



Netherlands Commission for
Environmental Assessment

Advice on the draft Terms of Reference for the SEA – Land Use Plan – Tana Delta

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Kenya



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Netherlands Commission for
Environmental Assessment

Dr. Ayub Macharia
Ag. Director General NEMA

your reference

your letter

our reference
OS25-O93/AK/Lw

enquiries to
Arend Kolhoff

direct phone number
(030) 234 76 04

Date: 22 December 2011
Subject: Advice on the draft Terms of Reference for the SEA – Land Use Plan - Tana Delta- Kenya

Dear Mr. Macharia,

In November 2011, you requested the Netherlands Commission for Environmental Assessment to advise on the draft Terms of Reference for the Strategic Environmental Assessment and to advice on the scoping report for Strategic Environmental Assessment of the Land Use Plan, Tana Delta in Kenya. It is my pleasure to submit herewith the advice on the scoping report (phase 1), prepared by an independent working group of the Commission.

I would like to draw your attention to the following issues:

- The setting of specific objectives for the Land use plan is essential for the start of the process. The current draft ToR does not specify these. Specific objectives are necessary as framework for the development of alternatives and to facilitate public consultation.
- It should be clear at the start of the process which authority – or authorities – will be responsible for the formal decisions to be taken. I propose to apply the subsidiarity principle for decision-making: central authorities should only perform those tasks that cannot be performed effectively at a more immediate or local level.
- Land use planning in a context like the Tana delta, where formal land rights are not clear, may be a conflict sensitive process. I would thus like to emphasize that consultation of stakeholders requires a careful approach. In this light it is recommended to start with consultation of the representatives of stakeholders to agree on the rules and objectives for consultation.

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- For the same reason I would recommend strongly to involve in the land use planning process organizations that can have a role in land use related conflict resolution. The capacity of those organizations to execute this role need to be adequate at the start of this process.

The NCEA would appreciate to be kept informed on the use that is made of this advice.

I would like to reiterate the willingness of the Commission to continue co-operation with NEMA in the coming years.

Yours sincerely,

Rudy Rabbinge



Chairman of the Working Group – Advice on the draft Terms of Reference for the SEA – Land Use Plan – Tana Delta, Kenya

Advice on the draft Terms of Reference for the SEA – Land Use
Plan – Tana Delta– Kenya

Advice submitted to the Minister for Development Cooperation, by a working
group of the Commission for Environmental Impact Assessment in the
Netherlands.

Technical secretary



Arend Kolhoff

Chairman



Prof. Rudy Rabbinge

Utrecht, 22 December 2011

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1. INTRODUCTION

1.1 Initiative and involvement of the NCEA

This initiative concerns a Strategic Environmental Assessment (SEA) for the development of a Land use plan for the Tana delta in Kenya. The Netherlands Commission for Environmental Assessment (NCEA) has been asked by the National Environmental Management Authority of Kenya (NEMA) to review the quality of the draft Terms of Reference for the Spatial Planning & Strategic Environmental Assessment for the Tana Delta and Tana River basin^{1 2}. Hereafter, this report is referred to as the “draft ToR”. This draft ToR contains proposed guidelines for the preparation of the Land use plan as well as for the SEA, with a focus on guidelines for the process and approach to be followed.

The NCEA and NEMA agreed to apply a two-phased approach: first the NCEA will issue an advice on process and approach issues, later to be followed by a more detailed advice on the content issues for the preparation of the SEA for the Land use plan. This second advice is scheduled for February 2012.

As said, this advice concerns process and approach for the land use and SEA process. The NCEA decided to follow for this advice a shortened procedure to best match the decision making agenda: before Christmas the Kenya government intends to decide on process and approach for the integrated land use plan and SEA. For this reason NCEA has not included the usual site visit in the preparation of this advice, nor has there been a consultation with stakeholders. As a consequence this review does not have the status of a ‘full’ NCEA advice, but is to be regarded as a technical desk review. The main implication is that there will be more uncertainty in the conclusions of the NCEA.

The findings of this review are prepared by a working group of experts that act on behalf of the NCEA³.

For the preparation of the second advice the Tana delta will be visited, including consultation of stakeholders.

