that the measures put in place to enforce EMCA, its regulations and guidelines are not effective in ensuring compliance. The enforcement of compliance with EMCA, its subsidiary regulations and guidelines is faced with a number of problems limiting NEMA's ability to deliver on its mandate:

- NEMA's supervision activities are characterised by leniency on government institutions, misplaced priorities in compliance monitoring and inadequate follow-up on recommendations/conditions all leading to laxity in compliance from the regulated community.
- Interrelated environmental sectoral laws are not harmonized with EMCA hindering its application. Besides, EMCA's provisions on EIA requirements are too general leading to confusion and NEMA lacks a comprehensive policy to guide its enforcement activities.
- NEMA's prosecution of environmental crimes does not deter future non-compliance given that NEMA lacks the capacity to investigate crimes and gather sufficient and reliable evidence, which can attract punitive penalties.
- Enforcement records are not properly managed as incomplete records and loose filing in non-indexed files is the norm making retrieval of information difficult.
- NEMA has been lenient while environmental harm continues as evidenced by the poor state of solid waste management and water pollution across the country. Further, it would appear from our findings that NEMA has consistently been turning a blind eye to glaring urban environmental violations and omissions witnessed throughout our audit.

Chapter 6

Recommendations

6.1 The following are the major recommendations made by the Auditor General for consideration to improve on enforcement of environmental laws;

1) Addressing ineffectiveness in supervision and coordination

- To improve on NEMA's supervision of government institutions, NEMA, through the Department of Compliance, Enforcement and Field Operations should establish mechanisms to ensure inflexibility when enforcing EMCA and its regulations on Lead Agencies and other Government departments
- To improve on compliance monitoring:
 - The Department of Compliance, Enforcement and Field Operations may consider establishing a clear guideline for following up with violators to verify that they return to compliance within the shortest time possible and with no further violation of EMCA, its regulations and guidelines.
 - NEMA should consider reducing the emphasis on revenue as a basis for performance evaluation of County Directorates.

2) Addressing legal framework challenges

- To strengthen the enforcement policy, NEMA may consider revising the enforcement and prosecution policy to address the methods of enforcement.
- To minimise instances of overlapping mandates, the Ministry of Environment, Water and Natural Resources may consider undertaking a review of sectoral laws, which should involve the affected Lead Agencies.
- To resolve ambiguity in certain EIA provisions, NEMA should review the EIA/EA regulations to ensure that activities for which EIA is required are clear, precise and unambiguous.

3) Addressing prosecution challenges

- To improve on efficiency of prosecution, NEMA may consider establishing a clear and effective working relationship with other Government departments like the National Police Service at the county level to enable easy coordination of activities.
- To improve on evidence gathering, NEMA should establish and implement guidelines to aid evidence gathering and investigations so as to improve on quantity, quality and timeliness of evidence and investigations to be used in prosecution.

4) Addressing ineffectiveness in records management

To improve records management, NEMA, through the Department of Compliance, Enforcement and Field Operations should come up with mechanisms to ensure regular and timely updating of records, proper filing and also control movement and issuance of orders.

Appendices

Appendix 1: Guidelines Published by NEMA

- 1) E-waste guidelines
- 2) National sand harvesting guidelines
- 3) Coastal zone pollution prevention and control guidelines
- 4) National guidelines for Strategic Environmental Assessment (SEA)
- 5) Environmental Impact Assessment (EIA) guidelines
- 6) National land use guidelines
- 7) Clean Development Mechanism (CDM) guidelines
- 8) Asbestos guidelines

Appendix 2: Methods of gathering evidence

a) List of People Interviewed

- Chief Compliance and Enforcement Officer (Head of Enforcement Section)-To get more understanding of the functions and operations of Enforcement section.
- Senior Enforcement Officer (head of Prosecution Unit) - To get understanding of operations of the section.
- Selected County Directors of Environment- To obtain more understanding of enforcement operations within Nairobi County.
- Staff of the various units to gain understanding of their operations and activities.

