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Regulation of Environmental Impact from Marine Tourist Activities

A Minor Field Study in Mombasa and Kisite Mpunguti Marine
National Parks and Reserves, Kenya

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Abstract

Mombasa and Kisite Mpunguti marine national parks and reserves (hereinafter ‘Mombasa MNPR’ and ‘Kisite Mpunguti MNPR’) consist of biodiversity rich ecosystems such as coral reefs and sea grass beds, with high ecological and economical value. Marine tourist activities taking place within these areas are connected with a risk of harming the marine environment. Mombasa MNPR and Kisite Mpunguti MNPR have the objectives of conserving marine biodiversity as well as supporting tourism. In order to properly integrate these objectives, it is important that marine tourist activities are adequately regulated.

The purpose of this study is to investigate how marine tourist activities, directly influencing the marine environment in Kisite Mpunguti MNPR and Mombasa MNPR, are regulated. An investigation is made of environmental requirements, in legal rules as well as more informal norms (e.g. codes of conduct), and how these requirements are enforced. A legal investigation has been performed through a judicial dogmatic methodology and empirical findings have been collected through semi-structured interviews during a minor field study in Kenya.

The findings of the study illustrate the roles of environmental requirements in legal rules as well as more informal norms in regulating marine tourist activities in Mombasa MNPR and Kisite Mpunguti MNPR. Legal environmental requirements that tourists and tourist activity organizers must comply with during marine tourist activities are primarily identified in provisions prescribing offences under the Wildlife (Conservation and Management) Act and the Environmental Management and Co-ordination Act, 1999. Other legal environmental requirements could also have a role in regulating marine tourist activities, but this appears unclear. It might for example be possible to prescribe legal environmental requirements in licenses or permissions, but it seems uncertain whether this is done in practice.

Furthermore, the findings show that it is mainly Kenya Wildlife Service (hereinafter ‘KWS’), of the studied government agencies, that enforces legal environmental requirements in relation to marine tourist activities taking place in Mombasa MNPR and Kisite Mpunguti MNPR. The enforcement is primarily performed through supervision, education, collaboration with tourist activity organizers, warnings and suspension. KWS appears to enforce environmental requirements in legal rules as well as more informal norms. Some of these environmental requirements are applied by KWS in Mombasa MNPR as well as Kisite Mpunguti MNPR, meanwhile other requirements differ between the areas. The findings also show that, in Mombasa MNPR, environmental requirements in norms of tourist activity organizers have a role in regulating marine tourist activities. Tourist activity organizers as well as KWS seem involved in enforcing these environmental requirements. Finally, the findings illustrate that environmental requirements in different types of norms (legal rules and more informal norms) seem to interact in the regulation of marine tourist activities in Mombasa MNPR and Kisite Mpunguti MNPR.

Keywords: Code of conduct, conservation, environmental law, Kenya, Kisite, marine protected area, Mombasa, norm, sociology of law, tourism

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Abbreviations

<i>AC</i>	African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968
<i>Art.</i>	Article
<i>Biological Diversity Regulation</i>	Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006
<i>BR</i>	World Commission on Environment and Development, Our Common Future, 1987 (or Brundtland Report)
<i>CBD</i>	Convention on Biological Diversity, June 5, 1982
<i>CMS</i>	Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979 (or Bonn Convention)
<i>Constitution</i>	Constitution of Kenya, 2010
<i>E.g.</i>	For example
<i>EIA Guideline</i>	Republic of Kenya, National Environmental Management Authority, Draft, Environmental Management and Coordination Act (No 8 of 1999) - Environment Impact Assessment Guidelines and Administrative Procedures, November 2002
<i>EIA-license</i>	Environmental impact assessment license
<i>EIA Regulation</i>	Environmental (Impact citation. Assessment and Audit) Regulations, 2003
<i>EMCA</i>	Environmental Management and Co-ordination Act, 1999
<i>GVI</i>	Global Vision International
<i>JD</i>	Johannesburg Declaration on Sustainable Development
<i>KSh</i>	Kenyan Shillings
<i>KWS</i>	Kenya Wildlife Service
<i>London Convention</i>	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972 (amended by Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996)
<i>MARPOL Convention</i>	International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973
<i>MBOA</i>	Used as an umbrella term for the Mombasa Boat Owners Association and the Mombasa Boat Operators Association
<i>MNPR</i>	Marine National Park and Reserve
<i>MT</i>	Ministry of Tourism

<i>NC</i>	Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, June 21, 1985 (or Nairobi Convention)
<i>NCBOF</i>	North Coast Beach Operators Forum
<i>NEMA</i>	National Environment Management Authority
<i>NEC</i>	National Environment Council
<i>NP</i>	Protocol Concerning Protected Areas of Wild Fauna and Flora in the Eastern African Region, June 21, 1995 (or Eastern Africa Protocol)
<i>PCC</i>	Public Complaints Committee
<i>Pollution Prevention Regulation</i>	Environmental Management and Co-ordination (Prevention of Pollution in Coastal Zone and other Segments of the Environment) Regulations, 2003
<i>RC</i>	Convention on Wetlands of International Importance, Feb. 2, 1971 (or Ramsar Convention)
<i>RD</i>	Rio Declaration on Environment and Development, June 13, 1992
<i>Sec.</i>	Section
<i>TA</i>	Tourism Act, 2011
<i>TILA</i>	Tourist Industry Licensing Act
<i>TILR</i>	Tourist Industry Licensing Regulations
<i>TRA</i>	Tourism Regulatory Authority
<i>TRI</i>	Tourism Research Institute
<i>UNCLOS</i>	United Nations Convention on the Law of the Sea, Dec. 10, 1982
<i>Waste Management Regulation</i>	Environmental Management and Co-ordination (Waste Management Regulations), 2006
<i>Water Quality Regulation</i>	Environmental Management and Co-ordination (Water Quality) Regulations, 2006
<i>Wetlands Regulation</i>	Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009
<i>WCMA</i>	Wildlife (Conservation and Management) Act
<i>WCMR</i>	Wildlife (Conservation and Management) (National Parks) Regulations
<i>WCMR, 2010</i>	Wildlife (Conservation and Management) (National Parks) Regulations, 2010

1 Introduction

1.1 Background and Problem

Tourism is one of the largest sectors of the global economy.¹ In Kenya, tourism constitutes the third largest source of foreign income and is recognized as having a central role in achieving socio-economical development.² In 2007, Kenya presented a long time vision for the development of the country called “Vision 2030”.³ This has the overarching goal of making Kenya “a globally competitive and prosperous nation with a high quality of life by 2030” and tourism is described as a key sector in achieving this goal.⁴ Kenya aims at increasing the number of visiting tourists by a twofold and at becoming one of the ten leading tourist destinations globally.⁵ This is to be reached through various strategies, including further development of Kenya’s coast and of niche products, such as water based tourism.⁶

For a long time, tourism was generally perceived as environmentally friendly. Today, it is however recognized that no tourism has “zero-impact” and that when tourism in an area expands, the environmental impact increases.⁷ In Kenya, tourism is described to have caused large environmental impact, for instance degraded coral reefs and harmed other marine species.⁸

The importance of protecting and sustainably using the marine environment is recognized by various international instruments.⁹ Kenya is for instance party to conventions aiming at protecting the marine environment from pollution.¹⁰ These include the UNCLOS¹¹, the London Convention¹², the MARPOL Convention¹³ and the Nairobi Convention¹⁴.¹⁵ Coral reefs and sea-grass beds are recognized as particularly sensitive to pollution.¹⁶ Kenya has also ratified several international conventions recognizing the importance of protecting specific species, habitats and/or ecosystems.¹⁷ The African Convention¹⁸ recognizes the need of

¹ Ikiara & Okech, p. 9.