¹ Manual (detailed Terms of Reference) for the Spatial Planning & Strategic Environmental Assessment processes relating to the Tana Delta and Tana River basin ; Draft 1, October 31st 2011

² Appendix 1: letter of invitation

³ Appendix 2: Information on the working group of the NCEA

2. MAIN OBSERVATIONS AND RECOMMENDATIONS

2.1 General observations

The NCEA supports the proposal to aim for an integrated Land use plan and Strategic Environmental Assessment (SEA). The process steps and the links between the Land use plan and the SEA as described in the draft ToR are a good basis for the start of this process. However, it is recommended to modify figure 4 on page 13 since this figure does not match what is explained in the text. Figure 4 for example mentions public consultation in step 6 whilst in the text public consultation already starts in step 1.

The draft ToR provides guidance for both the process of land use planning and the process of SEA. In each of the following sections we make explicit for which process an observation or recommendation is meant.

2.2 Problem definition and objective(s)

Land Use plan

The draft ToR does not contain a clear problem definition nor objective(s) to be achieved by the land use plan (LUP). The NCEA proposes to define these as specific as possible, since these are essential for the development of alternatives and for a fair and successful public consultation.

As a starting point for defining specific objectives, the following elements could be used that are extracted from the draft ToR and the Annex 1 to the draft ToR⁴:

- Stimulating the economic and social development of the Delta;
- Making use of available development opportunities;
- Taking into account the interests of the stakeholder groups depending on the natural resources;
- Conflict resolution on use of land / natural resources between different stakeholder groups;
- Sustaining the long-term productivity of the delta, not threatening or irreversibly compromising the existence of its biodiversity and ecosystem services provision level.

⁴ Communiqué of the Inter-Ministerial Consultative Meeting on sustainable development of Deltas in Kenya; Malindi meeting to confirm the support for the international Delta Alliance and launch the Tana Delta Planning and SEA Initiative, Malindi 15th September 2011, Kenya

In the draft ToR no reference is made to the importance of the historical context of the wider Tana Delta Region. The NCEA recommends to make an analysis of this context, because of its importance both for a better understanding of the existing land use situation, and as basis for developing feasible alternatives. The wider Tana basin and in particular the Tana delta has a history of conflicts and competition over land use and natural resources among different groups, both those living permanently in the area as well as visitors from, foremost, northern Kenya. The analysis should include the extent to which there are conflicting views on (traditional) and new land use practices, un-clarity and disputes of existing land rights and lack of trust by local stakeholders (e.g. related to externally driven developments in the past where their rights and demands were insufficiently considered). For the purpose of preparing this advice the NCEA made a short study of the historical context. If useful it can share this information during the preparation of the SEA.

Strategic Environmental Assessment

The present draft ToR does not describe the objective(s) of the SEA. The NCEA proposes to provide this objective because SEA has no legal basis yet in Kenya, and thus objectives need to be defined on a case by case basis. Since this is one of the first SEAs in Kenya we would suggest to include as a secondary objective of the SEA to gain insight in effective SEA application in the Kenya context and for land use plans in particular.

2.3 Analysis of the existing situation (phase one of the LUP and SEA)

Land use plan and Strategic Environmental Assessment

According to the draft ToR (page 8) phase one of the planning process will result in information that will be used “to formulate a number of scenarios/alternatives⁵ for future management and development of communities, land use and natural resources in the Tana Delta”. Activities that will provide the necessary information for these scenarios are listed on page 7 under two headings: Baseline surveys & policy analysis, and Public consultation.

⁵ The NCEA proposes to use the word scenario for those aspects / developments that are beyond control of the LUP but have an influence on the development opportunities in the Tana delta and the use of the word alternatives for those aspects / developments that are within the influence or control of the LUP.

The NCEA recommends to execute, as part of the policy analysis, a consistency analysis of the existing policies of sector ministries and TARDA. The consistency analysis is meant to show which policies are conflicting or strengthening each other.

The NCEA notes that the proposed approach in the draft ToR limits itself to the development of alternatives within the existing land use situation and proposed developments. This limitation has three disadvantages. Firstly, it may miss opportunities to solve current conflicts of interest between stakeholders. Secondly, it does not include the development *potential* of the Tana delta. Thirdly, it does not include the risks and or opportunities because of developments outside the delta, such as the upstream development of dams.

The NCEA therefore recommends another approach, namely to start from an analysis of the opportunities and constraints of the area, based on an inventory of natural capital or the ecosystem services provided by the area, an (e)valuation of these services by their users (including potential future users e.g. agricultural development of cash crops), and the foreseen developments outside the delta, including upstream. See figure 1 for an overview of the aspects to be studied as part of this analysis.