b) Documents Reviewed

- Constitution of Kenya - To obtain information on the constitutional provisions on environmental rights and their enforcement
- Environment Management and Coordination Act (EMCA), 1999- To obtain understanding of NEMA's mandate, functions and structures of its enforcement
- Various EMCA regulations- To understand their compliance and enforcement requirements as a basis of the criteria for the activities of the various units
- NEMA Strategic plan, 2013-2018- To obtain background information, strategies, structures, SWOT analysis, and key stakeholders
- NEMA annual work plans- To obtain information on enforcement activities; input, output, outcomes and budgets

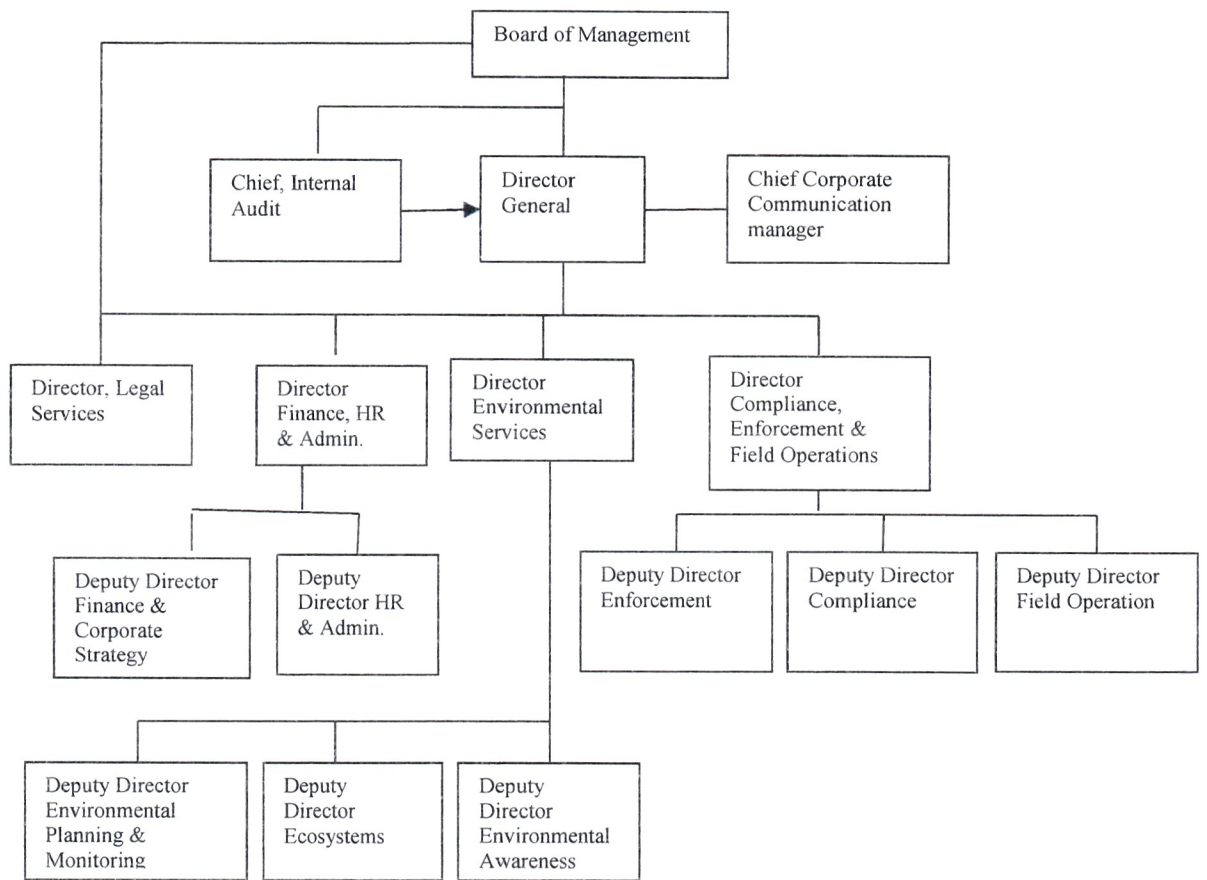
- NEMA procedures File- To obtain information on systems and procedures for compliance, enforcement and quality control.
- Activity files and reports- To understand the status of the activities of the various units
- Financial reports/budgets- To obtain information on the funding of activities