² Ikiara & Okech, p. 3 and 9, National Tourism Policy, Okech, p. 3 and 5, Strategic Plan 2008-2012, p. vi, and Vision 2030.

³ Vision 2030.

⁴ Vision 2030, p. 2 and 10.

⁵ Vision 2030, p. 10.

⁶ Vision 2030, p. 10 and 13. The majority of tourists visiting Kenya are accommodated at the coast, Honey, p. 296, Ikiara & Okech, p. 3, and 29, and Okech, p. 1-2.

⁷ Ikiara & Okech, p. 9.

⁸ Ikiara & Okech, p. 30, 34 and 54.

⁹ Webpage of The Energy & Biodiversity Initiative, p. 3 and 8, and webpage of United Nations Environment Programme, *Legal Agreements Relating to the Marine Environment*.

¹⁰ Ebbesson, p. 47, 57-59 and 107-109, and Louka, p. 23, 141, 146-148 and 164.

¹¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982.

¹² Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, which has been amended by Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996.

¹³ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973.

¹⁴ Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, June 21, 1985 (hereinafter ‘NC’).

¹⁵ Webpage of Kenya Maritime Authority, webpage of United Nations, *Treaties*, and webpage of United Nations Environment Programme, *Eastern Africa*.

¹⁶ Louka, p. 143.

¹⁷ Ebbesson, p. 42, 57-59, 162-163 and 168, Louka, p. 299, and webpage of The Energy & Biodiversity Initiative, p. 3.

¹⁸ African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968 (hereinafter ‘AC’).

conserving and rationally utilizing natural resources, for example flora, fauna and ecosystems.¹⁹ Dugong and all marine turtles, including their habitats, are recognized as requiring total protection.²⁰ The Ramsar Convention²¹ recognizes the need to conserve and wisely use wetlands, including certain marine areas.²² This comprises ecosystems such as coral reefs and coastal lagoons.²³ The Bonn Convention²⁴ aims at protecting migrating animal species, including their habitats.²⁵ Different sea turtle and dolphin species are listed as endangered migratory species requiring immediate protection and dugong is listed as having an unfavorable conservation status.²⁶ The Nairobi Convention and the Eastern Africa Protocol²⁷ specifically recognizes the importance of protecting the marine environment of the East African region.²⁸ Among the animals listed in the protocol as requiring specific protection are species of marine turtles, clams, corals and dugong.²⁹

Kenya is also party to the Convention on Biological Diversity³⁰ (hereinafter ‘CBD’).³¹ CBD has a holistic approach to biodiversity protection and aims at ensuring conservation and sustainable utilization of biodiversity in general.³² Biodiversity is defined as:

“the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems”.³³

CBD not only acknowledges for instance the economical, recreational, aesthetical, social and ecological values of biodiversity, but also its “intrinsic value”.³⁴ Conservation of biodiversity is recognized as a common concern globally and as an important part in obtaining sustainable development.³⁵

¹⁹ AC, art. 2-3, 6-8 and 10, Ebbesson, p. 40-41 and Louka, p. 326-330. The Convention Relative to the Preservation of Fauna and Flora in their Natural State, Nov. 8, 1933, was one of the first international conventions of biodiversity protection. This was developed by colonial governments in Africa and intended to apply to their colonial territories, for instance Kenya. This was revised by AC in 1968, which has strongly influenced wildlife laws in Africa. See Ebbesson, p. 40, Kameri-Mbote & Cullet, p. 7, and Louka, p. 28.

²⁰ AC, art. 8 and List of Protected Species (Class A), and Louka, p. 326.

²¹ Convention on Wetlands of International Importance, Feb. 2, 1971 (hereinafter ‘RC’).

²² RC, preamble, art. 1 and 3-4, Ebbesson, p. 179, Louka, p. 322, and webpage of CMS, *Kenya - Format for Reports of Parties on Implementation of the Convention on the Conservation of Migratory Species of Wild Animals*. The Sixth Conference of the Parties has interpreted ‘wise use’ as sustainable use, Louka, p. 322.

²³ Okidi et al, p. 335-336.

²⁴ Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979 (hereinafter ‘CMS’).

²⁵ CMS, preamble, art. 1-2, Ebbesson, p. 167-168, webpage of CMS, *Parties to the Convention on the Conservation of Migratory Species of Wild Animals and its Agreements*, p. 4.

²⁶ CMS, art. 3 and Appendix 1, Louka, p. 335-336, and webpage of CMS, *Parties to the Convention on the Conservation of Migratory Species of Wild Animals and its Agreements*. Kenya has also signed the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, 2000, webpage of CMS, *Parties to the Convention on the Conservation of Migratory Species of Wild Animals and its Agreements*.

²⁷ Protocol Concerning Protected Areas of Wild Fauna and Flora in the Eastern African Region, June 21, 1995 (thereinafter ‘NP’).

²⁸ See for example NC, preamble and art. 10 and NP, art. 2-7.

²⁹ NP, Appendix 2-4.

³⁰ Convention on Biological Diversity, June 5, 1982.

³¹ Webpage of CBD, *List of Parties*

³² CBD, preamble and art. 2, Christiernsson, p. 121, Ebbesson, p. 17 and 162-164, and Louka, p. 299.

³³ CBD, art. 2. An ecosystem is “a dynamic complex of plant, animal and microorganism communities and their non-living environment interacting as a functional unit” and habitat is “the place or type of site where an organism or population naturally occurs”, CBD, art. 2.

³⁴ CBD, preamble. Compare with for example the preambles of AC, CMS and NP.

³⁵ CBD, preamble, Christiernsson, p. 22 and 119-121, Kameri-Mbote & Cullet, p. 1, and Louka, p. 38 and 54.

The concept sustainable development was first presented in the Brundtland Report³⁶, defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.³⁷ The concept has also been expressed in for example the Rio Declaration³⁸ and the Johannesburg Declaration³⁹, the latter recognizing sustainable development as consisting of three mutually dependent pillars: economical development; social development; and environmental protection.⁴⁰ The international community has thus recognized that the interests of environmental protection and socio-economical development have to be balanced and jointly addressed.⁴¹ It has also acknowledged that, when balancing these interests, consideration has to be made to the special situation of low-developed countries.⁴²

This brief description of international law is intended to provide a background understanding of the importance that the international community attaches to ensuring conservation and sustainable utilization of marine biodiversity, but also to considering the special situation of developing countries. The specific influence of international environmental law at national level depends on the implementation measures undertaken by individual states.⁴³ A common method of how to conserve marine biodiversity, recognized by various international instruments, is establishment of marine protected areas.⁴⁴ Under the Wildlife (Conservation and Management) Act (hereinafter ‘WCMA’), Kenya has established four marine national parks and six marine national reserves along the Kenyan coastline.⁴⁵ These are managed by the government agency Kenya Wildlife Service (hereinafter ‘KWS’).

This essay focuses on two of these marine national parks and reserves. Mombasa marine national park (10 km²) and Mombasa marine national reserve (200 km²) were as established in 1987 and are situated along the coast in Mombasa (hereinafter together referred to as ‘Mombasa MNPR’). Kisite marine national park (28 km²) and Mpunguti marine national reserve (11 km²) were established in 1973 and are situated further out in the ocean near Shimoni (hereinafter together referred to as ‘Kisite Mpunguti MNPR’).⁴⁶ These marine protected areas consist of biodiversity rich ecosystems such as coral reefs and sea grass beds, described as having a high ecological as well as economical value.⁴⁷ There is a large variety of marine flora and fauna, including species recognized as requiring special protection in the international conventions described above.⁴⁸

Mombasa MNPR and Kisite Mpunguti MNPR are popular destinations for tourist excursions and different kinds of marine tourist activities can be performed within these areas. Tourists undertaking such activities can benefit the local as well as the national economy, and thereby contribute to socio-economical development in Kenya.⁴⁹ Marine tourist activities are

³⁶ World Commission on Environment and Development, *Our Common Future*, 1987 (hereinafter ‘BR’).