This recommended approach would provide a better overview of, firstly, areas suffering from overexploitation and, secondly, areas with development potential. An overlay with existing and proposed development plans would then provide insight in the feasibility of these plans, including potential present and future conflicts. This approach also enables comparison of alternative land use plans.

The NCEA supports the argumentation in the draft ToR to make a clear distinction between the project area to be studied in the Land use plan and the larger study area to be studied in the SEA. In the draft ToR the identification of issues to be studied focuses mostly on the project area. Looking at the larger study area the NCEA recommends to include the following developments in the SEA as they influence directly or indirectly, positively or negatively the development opportunities in the Delta:

- Foreseen socio-economic and infrastructural developments in the larger area, such as the construction of new dam(s) in the upstream Tana basin, influencing the availability of water in the Tana Delta;
- Analysis of groups of people living in the neighbouring regions, who will be affected by the proposed activities in the project area (positively or negatively), such as pastoralists using the Delta during seasonal or during time of (extreme) droughts;
- The development of Lamu port and its water needs, as far as this influences the availability of water in the rest of the delta and may cause induced development impacts;
- Relevant developments on global, national or local food markets that influence the socio-economic values of agricultural market products;
- The migration of cattle to the Delta and the development of the LAPSSSET corridor that might have an influence on this migration, may have impacts to the induced developments.