c) List of Sites Visited

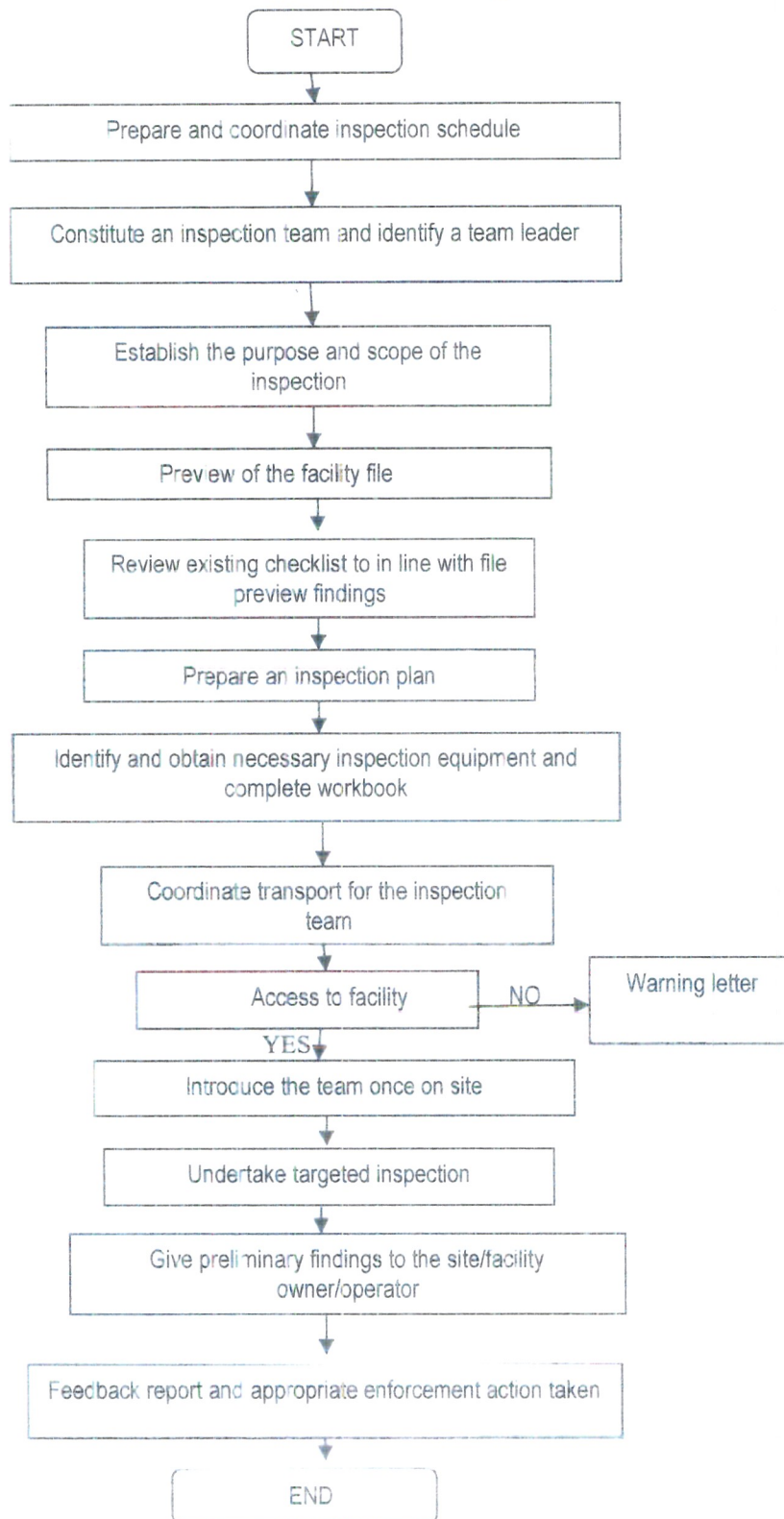
County		Name of the Facility	Type of Activity
Kiambu	1.	Kiambu Water and Sewerage Company Treatment Plant	Waste water treatment
	2.	Building construction at Ruaka Estate	Construction
	3.	Limuru Sewerage Treatment Plant	Waste water treatment
	4.	Building construction at Limuru	Construction
	5.	Kwabera Slaughterhouse in Limuru	Slaughter house
	6.	Mall construction at Limuru	Construction
	7.	Mitchelangelo recreation Centre	Recreation facility
	8.	Top Rank Brewing Company	Brewery
	9.	Benver Estate Ltd, Juja	Quarrying
	10.	Leather Industries Kenya Ltd, Thika	Tannery
	11.	Kang'oki Dump site, Thika	Waste disposal
Kisumu	12.	Kachok Dumpsite	Waste disposal
	13.	Kenol Complex Kisumu	Petrol Station
	14.	Petro Oil (K)	Petrol Station
	15.	Gulf Petrol Station	Petrol Station
	16.	Ujenzi quarries Ltd	Stone crushing
	17.	Kodiaga Prisons Treatment Plant	Waste water treatment
	18.	Kibos Sugar Company	Sugar manufacturing
Kakamega	19.	West Kenya Sugar Company	Sugar manufacturing
	20.	Rosterman Dumpsite	Waste disposal
	21.	Shirere waste water treatment plant	Waste water treatment
	22.	Savona inn	Guest House
	23.	Sigalagala Polytechnic	Training Institution
Nakuru	24.	NWASCO Park treatment plant	Waste water treatment
	25.	Gioto Dumpsite	Waste disposal
	26.	London Meat suppliers	Slaughter house
	27.	RIVA Ravine petrol station	Petrol Station
	28.	Karsan Ramji Quarry	Stone Crushing
	29.	Waste transport vehicle registration number KYU 961	Waste Transporters
	30.	Waste transport vehicle registration number KVM 039(ECO TRASH)	Waste Transporters