³⁷ BR, Chapter 2, and Louka, p. 52.

³⁸ Rio Declaration on Environment and Development, June 13, 1992 (hereinafter ‘RD’).

³⁹ Johannesburg Declaration on Sustainable Development (hereinafter ‘JD’).

⁴⁰ Louka, p. 52-53.

⁴¹ Ebbesson, p. 41, 43-45 and 48-50, Kameri-Mbote & Cullet, p. 6, and Louka, p. 9, 29, 32 and 52-53.

⁴² BR, Chapter 2, CBD, preamble, Christiernsson, p. 120, and Ebbesson, p. 44, Louka, p. 38 and 54.

⁴³ See for example Christiernsson, p. 121 and 127-128, Ebbesson, p. 11, 21, 52, 64-66 and 68, Kameri-Mbote & Cullet, p. 6-7, and Louka, p. 149, 300 and 326. See for example CBD, preamble, art. 3, 6-11 and 14 (as far as possible and as appropriate), NC, art. 10 (all appropriate) and NP, art. 8 (where necessary).

⁴⁴ Louka, p. 289-291, 300-301, 326, 328 and 342. See for example AC, art. 3 and 10, NC, art. 10, NP, preamble and art. 8-10, and CBD, preamble and art 8. NP specifically mentions that regulation of pleasure craft activities should be considered when required to fulfil the objective of an area protection, NP, art. 10.

⁴⁵ Muthiga, p. 1.

⁴⁶ Frontani, p. 18. The marine protected area has been expanded two times (1976 and 1978).

⁴⁷ Muthiga, p. 1.

⁴⁸ Webpage of KWS, *Facts about Kisite Mpunguti* and webpage of KWS, *Mombasa Marine Reserve*.

⁴⁹ Ikiara & Okech, p. 42 and 54, and Salm, p. 230.

however also connected with a risk of damaging the marine environment.⁵⁰ Information about environmental impact from marine tourist activities taking place within Mombasa MNPR and Kisite Mpunguti MNPR appears scarce.⁵¹ Risks that these kinds of activities are connected with can however be illustrated by a few examples of impact on the marine environment that these kinds of activities have caused in other marine areas. Divers and snorkelers have injured corals reefs through kicking with fins, touching and stirring up sediment.⁵² Careless boating, particularly anchoring, has also harmed coral reefs.⁵³ Sea turtles have died after eating clear plastic bags, which they confuse with jelly fish, or after colliding with jet-skis or boats.⁵⁴ The marine environment has also been negatively affected by collection of corals and shells.⁵⁵ Furthermore, marine animals, such as dolphins and dugongs, have been disturbed by large number of boats and tourists getting too close.⁵⁶

Mombasa MNPR and Kisite Mpunguti MNPR have the objectives of conserving marine biodiversity as well as supporting tourism.⁵⁷ As described, marine tourist activities are connected with a risk of harming the marine environment which the marine protected areas are established to conserve. If the objectives are to be properly integrated, it therefore appears important that marine tourist activities are adequately regulated.⁵⁸

Kenya is generally described as having problems in ensuring effective environmental governance.⁵⁹ Specific challenges in relation to Kenyan marine national parks and reserves are for example that marine ecosystems, including the activities taking place within these areas, fall within the ambit of various legislations, causing ineffective coordination and enforcement.⁶⁰ Furthermore, WCMA and the regulations under this act were developed for terrestrial areas and are therefore considered inadequate in relation to marine national parks and reserves.⁶¹ In Kenya, there are however also incentives of developing more informal norms, such as codes of conduct, to regulate tourist activities.⁶² Legal regulation as well as regulation through such more informal norms could have a role on minimizing negative impact on the marine environment from marine tourist activities.⁶³

1.2 Purpose and Questions

The general purpose of this essay is to study how marine tourist activities, directly influencing the marine environment within Kisite Mpunguti MNPR and Mombasa MNPR, are regulated.

⁵⁰ Salm, p. 229.

⁵¹ See for example Ikiara & Okech, p. 10 and 20.

⁵² Ikiara & Okech, p. 20, Ransom & Mangi, p. 152, Salm, p. 229, and webpage of WWF.

⁵³ Ikiara & Okech, p. 20, Sand, p. 229 and 231, and webpage of WWF.

⁵⁴ Webpage of Bermuda Zoological Society and webpage of GVI Kenya.

⁵⁵ Ikiara & Okech, p. 20, Salm, p. 229-230, and webpage of WWF.

⁵⁶ Ransom & Mangi, p. 152, and webpage of WWF.

⁵⁷ WCMA, preamble and sec. 3A, Muthiga, p. 1, Okidi et al, p. 291, and webpage of KWS, *General Information of Kisite/Mpunguti Marine Park and Reserve*.

⁵⁸ Honey & Gilpin, p. 8, Okech, p. 3, and Salm, p. 230-231 and 236.

⁵⁹ Ikiara & Okech, p. 32, 45 and 55-56, Kamau, p. 229, and Sida, p. 2.

⁶⁰ Ikiara & Okech, p. 42, and Muthiga, p. 1-2.

⁶¹ Muthiga, p. 1.

⁶² Ikiara & Okech, p. 43-44, 47-50 and 57-58, Muthiga, p. 5, Okech, p. 3-5, and United Nations Environment Programme, 1995, p. 59-60. See for instance Ikiara & Okech, p. 32, 41-53 and 55, webpage of Ecotourism Kenya and webpage of Mombasa & Coast Tourist Association for examples. Ikiara & Okech notes that in order to effectively enforce tourism associations codes of conduct there is need for legal reinforcement, which does not exist in Kenya, Ikiara & Okech, p. 50. United Nations Environment Programme warns that too many codes of conduct could lead to confusion and as a consequence not achieve their purpose, United Nations Environment Programme, 1995, p. 59.

⁶³ Honey & Gilpin, p. 1 and 9-10.

The aim is to examine which legal environmental requirements tourist activity organizers and tourists must comply with during marine tourist activities. The purpose is also to investigate which environmental requirements, in legal rules as well as more informal norms, that KWS demands tourists and tourist activity organizers to comply with. Furthermore, the objective is to examine if tourist activity organizers have own norms with environmental requirements which regulate marine tourist activities. The purpose is also to study how these different environmental requirements are enforced. Furthermore, the aim is to, on a more general level, create an understanding of how environmental requirements applied by KWS and/or tourist activity organizers seem to relate to and interact with legal environmental requirements. The objective of this essay is to gain theoretical as well as practical insights on the subject.

In order to fulfil the purpose of the essay, I will answer the following questions:

1. What legal environmental requirements must tourist activity organizers and tourists comply with during marine tourist activities?
2. Which environmental requirements (in legal rules and more informal norms) does KWS demand tourist activity organizers and tourist to comply with during marine tourist activities?
3. Do tourist activity organizers have own collective norms (e.g. codes of conduct) with environmental requirements which tourist activity organizers must comply with during marine tourist activities?
4. How are environmental requirements in question 1-3 enforced?
5. How do the environmental requirements which KWS and/or tourist activity organizers apply relate to and interact with legal environmental requirements?

1.3 Employed Definitions

In this essay, the following terms are employed with the given definitions.

Marine tourist activity: Water based tourist activity taking place within Mombasa MNPR and/or Kisite Mpunguti MNPR, organized through tourist activity organizers. See subchapter 6.2.2.1 and 6.2.3.1 for specifications of the kind of marine tourist activities taking place within Mombasa MNPR and Kisite Mpunguti MNPR.