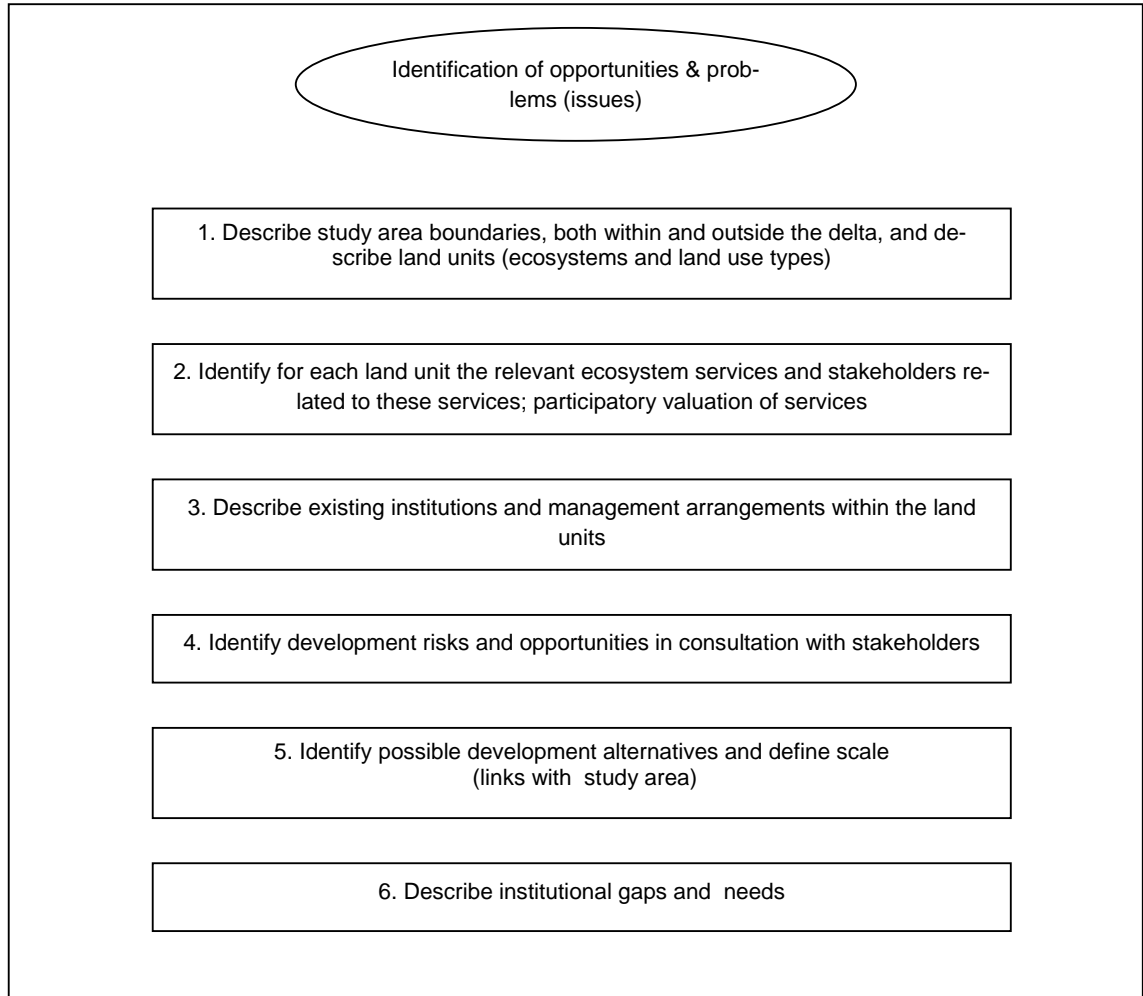


Figure 1: Overview of the aspects of the proposed approach: Opportunity and problem analysis through a participatory ecosystem services valuation.

2.4 Scenarios

Land use plan and Strategic Environmental Assessment

The development of scenarios – as defined in footnote 5 – is essential to assess the feasibility of alternatives. Scenarios should therefore be elaborated in phase one. In our view the Land use plan should at least be based on a minimum, a maximum and a most probable scenario for relevant key indicators such as:

- Expected future water availability (and uncertainty) in the Delta, expressed in seasonal, year to year and long term variation / uncertainty in water resources. This availability may be influenced by external developments such as development of

water resources, potential use of water resources for development of Lamu port (LAPPESET project) and the influence of climate change.

- Expected future demographic and socio-economic developments in the project area.
- Development of national and international markets for agricultural products produced in the Delta. The development of Lamu port might have an influence on the market value of those products and should also be included in the scenarios.

For these scenarios ideally a time horizon of 10, 20 and 50 years should be applied, and their impacts on the baseline scenario and the project alternatives should be assessed.

2.5 Alternatives (Phase 2 of the LUP and SEA)

Land use plan and Strategic Environmental Assessment

The NCEA noted that the draft ToR is not clear about the role of the SEA team in the development of the alternatives. One way to read the draft ToR is that the SEA team will only be involved in the evaluation of the alternatives, and predominantly focuses on mitigation of negative impacts (re-active). If so, the NCEA strongly recommends that the SEA team should also be involved in the development of alternatives. This will contribute to the prevention of negative environmental and social consequences as well as capitalizing on development opportunities (positive impacts).

In the draft ToR (p.8) it is stated that the following alternatives will be developed in phase two:

- A. A conservation oriented strategy;
- B. A development oriented strategy;
- C. A community focused strategy and;
- D. Other alternatives, illustrating variants and hybrids of the above

A first general observation is that in the view of the NCEA, development of alternatives should be based on the objectives of the Land use plan and as noted in section 2.2 these are not yet specified in the draft ToR.

A second observation is that the reasoning behind the selection of the mentioned alternatives is not given. The NCEA assumes that this is as follows: the three alternatives represent the 'extremes' of the continuum of possible development opportunities in the Delta. This is a well known approach with proven advantages within SEA literature. However, achieving these advantages depends on a certain context for the planning process. The approach particularly works well in situations where stakeholders are equally strong, rights of individuals are legally guaranteed and, there is trust and an open dialogue possible between stakeholders.

However, as described in section 2.2 the situation in the Tana delta does not meet these conditions. As a result this approach may have an undesired side effect: it might lead to polarization of the stakeholders, each defending 'their' alternative. For this reason, the NCEA suggests to consider a different approach: a more integrated and more inclusionary approach in developing alternatives to avoid polarization and possibly contribute to conflict resolution related to land use.

Such an approach would be based on the assumption that it is to a certain extent possible to combine interests of different stakeholders such as biodiversity conservation, sustainable land use, agricultural development and pastoralism. The process of developing, designing and comparing possible alternatives provides an opportunity to search in a participatory, bottom-up approach for feasible and acceptable combinations of different land use types, serving the interests of different stakeholders in the Delta. Such an interactive, participatory and inclusionary process is expected to yield generally more acceptable development paths for the area as a whole.