County		Name of the Facility	Type of Activity
Nairobi	31.	Proposed commercial development	Construction
	32.	Proposed commercial development	Construction
	33.	Proposed commercial development	Construction
	34.	Geeenville Park-Calydis Enterprises	Apartments
	35.	Taka Kenya Recycling Ltd- Dagoreti	Waste Segregation
	36.	Residential development by - Kangemi/Dagoreti	Construction
	37.	Bahati Health Centre	Hospital
	38.	LabChem	Chemical
	39.	Expo Plastics Limited	Waste Recycling
	40.	Waste transport vehicle registration number KTJ 514(ALLY BINS)	Waste Transporters
	41.	Garbage dot com waste transport vehicle	Waste Transporters
	42.	Njiru Trunk line	Waste Water Treatment
Isiolo	43.	IWASCO - Isiolo Water and Sewerage Company	Waste Water Treatment
Laikipia	44.	NAWASCO- Nanyuki Water and sewerage Company	Waste Water Treatment
	45.	Oil Libya petrol station	Petrol station
Meru	46.	Mini Bakers Limited	Bakery
	47.	MENYA Petrol Station	Proposed petrol station construction
	48.	Meru Stone Miners Limited - Mitunguu area	Quarrying
	49.	Meru Stone Miners Limited- Nkubu area	Quarrying
Nyeri	50.	Outspan Hospital	Hospital
	51.	Nyeri PGH	Hospital
	52.	Nyeri Probation office	Construction
	53.	Kagunduini Slaughter Slab	Slaughter house