Sanction: Different kinds of penalties connected to a violation of an environmental requirement, including for example fine, imprisonment and payment of the costs for cleaning up a polluted environment.

Tourist: Person undertaking marine tourist activities through a tourist activity organizer. This includes resident, non-resident as well as citizen persons.

Tourist activity organizer: Businessman from the local community near Mombasa MNPR or Kisite Mpunguti MNPR involved in organizing marine tourist activities. This comprises for example salesman, captain and guide.⁶⁴

⁶⁴ In Mombasa MNPR, there seem to be two main groupings of businesses organizing marine tourist activities. The people of the local community operate marine tourist activities from the beach and are in this essay referred to as tourist activity organizers. The other businesses derive from the hotels and are normally referred to as 'hoteliers'. This study is thus limited to the first mentioned group.

During interviews with KWS officers and tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR, reference was made to environmental requirements in different sources, for instance legislations, codes of conduct and unwritten sources. It was not always clear from which source the mentioned environmental requirements derived. The reader of this essay must therefore be aware that it is inevitable that this ambiguity is reflected in the essay. With the purpose of making it clear what I mean with ‘norm’ and ‘legal’ in this essay, I use the terms below in the following manner.

Norm: I use the definition of norm described in subchapter 2.2. It should be noted that the term norm in this essay does not exclude the possibility that the norm is a legal rule. Legal rules are thus perceived as a type of norm. I perceive norms as comprising a grayscale of legal rules to more informal norms.

Legal: Applied when a norm is *clearly* derived directly from legislations, regulations and/or licenses/permissions (e.g. legal environmental requirement and legal rule).

1.4 Limitations

Marine tourist activities impact the environment in different manners and these impacts are regulated by provisions in various Kenyan legislations. This essay is limited to the regulation of direct impact on the marine environment and does not for example describe the regulation of impact on air or beach quality. Furthermore, the essay is limited to the following legislations: the Environmental Management and Co-ordination Act, 1999 (hereinafter ‘EMCA’), the Tourist Industry Licensing Act (hereinafter ‘TILA’), the Tourism Act, 2011 (hereinafter ‘TA’), and WCMA, including the regulations and licenses under these acts. The Constitution of Kenya, 2010 (hereinafter ‘Constitution’) is also briefly considered.

Furthermore, focus is mainly on the following public authorities: the National Environment Management Authority (hereinafter ‘NEMA’), the Ministry of Tourism (hereinafter ‘MT’), the Tourism Regulatory Authority (hereinafter ‘TRA’) and KWS. Focus is primarily on their roles in prescribing and enforcing environmental requirements. With the exception of the Public Complaints Committee (hereinafter ‘PCC’), the roles of different committees within these authorities are not specified. NEMA’s power to ensure that lead agencies obligations in relation to the environment are fulfilled is not explained.

The essay primarily has a national Kenyan perspective and does not, for example, investigate whether national law is compatible with international law. Furthermore, the delimitation of Kenyan territorial waters is not described, since it seems clear that marine tourist activities take place within this area and that Kenya thus has full jurisdiction to prescribe and enforce legal environmental requirements.⁶⁵ Legal provisions relating specifically to non-citizen persons or ships from other nations are not either considered. The essay is based on the simplified precondition that the same legal rules apply to these persons and ships as to Kenyan citizens and Kenyan ships.

The essay does not explain how conflicting provisions are handled under Kenyan law or which provisions that should be applied when different provisions appear to have similar content. Identified conflicts or uncertainties are therefore noted without a deeper analysis of to

⁶⁵ Unfortunately I have not been able to identify the exact delimitation of Mombasa MNPR and Kisite Mpunguti MNPR. See Okidi et al, p. 445-447, for a discussion about the determination of the baseline and Kenyan territorial waters. See also UNCLOS, art. 2-16.

handle these. When various provisions appear to have similar content, these are referred to in the foot notes and examples or summaries are made in the text.

Transitional provisions are not either considered, except through references in the footnotes in a few cases. For example, the new Constitution might affect the legislations this essay focuses on, but the simplified presumption is made that these legislations are valid as currently written.⁶⁶ Since a new court system is developed under the Constitution, the general term ‘court’ is applied in the essay and different courts’ jurisdictions are not specified.

A general delimitation made in the legal investigation is that procedural law and law governing the authorities is only described to the extent this appears to be of direct relevance for the prescription or enforcement of legal environmental requirements. This delimitation is however sometimes difficult to draw. For instance, when the substantive law which authorities are to consider during licensing procedures seems vague, procedural law appears relevant in order to understand whether this could result in legal environmental requirements.

The following limitations have been made when identifying environmental requirements. It is only requirements directly relating to the performance of marine tourist activities that are described, not for example how to handle waste after an excursion. A prohibition against performing marine tourist activities is however considered an environmental requirement which directly affects the performance of marine tourist activities. Requirements relating to noise levels, vibration levels or effluent discharge are not described. It is only regulation of pollution through discharge of waste or fuel (e.g. petrol/diesel) that is described. Furthermore, requirements relating specifically to fishing, hunting or ports are not described.

In relation to offences, it is only offences which seem to result in legal environmental requirements that are included. Offences indirectly relating to legal environmental requirements or the enforcement of these, such as provision of false information and contravening authorities’ or courts’ decisions, fall outside the scope of this essay.

In relation to the enforcement of legal environmental requirements, focus in the legal investigation is on describing the enforcement by the above mentioned authorities, including the actions these can take in the first court instances. Procedural rules on court proceedings are not described (e.g. issues of criminal liability and evidence). Individuals’ possibilities to enforce legal environmental requirements through court proceeding are not considered. Rules on compensation to third parties, affected by a violation of a legal environmental requirement, are not described.

EMCA and TA provides for various instruments to be developed (e.g. reports, plans and inventories), which can directly or indirectly have roles in regulating marine tourist activities.⁶⁷ In this essay, it is however only possible to describe such instruments when they appear to be of direct relevance for the prescription or enforcement of legal environmental requirements. Furthermore, it is only possible to briefly describe monitoring of environmental impact when this appears to be of direct relevance for the prescription or enforcement of legal environmental requirements.

The following limitations are specifically made in relation to EMCA and the regulations under this act. Provisions that clearly only relate to activities with significant environmental impact are not described. This for example means that it is only the requirement of issuing a

⁶⁶ See Constitution, art. 2(4).

⁶⁷ Several instruments shall be developed by NEMA to, for example, monitor the state of the environment, identify environmental impacts and potential measures to handle these. For further information see: EMCA, sec. 9(2p and 3); EMCA, sec. 37-41; EMCA, sec. 42(3) and Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009 (hereinafter ‘Wetlands Regulation’), sec. 10 and 18; EMCA, sec. 50-51 and Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 (hereinafter ‘Biological Diversity Regulation’), sec. 6-7; and EMCA, sec. 55(2-4).

project report which is considered, not the requirement of undertaking an environmental impact assessment.⁶⁸ This also entails that environmental auditing is not described.⁶⁹ The requirement of adopting a strategic environmental plan is only considered to the extent this appears relevant in the licensing of marine tourist activities under TILA. A deeper description is therefore not made of this instrument. The possibility to prescribe water quality standards is not either considered, since such standards do not seem to have been developed for wildlife or fisheries.⁷⁰ Not either the requirement of having a wetland resource use permit is described, since it does not seem like this is required in relation to marine tourist activities.⁷¹ Furthermore, the possibility to use the national environmental restoration fund, environmental easements and conservation orders are not considered.