The opportunity and constraints analysis, including the policy analysis, as we have proposed will result in an overview of problems and opportunities in the Tana delta, and the options to deal with the problems and utilizing the opportunities. The different options need to be combined in coherent and logical alternatives. These alternatives may be based on possible choices on the following issues:

- A. Scenarios as indicated in section 2.4;
- B. National versus local interests, based on alternative solutions as mentioned in section 2.3;
- C. Existing land use versus new land use; also based on alternative solutions as mentioned in section 2.3;
- D. High versus low input of investments for implementing the alternatives. Implementation of the LUP will require substantial investments from various sources like (national) government, international funding agencies and/or private (foreign) investors. Depending on the availability of these sources the level of investments may be high or low, which has consequences for what would be the best alternative for the delta. The NCEA recommends as much as possible to provide insight in the proposed or expected availability of investment funds.

The approach will provide an insight in which stakeholders will clearly benefit and which stakeholders may be negatively affected. For the latter options for mitigation or compensation should be analysed.

Once the specific objectives for the Land use plan are formulated, the NCEA will provide more concrete suggestions for possible alternatives in its second advice.

The NCEA recommends evaluating and comparing the alternatives by making use of a so-called ‘participative social cost-benefit analysis (social-CBA)’. In a social-CBA alternatives are evaluated on both economic, social and environmental costs and benefits, through a combined experts and participatory approach. This will give insight into the advantages and disadvantages for different stakeholder groups that have an interest in the Delta. On the basis of available information, and budget and time available for the social-CBA it should be decided to what extent costs and benefits are described qualitatively or should be quantified and put into monetary (economic) terms.

As part of this approach the appropriate environmental, social, economic criteria need to be defined. These criteria and their measurement (e.g. through indicators) have to be further developed together with the relevant stakeholders and experts. For reviewing the development of cash crop agriculture it is recommended to make use of the recently developed guidelines by – amongst others– the World Bank and FAO. In the second advice the NCEA will provide guidelines to develop these criteria as part of the social-CBA.

In addition to the economic, social and environmental criteria, also the criteria for the institutional assessment should be defined.

2.6 Consultation with stakeholders

The draft ToR states the following about public consultation in the respective three phases:

- Phase one: “ ... all citizens are given the opportunity to learn about the plan process and how it will influence future land use decision (p.7).
- Phase two: All stakeholders who participated in phase one consultations will be invited to a repeat series of community meetings to discuss and give opinions on the findings and conclusions of the Planning report (p.8).
- Phase three: A further round of consultations with all stakeholders will follow approval of the draft plan by the Task force (p.9)”.

The NCEA notes that the draft ToR is unclear on the following issues:

- What is the aim of public consultation?
- Which stakeholders will be consulted?
- How and to what extent are the stakeholders consulted?
- How are the expectations of the stakeholders managed?
- How to deal with disputes and conflict on land rights?

The NCEA proposes to develop in accordance with the NEMA guidelines for SEA a public engagement and disclosure plan in which the above mentioned questions are adequately addressed and building of trust and management of (realistic) expectations are starting points. We recommend making use of the following guidelines:

- FAO (2006): Conflict management and land tenure. FAO Land tenure studies.
- FAO (2007): Good governance in land tenure and administration. FAO Land tenure studies 9.
- World Bank (2005): Strategic Environmental assessment: Capacity building in conflict affected countries; Paper no.30.

The NCEA proposes to include the consultation of the following stakeholders:

- (temporary) users and inhabitants of the Delta, distinguishing between different gender and age groups, including youngsters;
- authorities (national/ sector, regional, local) and Tana River Development Authority (TARDA) ;
- (potential) private and future investors;
- NGOs (national and international);
- stakeholders in initiatives outside the delta that (partly) depend on the delta (e.g. Lamu water supply).

2.7 Institutions for negotiating and conflict resolution

The NCEA emphasizes that it is likely that this combined land use planning and SEA process will be confronted with disputes and conflict on land use. For this reason, the NCEA recommends to assess at the start of this process, what institutions (organizations and mechanisms) are in place and or need to be developed for negotiations and handling grievances, disputes and conflict on land use. We suggest to give these institutions a role in this process. The following report provides an example of one of those possible mechanisms, peace committees at district and community level that seems to have been functioning in the Tana region as well.

- The concept of Peace Committee: A snapshot analysis of the concept peace committee in relation to peace building initiatives in Kenya. Practical Action 2006 M. Adan and R. Pkalya.