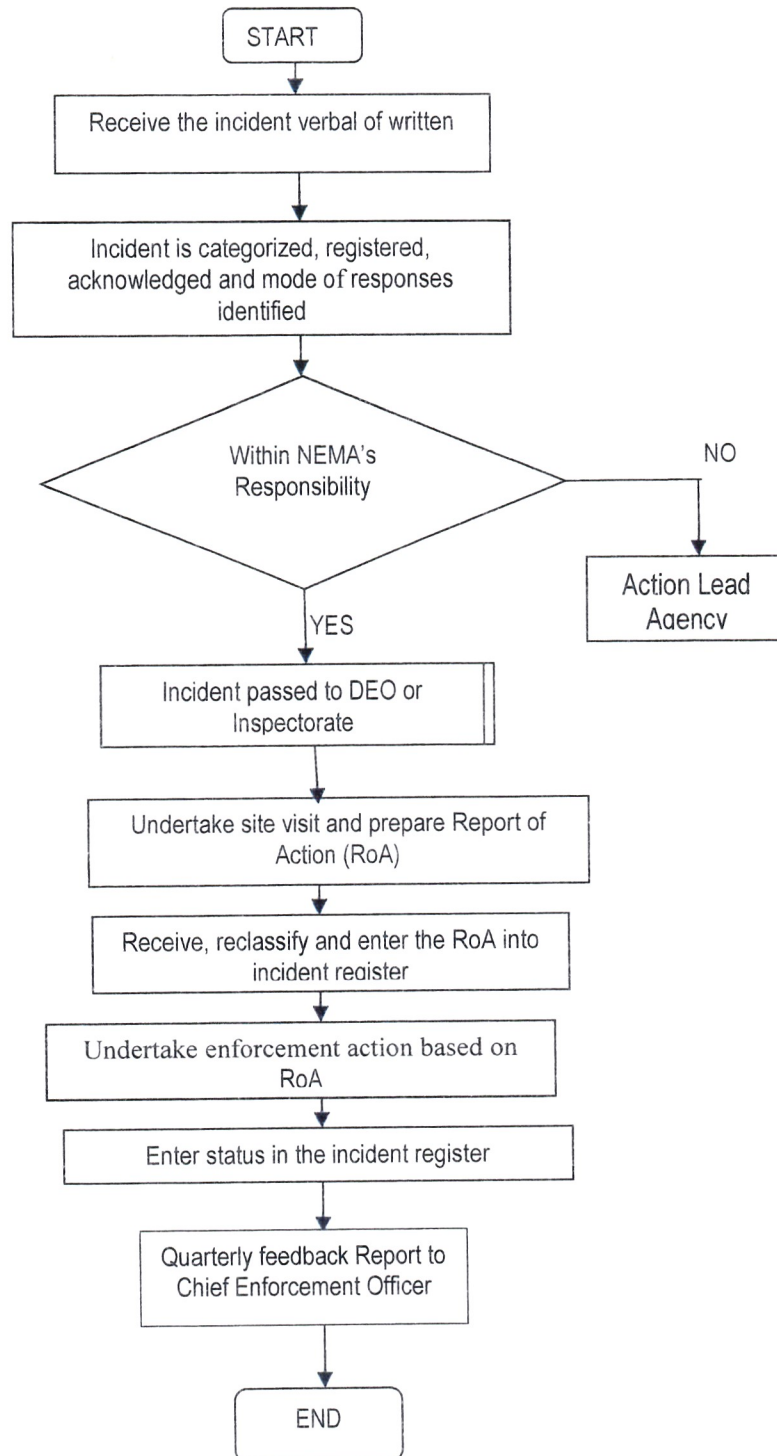
Appendix 3: Organizational Structure from 2013-2018 Strategic Plan