Incentives are undertaken by various stakeholders in Kenya to promote environmental consideration during marine tourist activities, for example through codes of conduct. In this essay, it is only possible to describe examples of such more informal norms. As the purpose and questions imply, the essay is limited to such more informal norms applied by KWS and/or tourist activity organizers. In relation to norms of tourist activity organizers, focus is on norms that are collectively applied by groups of tourist activity organizers. Individual incentives are thus not included. In Mombasa MNPR, tourist activity organizers are required to be organized into associations, but there are also unorganized tourist activity organizers in this area. In relation to Mombasa MNPR, the study focuses on tourist activity organizers that are members of associations.

Finally, TA is included in this essay since it seems like this legislation in the near future will replace TILA. The focus of the essay is however primarily to identify and describe *how* marine tourist activities currently are regulated. The essay does thus not investigate the reasons for or the effectiveness/adequacy of this regulation. An investigation is for example not made of whether the regulation is satisfying in order to ensure conservation of marine biodiversity. The reason for this is that I believe my knowledge and overview to be too limited in order to give such comments. In subchapter 9.5, I however provide examples of how insights gained through this study could be taken further through future research.

⁶⁸ For more details, see EMCA sec. 58 – 65, Environmental (Impact citation. Assessment and Audit) Regulations, 2003 (hereinafter ‘EIA Regulation’), Part III-IV, and EIA Guideline, p. 1-17. EIA Regulation, sec. 4(1), requires an EIA to be undertaken when the environmental impact is negative *or* when required under EMCA or the EIA Regulation. This gives the impression that the EIA Regulation lowers the required environmental impact. EIA Regulation, sec. 10(3), however requires EIA to be performed first if the impact is significant. Wetlands Regulation and Biodiversity Regulation contain requirements of performing an EIA when an activity has adverse environmental impacts, Biological Diversity Regulation, sec. 4 and Wetlands Regulation, sec. 5. When analyzing the regulations under EMCA together, ‘adverse’ seems synonymous to ‘significantly negative’, see EIA Regulation, sec. 4(1) and 10(3), Wetlands Regulation, sec. 2-3, 5, 17(b) and 21 and Biological Diversity Regulation, sec. 2 and 4.

⁶⁹ See EMCA, sec. 68, EIA Regulation, Part V, and EIA Guideline, p. 2, 6 and 18, for more information.

⁷⁰ NEMA shall recommend quality standards for all Kenyan waters for different purposes, for example wildlife and fisheries, EMCA, sec. 70(1) and 71(b). The Environmental Management and Co-ordination (Water Quality) Regulations, 2006 (hereinafter ‘Water Quality Regulation’) does not contain any water quality standards for wildlife or fisheries, Water Quality Regulation, Tenth Schedule.

⁷¹ See Wetlands Regulation, sec. 2, 12 and 19. According to the definition, this includes permits granted for “non-extractive uses [of wetland] such as tourism and cultural activities” and certain marine areas are included as wetland, Wetlands Regulation, sec. 2. I however find it unclear how non-extractive uses such as tourism relate to the activities outlined in EMCA, sec. 42.

1.5 Methodology

1.5.1 Selection of Subject and Area for the Minor Field Study

There are several reasons why I chose to perform a minor field study in Kenya in this subject. An interest about how to suitably balance tourism development and environmental protection has gradually evolved when travelling to other developing countries, where I have for example observed that marine tourist activities have negatively impacted coral reef ecosystems. A reason why I found Kenya suitable for the minor field study was that the Kenyan tourism sector is under expansion. This winter (2011-2012) direct flights have for example started from Sweden to the Kenyan coast. An increased number of tourists naturally lead to higher impact on the environment. I therefore found it of interest to examine how marine tourist activities are regulated in Kenya in order to minimize negative impact on the marine environment. There are mainly practical reasons why I found it suitable to focus the study on Mombasa MNPR and Kisite Mpunguti MNPR. My contact with Arthur Tuda at KWS in Mombasa made it a natural choice to include Mombasa MNPR. The focus on Kisite Mpunguti MNPR, instead of other marine national parks and reserves, was mainly chosen because of security reasons.

The specific focus of this essay has of several reasons gradually evolved. The purpose was initially to study the regulation of marine tourist activities promoted as having an eco-tourism profile, organized by Swedish companies. The idea was to investigate the role of legal regulation and self-regulation in minimizing impact on the marine environment. After interviewing a few Swedish companies, I however realized that there are too many middlemen between Swedish and Kenyan companies in order to set up the study as planned. I therefore decided to concentrate on Kenyan companies with eco-tourism profiles. During the minor field study in Kenya, I however realized that no tourist activity organizers in Mombasa MNPR or Kisite Mpunguti MNPR have explicit ecotourism profiles. Since my intention from start was to not only investigate the role of legal regulation, it was natural to include other types of more informal norms applied by KWS and tourist activity organizers in this study.

1.5.2 General Information Sources

I have reviewed secondary sources, such as literature, articles and information at internet websites, in order to gain an overview of the subject of this essay and knowledge about for instance tourism, environmental impact from tourism, international environmental law, theories and methodological issues. International environmental law has also been studied through primary legal sources in the form of international conventions. These sources have primarily been used when writing chapter 1 to 3 of this essay.

1.5.3 Legal Investigation

The legal investigation in Kenyan law is presented in subchapters 3, 4.1, 5.1, 5.2 and 6.1, and it forms the base for large parts of the analysis. In this subchapter, a description is given of how this legal investigation has been performed. The first subchapter describes the general methodology. The subsequent subchapter contains a more detailed description of some of the methodological challenges that have occurred and how I have attempted to handle these.

1.5.3.1 General

The legal investigation of this essay is based on a judicial dogmatic methodology. At the initial stage, legislations were identified through the website of the National Council for Law Reporting (Kenya Law Reports) and these were studied in order to gain an overview.⁷² Brief

⁷² This is the official website of the public body National Council for Law Reporting (see www.kenyalaw.org). Other legislations that might have been relevant to study are for example: Coast Development Authority Act;

consultations were also made with a couple of Kenyan lawyers and a KWS officer at this stage. Among the identified legislations, EMCA, TILA, TA and WCMA were identified as most relevant for the purpose of this essay.

I chose to focus on four legislations due to the limited amount of time for conducting this study. It was natural to include WCMA, since Mombasa MNPR and Kisite Mpunguti MNPR are protected under this legislation. EMCA was included since it is the framework law on environmental governance. TILA was included since it regulates the licensing of marine tourist activities. In order to highlight the changes which currently are in process, I also found it of relevance to include TA, which will succeed TILA.

The legal investigation is primarily based on an examination and textual analysis of primary legal sources. Focus has been on EMCA, TILA, TA, WCMA, and the regulations under these acts. I have also studied relevant parts of the Constitution. Relevant secondary sources on Kenyan law, which I have identified, have also been studied. It has not been possible to study case law, since my attempts to identify whether relevant case law exists have been unsuccessful. Policies I have been able to identify through internet and literature have briefly been studied. Focus has however been on investigating primary legal sources, since policies seem to have a weak standing in Kenyan law (see Chapter 3).