APPENDICES

To the Advice on the draft Terms of Reference for
the SEA - Land Use Plan - Tana Delta- Kenya

(Appendices 1 to 2)

APPENDIX 1

Draft letter of request from NEMA, received on 3 November 2011

Ms. Veronica Ten Holder
The Director
Netherlands Commission for Environmental Assessment

STRATEGIC ENVIRONMENTAL ASSESSMENT FOR THE LAND USE PLAN OF THE TANA RIVER DELTA IN KENYA-REQUEST FOR INDEPENDENT ADVISORY SERVICES OF THE COMMISSION

Over the last decade, conflicts have been increasing in the deltas as the demands for competing land uses, natural resources, nature conservation and community interests have intensified. Attempts to reach rational decisions on the future of the Delta's have largely failed due to the polarization of views between different stakeholders which has resulted in re-course to legal processes.

The present impasse in harmonizing multiple development initiatives, local aspirations and conservation goals is unlikely to be achieved without a shift in approach. It is for this reason an inter-ministerial technical committee (IMTC), led by Office of the Prime Minister and the National Environment Management Authority (NEMA) have initiated a combination of strategic planning and integrated assessment to be used to develop a long term Land use plan and/or General Management Plan (GMP) for the Deltas encompassing Strategic Planning approaches (SEA). This strategy sets out a road map, governance and structures needed to secure the long term sustainable development of Kenya deltas that include Tana, Yala, Nyando, and Malewa among others starting with Tana Delta. The end product of the strategy is to ensure a planning process that provides for economic prosperity, stable social conditions and sustainable environmental quality.

An integrated approach makes it possible to carry out a comprehensive and objective planning of competing development needs in the Deltas. It also enables identification of future land use options that ensure sustainable development of the deltas in line with the Constitution and aspirations of Vision 2030 and other planning frameworks.

To build SEA Country capacity, ensure quality control and to set up a good SEA process which is efficient and effective, NEMA is requesting the services of Netherlands Commission for Environmental Assessment (NCEA) to:

1. Advice on the terms of reference for the SEA for the Land Use Plan (LUP) for the Tana River Delta and provide an advisory report on the Terms of Reference for the SEA for the LUP of the Tana Delta.
2. Together with NEMA SEA Reviewers, undertake Review of the scoping report, draft SEA Report and Final SEA Report. The deliverable being and advisory review report on the quality of the mentioned SEA output documents and provide

Your role as an advisor will also provide opportunities on the hands-on- capacity building for NEMA Officers. We look forward to your favorable consideration on this matter and advice on any notification procedure that we need to comply with.

Yours Sincerely,

DR. AYUB MACHARIA

AG. DIRECTOR GENERAL

CC. Permanent Secretary
Ministry of Environment & Mineral Resources

NAIROBI KENYA

APPENDIX 2

Project information

Proposed activity:

The Netherlands Commission for Environmental Assessment (NCEA) has been asked by the National Environmental Management Authority of Kenya (NEMA) to review the quality of the draft Terms of Reference for the Spatial Planning & Strategic Environmental Assessment for the Tana Delta and Tana River basin. This draft ToR contains proposed guidelines for the preparation of the Land use plan as well as for the SEA, with a focus on guidelines for the process and approach to be followed.

The NCEA and NEMA agreed to follow a shortened procedure for this review to best match the decision making agenda: before Christmas 2011, the Kenya government intends to decide on process and approach for the integrated land use plan and SEA. For this reason NCEA has not included the usual site visit in the preparation of this advice, nor will there be a consultation with stakeholders. As a consequence this review does not have the status of a 'full' NCEA review, but is to be regarded as a technical desk review. The main implication is that there will be more uncertainty in the conclusions of the NCEA.

The findings of this review are prepared by a working group of experts that act on behalf of the NCEA.

In a second advice, requested by NEMA and scheduled for February 2012, the NCEA will issue more detailed advice on the content issues for the preparation of the SEA for the Land use plan. For the preparation of this second advice the Tana delta will be visited, scheduled for February 2012.

Composition of the working group of the NCEA:

- Mr Rudy Rabbinge, chairman
- Mr Roel Slootweg, expert on: ecology and natural resources management
- Mr Roy Brouwer, expert on environmental economics
- Mr Peter Droogers, expert on hydrology and institutional aspects
- Mr Marcel Rutten, expert on land use and social aspects
- Mr Arend Kolhoff, technical secretary