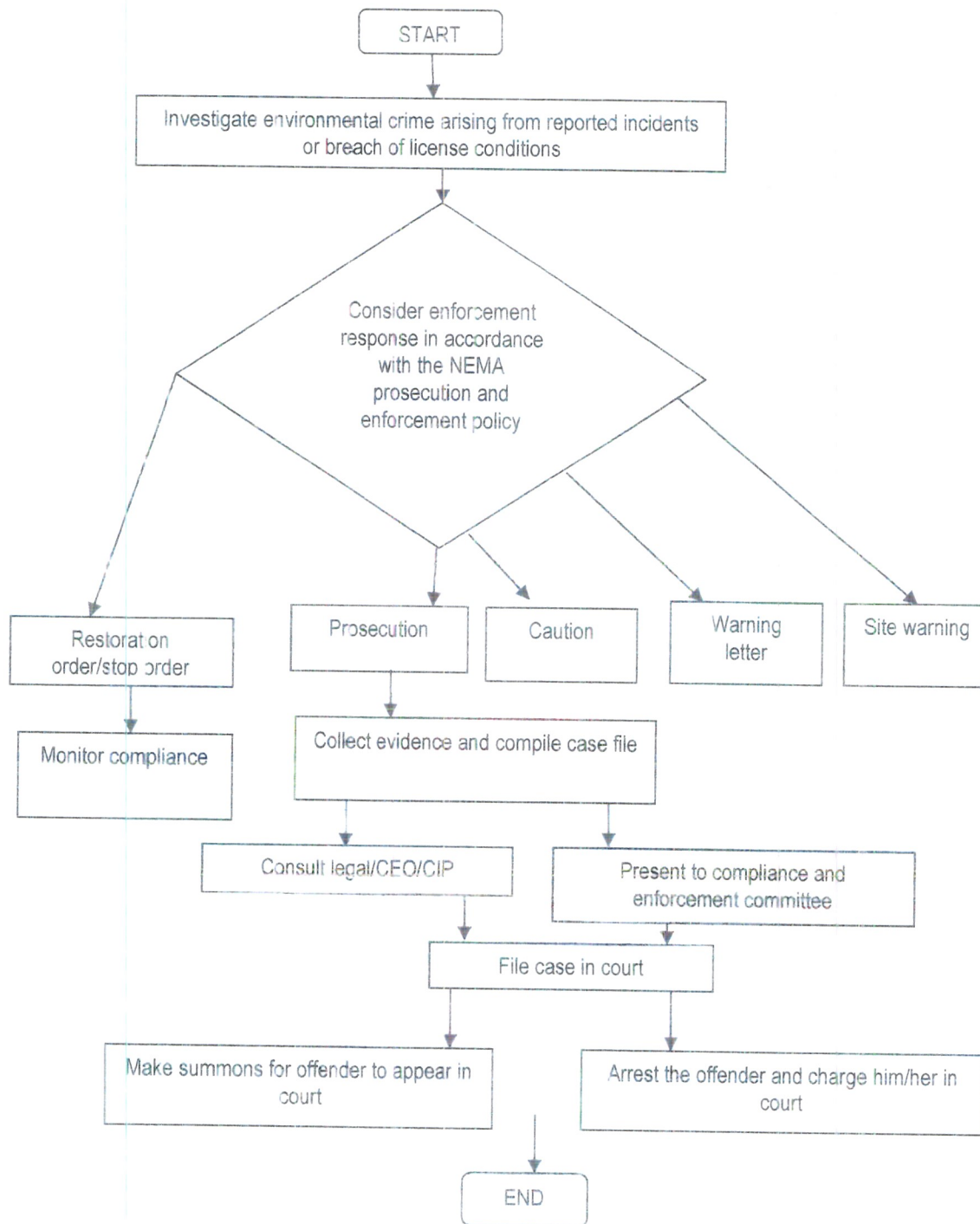
Appendix 4: Procedure for Carrying Out Inspection of Facilities



Appendix 5: Procedure for Environmental Incident Management



Appendix 6: Procedure for Enforcing Environmental Crimes



Appendix 7: Management comments on issues raised

Supervision and Coordination activities carried out by NEMA are not effective in ensuring compliance

Audit Finding	Director General's Response	OAG Comments On Response
<p>Interviews with NEMA staff, review of enforcement records and physical verifications revealed that supervision and coordination activities carried out by NEMA's Enforcement Section and County Offices are not effective in ensuring compliance with set environmental laws.</p> <p>Although NEMA is mandated under Section 9(2)(a) of EMCA to coordinate the environmental activities of various lead agencies, NEMA is not firm in undertaking its supervision role. For example, NEMA has not been able to bring the concerned government lead agencies to compliance with EMCA (solid waste management) regulations as well as EMCA (Water Quality) regulation. NEMA has been lenient while environmental harm continues as evidenced by the poor state of solid waste management and water pollution across the country.</p> <p>In addition, while Section 9(2)(i) of EMCA mandates NEMA to monitor activities to ensure that compliance is attained, NEMA does not also appear to be active in following up on enforcement actions issued during compliance monitoring. Only gross violations are followed up while the rest are assumed to have implemented the enforcement</p>	<p>The auditee has stressed on the efforts they have made to ensure enforcement of compliance but has acknowledged the challenges they have faced from public institutions especially based on the premise that government should not fight government. Again, the auditee has adduced to their own limited capacity in terms of resources and personnel.</p>	<p>Some causes of unsatisfactory performance are operational and require system reform and not additional funds for improvement to be realized.</p>