1.5.3.2 Methodological Challenges and Attempts to Handle These

There are methodological challenges connected with studying the law of another country. This subchapter is intended to provide the reader an understanding of the most relevant methodological challenges that I have experienced during the legal investigation and how I have attempted to handle these, in order to create transparency in the study. Advice given by Bogdan, on considerations to be made when studying the law of another country, forms the basis and structure around which I elaborate some of my own experiences in this subchapter.⁷³

Bogdan mentions the importance of gaining basic knowledge about the foreign legal system, since there can be large differences between legal cultures and systems.⁷⁴ I have attempted to gain basic knowledge about the Kenyan legal system and some basics are presented in Chapter 3 of this essay. Kenya has however recently adopted a new Constitution and the Kenyan legal system is therefore currently undergoing large changes. It has not been possible to identify updated literature on the Kenyan legal system. A general textbook on Kenyan law, written in the late 1980's, has therefore been used for this purpose.⁷⁵ Aware that this textbook might be outdated, I have only been able to use it to gain knowledge about fundamental principles of Kenyan law and have attempted to consult primary legal sources in order to ensure the accuracy. I have also studied the Constitution, but since it is not at this stage fully implemented, I have only been able to consider this to a minor extent. In order to gain a better understanding, I have also studied principles of how to interpret British statutory law, since these might be similar to the principles applied in Kenyan law (see Chapter 3).

Bogdan also notes that it is easy to unconsciously presume that such things as concepts, hierarchy of legal sources and methods of interpretation, can be used in the same manner in the foreign legal system as in the home country's legal system.⁷⁶ I have made an effort to study Kenyan law without making such presumptions. This has however been a challenge. A large difference between Kenyan law and Swedish law is for example that Swedish law is based on statutory law and Kenyan law is based on common law. Kenyan environmental law

Fisheries Act; Kenya Maritimes Authority Act; Local Government Act; Maritimes Zones Act; Merchant Shipping Act; Physical Planning Act; Water Act.

⁷³ Bogdan, p. 39.

⁷⁴ Bogdan, p. 19, 40 and 43-48.

⁷⁵ Jackson.

⁷⁶ Bogdan, p. 40 and 44-45.

however primarily consists of written law and, by limiting this essay to written law, I have attempted to focus on the kind of legal sources that I am familiar with handling.⁷⁷ Furthermore, as mentioned below, the secondary sources that I have identified have been of limited aid concerning how to interpret legal provisions in relation to marine tourist activities. I have, as a consequence, primarily had to rely on the knowledge I have gained through my Swedish law education and a challenge has been how to balance when, and when not, to be guided by my Swedish presumptions.⁷⁸ In the essay, I note when I find aspects uncertain.

Bogdan also mentions that, when investigating the specific subject of the study, it is rational to examine secondary sources before primary legal sources.⁷⁹ I have gained general knowledge in Kenyan environmental law through secondary sources, primarily a textbook published in 2008.⁸⁰ A large challenge has however been that it has only to a limited extent been possible to find information in secondary sources of relevance for the specific subject of this essay. This has for example resulted in that I have studied a great amount of primary legal sources and have had difficulties to gain an overview and identify a suitable focus for the study. Furthermore, it has resulted in that I have not been able to resolve the issues I find unclear in the primary legal sources.

Bogdan also explains that it is essential to ensure that relevant and accurate legal materials are studied.⁸¹ I have attempted to be careful to certify this during the study, but there have been practical difficulties. For example, it was a challenge to identify whether TILA or TA is in force and it was first when performing the interview at MT that this could be resolved. It has also been difficult to determine which materials that exist and thus whether the relevant materials have been identified. For example, it took me a few weeks in Kenya before I understood that Kenyan marine national parks and reserves do not have specific local regulations, which I had initially planned to focus the study on. When I am aware of relevant materials that I have not been able to access, this is indicated in the footnotes of the essay.

Furthermore, Bogdan mentions the challenge language barriers can cause.⁸² The legal materials of relevance for this study have been available in English. It should however be noted that I do not have English as my first language. There have been some difficulties in understanding the exact meaning of legal terms and in identifying translations of jurisprudential terminology. Despite my efforts to minimize the effects of this language barrier, it influences the quality of this essay.

Finally, Bogdan points out that qualified colleagues can be contacted in order to ensure that legal materials are interpreted correctly.⁸³ I have primarily performed this study on my own, based in Mombasa, and my efforts to get in contact with Kenyan lawyers in Mombasa were unfortunately unsuccessful. I have however had sporadic contacts with four lawyers in Nairobi, of which a couple are specialized in Kenyan environmental law. These have briefly been consulted via e-mail and through a couple of personal meetings. It has however, of natural reasons, not been possible to clarify all the question marks I have.

⁷⁷ Okidi et al, p. 3, 6-7 and 11.

⁷⁸ An example of this is the environmental impact assessment procedure. According to my Swedish presumptions, this is not required for marine tourist activities. When studying EMCA and the regulations under this act I however find it difficult to exclude the possibility that tourist activity organizers might be required to submit a project report for certain marine tourist activities. I have therefore chosen to describe the possible requirement of submitting a project report.

⁷⁹ Bogdan, p. 40 and 42.

⁸⁰ Okidi et al.

⁸¹ Bogdan, p. 43.

⁸² Bogdan, p. 48-50.

⁸³ Bogdan, p. 39 and 43.

1.5.4 Empirical Findings

The empirical findings of this essay were gathered during a ten week long minor field study in Kenya, during the autumn/winter of 2011. These findings are presented in subchapters 4.2, 5.3 and 6.2. In this subchapter, a description is given of how the material was gathered. The first subchapter describes general issues and the subsequent subchapters contain aspects specifically relating to the different groups of respondents.

1.5.4.1 General

The empirical findings of this essay were gathered through interviews. The purpose of performing interviews was to gain an understanding of how marine tourist activities are regulated in practice. I therefore primarily focused on performing interviews with different stakeholders in Mombasa MNPR and Kisite Mpunguti MNPR, primarily KWS officers and tourist activity organizers. Interviews have however also been done with authority officials at NEMA and MT in order to gain an understanding of how EMCA and TILA regulate marine tourist activities in practice.

In total, twenty-four interviews have been performed. A list of the respondents, including details, is found in Appendix 1. Most of the interviews were performed with individual persons, but in a few cases group interviews were more suitable. The group interviews are presented in the empirical findings under a common term: Global Vision International (hereinafter 'GVI'); North Coast Beach Operators Forum (hereinafter 'NCBOF'); Mombasa Boat Owners Association and Mombasa Boat Operators Association (hereinafter collectively referred to as 'MBOA' and individually⁸⁴ as 'MBOA(A)' and 'MBOA(B)'). The interviews were normally performed through personal meetings, except one which was done via e-mail (see subchapter 1.5.4.2).

A difficulty was to identify and arrange interviews with the best suited respondents by myself. It was therefore necessary to arrange interviews through contacts who have identified suitable respondents and which in their turn might have referred me to other suitable respondents. This method of finding suitable respondents is called snowball sampling and a risk with using this method is that I might not have identified the persons best suited to answer my questions.⁸⁵ I have been aware of this risk when writing the analysis, especially in relation to responses of respondents at NEMA.

The interviews have generally taken the form of semi-structured interviews, since this appears most suitable when studying an unexplored field, where the focus of the study may change.⁸⁶ This means that questions have been asked in a predetermined order and that follow-up questions have been asked when I have found this suitable. This method has the advantage of allowing flexibility, by making it possible to include unexpected answers of respondents and to come back to ask supplementary questions for clarifications.⁸⁷ Because of practical reasons, it has however not always been possible to ask for clarifications after the interviews.

Interviews were recorded and transcribed when possible. I could then fully concentrate on the interview situation. When respondents wished not to be recorded, I instead attempted to take detailed notes. The drawback of this was that it was more difficult to concentrate on the interview situation and that there are fewer, more sporadic, notes from those interviews.

Personal interviews are connected with a risk that answers of respondents can be influenced by the questions posed.⁸⁸ A challenge when performing interviews about legislations was also that respondents could get the impression that my intention was to

⁸⁴ These terms MBOA(A) and MBOA(B) are used to keep the organizations anonymous.

⁸⁵ Esaiasson et al, p. 212 and 286.

⁸⁶ Esaiasson et al, p. 279 and 281.

⁸⁷ Esaiasson et al, p. 279.

⁸⁸ Esaiasson et al, p. 290-291.

control their compliance with legal rules. Also my connection to KWS might have given this impression. I attempted to avoid this by explaining that my study focuses on gaining an overall understanding of the regulation of marine tourist activities and does not examine individual's compliance or knowledge. It was however not possible to entirely avoid the risk of respondents adapting their answers.

Since I find it difficult to assess whether any responses could be of a sensitive nature, the respondents are kept anonymous to some extent in this essay.⁸⁹ This is done by not presenting their names and by generally using the pronoun 'he'. The positions of government officials are however specified, except when these have expressly wished to be kept anonymous.

Finally, it is important to get an understanding of a subject before performing interviews.⁹⁰ As mentioned in subchapter 1.5.3.2, a large challenge during this study has however been to identify relevant materials on Kenyan environmental law and it has also been difficult to gain prior knowledge of how marine tourist activities are regulated in practice. Since I performed semi-structured interviews and attempted to carefully plan these, I was able to handle some of the challenges that the lack of knowledge entailed. It should however be mentioned that the lack of knowledge affected my possibility to prepare the questions best suited to fulfil the purpose of this essay.

1.5.4.2 National Environment Management Authority

Interviews were performed with three respondents at NEMA. The reason for performing interviews at NEMA was due to its role as the authority with main responsibility of environmental regulation under EMCA. The ambition was to identify respondents with knowledge of how EMCA and the regulations under this act regulate marine tourist activities. The interview with Officer Y was arranged through a personal contact at KWS, who believed him to be suited to answer my questions. Officer Y arranged an interview with Officer X, who in his turn arranged a meeting with Officer Z. In Mombasa, I also attempted to perform an interview with someone focused on marine issues, but this was not possible.

The interview with Officer Z was, of practical reasons, performed in the form of a shorter informal conversation followed up by an interview via e-mail. The drawback of performing an interview in this manner could be that the interviewer does not have the same interaction with the respondent as during a personal meeting and not the same possibility to ask follow up questions.⁹¹ The reason for nonetheless performing this interview was due to Officer Z's specialization on marine issues and involvement in projects relating to tourism.

The questions during the interviews with respondents at NEMA focused on which legal environmental requirements EMCA and the regulations under this act entail in relation to marine tourist activities and how these are enforced. Some questions were of an open character, but most questions were of a more direct and interpretive nature.⁹² The direct questions, concerning the interpretation of specific provisions, were adjusted over time as I gained more knowledge. Focus was on clarifying aspects which I found uncertain from the legal materials. Identical questions were thus not asked to all three respondents, which is relevant to mention since it results in varied interview structures and responses.

1.5.4.3 Ministry of Tourism

An interview was performed with one respondent at MT. The reason for performing this interview was that MT is the authority with responsibility of licensing marine tourist activities under TILA. The interview was arranged through Officer E(M), who had identified a suitable

⁸⁹ Esaiasson et al, p. 285.

⁹⁰ Esaiasson et al, p. 285, and Sandgren, p. 43.

⁹¹ Esaiasson et al, p. 279-280.

⁹² Esaiasson et al, p. 291.

respondent. It might have been suitable to perform interviews with one or two additional respondents at MT, but this was not possible.

The questions during the interview concerned whether the licensing of marine tourist activities under TILA results in legal environmental requirements in relation to marine tourist activities and how these, in that case, would be enforced. Some questions were of an open character and other questions were of a more direct and interpretive nature.⁹³

1.5.4.4 Kenya Wildlife Service

Interviews were performed with KWS officers at the local KWS headquarters in Mombasa MNPR and Kisite Mpunguti MNPR. The reason for performing these interviews was that KWS is responsible of enforcing legal environmental requirements in relation to marine tourist activities in Mombasa MNPR and Kisite Mpunguti MNPR. Since I estimated these interviews to be of central importance for the purpose of this study, interviews were performed with five KWS officers in Mombasa MNPR and four KWS officers in Kisite Mpunguti MNPR. In order to identify suitable respondents, the interviews in Mombasa MNPR were arranged through Officer E(M) and Officer B(M), and the interviews in Kisite Mpunguti MNPR were arranged through Officer I(K) and Officer F(K).

The questions during the interviews primarily concerned which legal environmental requirements tourists and tourist activity organizers must comply with during marine tourist activities and how these are enforced. Furthermore, the questions concerned whether tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR have own common norms (e.g. codes of conduct) with environmental requirements and how these are enforced. The questions during the interviews were mainly of an open nature, with more specific follow-up questions.⁹⁴ Almost the same predetermined questions were asked to all respondents, with the exception of Officer E(M) and Officer I(K) who were asked questions based on issues which needed clarification after the interviews with other respondents. The open questions used during the interviews turned out to be an advantage when realizing that the situation on the ground was not as I had expected from the legislations. These questions made it possible to capture unexpected responses and to get an overall picture of the regulation of marine tourist activities, even though the focus of the study and my understanding of the subject changed. Initially, the focus was primarily on identifying legal environmental requirements, but the open questions also made it possible to gain an understanding of the role of other environmental requirements in the areas.

1.5.4.5 Tourist Activity Organizers

Interviews were performed with tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR. A purpose of performing these interviews was to get indications of which legal environmental requirements that should be complied with during marine tourist activities, which licenses that contain legal environmental requirements and how legal environmental requirements are enforced. A purpose was also to investigate if tourist activity organizers have own norms (e.g. codes of conduct) with environmental requirements and how these are enforced.

I estimated the interviews with these respondents to be of central importance for the purpose of this study. Interviews were therefore performed with four tourist activity organizers in Kisite Mpunguti MNPR and six tourist activity organizers in Mombasa MNPR. The interviews in Kisite Mpunguti MNPR were arranged by Officer F(K), who identified suitable respondents. In Mombasa MNPR, Officer B(M) and Officer D(M) identified suitable

⁹³ Esaiasson et al, p. 290-291.

⁹⁴ Esaiasson et al, p. 290-291.

respondents. Two interviews, with members of MBOA(A) and MBOA(B), were performed as group interviews.

The questions during the interviews concerned which legal environmental requirements tourists and tourist activity organizers are required to comply with during marine tourist activities and how these are enforced by the authorities this essay focuses on. The questions also focused on identifying whether tourist activity organizers have own norms with environmental requirements and how these are enforced. Almost the same predetermined questions were asked to all respondents, with additional follow-up questions. The questions during these interviews were mainly of an open nature, similar to those I asked KWS officers. As mentioned in subchapter 1.5.4.4, the advantage of these open questions was that they made it possible to capture unexpected responses and to get an overall picture of the regulation of marine tourist activities, even though the focus of the study and my understanding of the subject changed.

1.5.4.6 Other Respondents

Interviews were also performed with a few other respondents. A group interview was done with two respondents from GVI, which is an organization educating tourist activity organizers on for example the codes of conduct for dolphin watching in Kisite Mpunguti MNPR. A group interview was also performed with two respondents from NCBOF, which is an umbrella organization for associations of tourism businesses in Mombasa MNPR. Furthermore, an interview was done with the person (hereinafter ‘Trainer’) who has organized workshops with tourist activity organizers in Mombasa MNPR, where codes of conducts for glass-bottom-boat excursions have been developed. I arranged these interviews on my own, after recommendations from respondents that I had previously interviewed. The purpose of these interviews was to gain further insight on how KWS and/or tourist activity organizers regulate marine tourist activities. The interviews were performed as informal conversations around a few predetermined questions.