Audit Finding	Director General's Response	OAG Comments On Response
<p>recommendations. As a result, compliance is never achieved and the environment continues to be degraded as most entities only implement the recommendations partially.</p>		
<p>Enforcement of EMCA is further hampered by NEMA's weak enforcement policy and challenges emanating from the law</p>		
<p>Enforcement of EMCA regulations is curtailed by a weak enforcement policy on one hand and challenges of clarity and harmonization of the law on the other.</p> <p>Being an important source of reference for NEMA officers to guide enforcement activities, the enforcement policy should be comprehensive. In contrast, the policy focuses more on prosecution and fails to adequately address the other methods of enforcement like issuance of improvement orders, restoration/stop orders, site warnings, warning letters and caution.</p> <p>Further, enforcement of EMCA can only be effective in an environment with functioning legal instruments in which related sectoral laws are harmonised. However, the audit revealed that EMCA is not harmonized with other sectoral environmental laws like the Water Act (2002), Forest Act (2005) and the Wildlife (Management and Conservation) Act (2013) leading to duplication of roles and confusion in</p>	<p>The management has agreed with the observation that there appears to be some inconsistencies and duplications of responsibilities between NEMA and other government agencies. They have however insisted that EIA process is never based on personal judgement as Schedule II and the EIA regulations are clear on the projects that are supposed to undertake EIA studies.</p>	

Audit Finding	Director General's Response	OAG Comments On Response
<p>application. The lack of harmony in law was attributed to inadequate multisectoral consultation during design of the laws.</p> <p>In addition, EMCA and its regulations should have clear, precise, unambiguous and consistent requirements for them to be enforceable. But it emerged from the audit that some of EMCA regulations have unclear provisions that can lead to either misinterpretation or application of personal judgement during application. For example, EMCA lists some of the activities for which environmental impact assessment (EIA) is required in a general manner leaving room for personal judgement. This partly explains why EMCA (Environmental Assessment/ Environmental Audit) regulations of 2003 remains one of the most violated regulation in the country.</p>		
<p>NEMA's Prosecution of Environmental Crimes was faced with Investigation Challenges</p>		
<p>Prosecution should be punitive enough if its aim is to deter instances of non-compliance within the regulated community. For NEMA to achieve this, cases should be backed by watertight evidence and presented to court in a convincing manner to ensure that violations attract deterrent penalties.</p> <p>According to NEMA's Enforcement and Prosecution policy, prosecution of environmental crimes should not be</p>	<p>NEMA has adduced to the limitation of resources as one cause of the challenges pertaining to investigations especially considering that environmental crimes are getting more sophisticated and attractive to criminal.</p>	<p>Some causes of unsatisfactory performance are operational and require system reform and not additional funds for improvement to be realized.</p>

Audit Finding	Director General's Response	OAG Comments On Response
<p>commenced by NEMA unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction.</p> <p>Although an analysis of NEMA's criminal case records showed that prosecuted crimes has been declining over the years from 2011/12 to 2013/14, it was revealed that there were delays in gathering and collecting evidence. For example identified cases are forwarded to the police for investigation. They however take too long to perform investigations.</p> <p>Again, in order to gather appropriate and relevant evidence, the scene of crime needs to be secured in a timely manner and exhibits taken as delay may lead to interference and tampering with the scene resulting in cases being lost. CDE's complained that getting assistance from Police in a timely manner is a big challenge.</p> <p>Some cases have been lost due to lack of sufficient evidence while others ended up with non-punitive penalties. Analysis of NEMA's criminal case records showed that only 40% of all cases prosecuted during the period 2011/12-2013/14 were successfully completed while another 41% is still pending before the court as environmental damage continues. 9%</p>		

Audit Finding	Director General's Response	OAG Comments On Response
<p>of the cases were either acquitted/dismissed or withdrawn while another 7% and 3% did not go past warrant of arrest being issued and first mentioning respectively.</p> <p>Interviews with NEMA staff revealed that most environmental violators receive low penalties compared to what is provided in EMCA and its regulations. This may have led to increased instances of violations since the regulated community can easily get away with environmental crimes. Besides, the non-punitive penalties awarded to violators may have a negative impact on compliance as the regulated community might find non-compliance less expensive compared with benefits from violations.</p>		
<p>Inadequacy in Records Management and Information Sharing</p>		
<p>A guiding principle of records management is to ensure that information is available when and where needed, in an organized and efficient manner, and in a well maintained environment.</p> <p>During the audit, the team inspected NEMA's files and databases maintained both manually and electronically at the headquarters and selected County offices. It was revealed that files and records are not well maintained. For example, scrutiny of an electronic database intended to capture inspections activities and incidents at headquarters revealed that the records were incomplete and had not been up dated for some time.</p>	<p>The Authority has embarked on streamlining its records both electronically and manually to address the gaps identified in the audit among others.</p>	<p>The management has agreed with audit findings.</p>

Audit Finding	Director General's Response	OAG Comments On Response
<p>At the same time it was revealed that information available in manual files for inspection and incidents had information gaps when compared with the electronic counterparts.</p> <p>At the CDE Nairobi offices for example, it was revealed that reports and documents like warning letters, restoration orders, improvement orders and acknowledgment notes are loosely filed into files without indexing and therefore prone to damage, malicious destruction or accident or may be corrupted without users notice. Retrieving information is also difficult as the manual files are not indexed.</p> <p>Further, during field verifications the team witnessed the officers issuing various orders to project developers. However, it was noted that the orders were in form of loose papers which are issued without control, accountability and responsibility for their issuance. Cases were witnessed where developers informed the officers that they had previously been issued with the same order by other officers doing the rounds. As such the developers had more than one copy of the order which were issued by different officers at different times. The problem was attributed to the fact that the various orders are not designed in the form of controlled and accountable documents. Neither are they pre-numbered.</p>		

Audit Finding	Director General's Response	OAG Comments On Response
<p>1. To address ineffectiveness in supervision and coordination</p> <p>i) To improve supervision and coordination, NEMA, through the Department of Compliance, Enforcement and Field Operations should establish mechanisms to ensure inflexibility when enforcing EMCA and its regulations on Lead Agencies and other Government departments</p> <p>ii) To improve on compliance monitoring:</p> <ul style="list-style-type: none"> • The Department of Compliance, Enforcement and Field Operations may consider establishing a clear guideline for following up with violators to verify that they return to compliance within the shortest time possible. • NEMA should consider reducing the emphasis on revenue as a basis for performance evaluation of County Directorates <p>2. Address legal framework challenges</p> <p>i) To strengthen the enforcement policy, NEMA may consider revising the enforcement and prosecution policy to address all methods of enforcement available.</p> <p>ii) To minimise instances of overlapping mandates, the Ministry of Environment, Water and Natural Resources may consider undertaking a review of sectoral</p>	<p>The authority appreciates our recommendations and expressed the willingness to implement the them to improve environmental management in the country</p>	<p>The Office will assess the implementation of the recommendations during the follow-up audit to be conducted at a date agreed with the NEMA</p>

Audit Finding	Director General's Response	OAG Comments On Response
<p>laws, which should also involve consultation with the affected Lead Agencies.</p> <p>iii) To resolve ambiguity in certain EIA provisions, NEMA should review the EIA/EA regulations to ensure that activities for which EIA is required are clear, precise and unambiguous.</p> <p>3. To address prosecution challenges</p> <p>i) To improve on efficiency of prosecution, NEMA may consider establishing a clear and effective working relationship with other Government departments like the National Police Service at the county level so as to enable easy coordination of activities.</p> <ul style="list-style-type: none"> • To improve on evidence gathering, NEMA should establish and implement guidelines to aid evidence gathering and investigations so as to improve on quantity, quality and timeliness of evidence and investigations to be used in prosecution. <p>4. To address ineffectiveness in records management</p> <p>To improve records management, NEMA, through the Department of Compliance, Enforcement and Field Operations should come up with mechanisms to ensure regular and timely updating of records, proper filing and also contro movement and issuance of orders</p>		