1.5.5 Perspectives on Law in this Essay

Something should also be mentioned about the perspectives on law in this essay. Law can be studied from various perspectives.⁹⁵ A general division is for example made between an inner perspective, focusing on describing such things as the valid law, and an external perspective, focusing on for instance the effects of legal rules.⁹⁶ Furthermore, Hydén means that a division could be made between a judge and a user perspective on law.⁹⁷ When applying a traditional judicial dogmatic methodology, the legal study has a judge perspective.⁹⁸ The user perspective is what for example lawyers and authority officials, working outside courts, normally use when applying law in their practical work.⁹⁹ This reminds more of the external than the internal perspective on law according to Hydén, since effects of legal rules are usually considered.¹⁰⁰

The methodology used in this essay could be seen as highlighting law from a judge as well as a user perspective. The legal investigation is based on a judicial dogmatic methodology and thus has a judge perspective. The empirical findings give insights on how the legal rules are applied in practice by the authorities and thus have more of a user perspective. The analysis could be viewed as having a judge as well as, to some extent, a user perspective on law.

⁹⁵ Baier & Svensson, p. 27.

⁹⁶ Baier & Svensson, p. 21 and 27.

⁹⁷ Hydén 2002, p. 17.

⁹⁸ Hydén 2002, p. 15 and 17.

⁹⁹ Hydén 2002, p. 17.

¹⁰⁰ Hydén 2002, p. 17-18.

1.6 Critique

It has been a challenge for me to perform this study and several aspects of the essay can be criticized. All the difficulties described in subchapters 1.5.3.2 and 1.5.4.1 naturally affect the quality of this essay. In this subchapter, I mention some of the major inadequacies I have noticed.

I had difficulties in gaining sufficient knowledge about Kenyan law as well as the regulation of marine tourist activities in practice before and during the minor field study. This resulted in difficulties to plan the study and the theoretical knowledge I had gained before arriving in Kenya was not relevant in order to fulfill the purpose of this essay. The lack of knowledge resulted in a gradual shifting of focus as problems arose and the essay can be criticized for having a too wide scope and an unclear focus.

The challenges in gaining sufficient knowledge before and during the minor field study also resulted in difficulties to plan the interviews. The empirical findings therefore have varying quality. Especially the empirical findings in relation to EMCA could be criticized for having gaps. Furthermore, the empirical findings under WMCA could be viewed as unstructured, for example since a clear separation is not made between environmental requirements in legal and other sources. As mentioned above, this was however seldom clear during the interviews either and it is therefore inevitable that this ambiguity is reflected in the essay. Furthermore, since I have primarily been based in Mombasa during the study, the essay contains more empirical material from Mombasa MNPR than Kisite Mpunguti MNPR. As always when using interviews as an information source, the reliability in the empirical findings could also be questioned.

The legal investigation of this essay is mainly based on primary legal sources. If relevant case law exists, a drawback would be that this has not been studied. Furthermore, I have only briefly studied policies, since these appear to have a weak standing in Kenyan law and since I have had difficulties in determining which policies that are relevant and accurate. It might have been an advantage to study policies further. Secondary sources have only to a limited extent been of aid when performing the legal investigation. The main focus on primary legal sources can give an incomplete and superficial impression. This also results in that there are substantial and structural gaps in the essay and that many aspects are found uncertain. Another weakness of the legal investigation could be that it is strictly limited to EMCA, WCMA, TILA and TA and thus gives an incomplete picture of the legal regulation of marine tourist activities. In retrospect, I however believe that it might have been better to limit this study to only WCMA, given the practical perspective that is also included in this essay. Such a limitation would also have made a deeper theoretical foundation possible.

Finally, even though I find the theories used in this essay suitable to fulfil parts of the essay's purpose, other theories could be considered to better suit law and culture in Kenya.

1.7 Disposition

This chapter is followed by seven chapters. In the *Second Chapter*, theories used in the essay are presented. These are intended to give background information as well as a basis for parts of the analysis. *Chapter Three* provides a brief overview on a few basics on Kenyan law, intended to provide a background understanding before describing the legal materials of specific interest for this study. In the *Forth to Sixth Chapters*, the legal investigations in relation to EMCA, TILA/TA and WCMA, including the regulations under these acts, are presented. The legal investigation in each chapter is followed by a presentation of the empirical findings. The empirical findings in Chapter Four and Five are intended to give indications on how EMCA and TILA, including the regulations under these acts, regulate marine tourist activities in practice. The empirical findings in Chapter Six are intended to give

a more in-depth understanding of how marine tourist activities are regulated in practice by KWS and tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR. In *Chapter Seven*, an analysis is made in order to answer the questions of this essay. The *Eighth Chapter* presents the conclusions, a few reflections and suggestions for further research.

2 Theories

This chapter presents the theories used in the essay. The purpose is give background information as well as a basis for parts of the analysis. In the first subchapter, the role of legal environmental requirements and enforcement, in order to achieve environmental goals, is described. This is intended to provide an understanding of why it is of interest to investigate what legal environmental requirements tourists and tourist activity organizers must comply with during marine tourist activities and how these requirements are enforced. The second subchapter is intended to place legal rules in the context of different norms in society. It is also intended to provide a basis for how norms can be defined, categorized and analyzed in relation to each other.

2.1 Legal Environmental Requirements and Enforcement

Environmental goals, such as conservation of marine biodiversity or sustainable development, are typically generally expressed and without legal effect in relation to individuals.¹⁰¹ Normally, it is therefore not sufficient to prescribe an environmental goal if this is to be effectively achieved.¹⁰² It is also important that legally binding rules ensure that individuals (legal or physical persons), who affect the state of the environment which the goal is intended to protect, behave in consistency with the goal.¹⁰³ These kinds of legal rules are referred to as legal environmental requirements in this essay.

Effective enforcement is also essential in order to achieve environmental goals.¹⁰⁴ Legal rules must therefore ensure that individuals can be enforced to comply with legal environmental requirements in practice.¹⁰⁵ Examples of enforcement mechanisms are supervision, sanctions and education.¹⁰⁶ Figure 1 is intended to illustrate the interconnection between these three parts of environmental law.

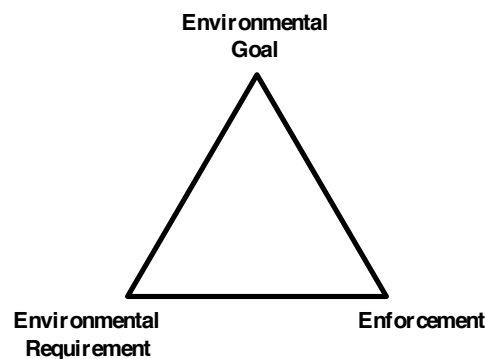


Figure 1. This figure illustrates the relationship between environmental goals, legal environmental requirements and enforcement.

¹⁰¹ Christiernsson, p. 78-79, Michanek & Zetterberg, p. 394, and Westerlund, p. 43.

¹⁰² Christiernsson, p. 3, 77 and 85, Michanek & Zetterberg, p. 394, and Westerlund, p. 43.

¹⁰³ Christiernsson, p. 3, 78, 85 and 87, Michanek & Zetterberg, p. 394, and Westerlund, p. 43 and 53-55. Various aspect of the legal system are relevant to consider to evaluate if this is designed in a manner which ensures fulfillment of environmental goals. As mentioned in the limitations, such aspects are however outside the limitation of this essay. See for example Westerlund for more information on this.

¹⁰⁴ Westerlund, p. 58-59.

¹⁰⁵ Christiernsson, p. 3, Hydén 2002, p. 32, Michanek & Zetterberg, p. 394, and Westerlund, p. 45, 56 and 60. See also Okidi et al, p. 173.

¹⁰⁶ Christiernsson, p. 3, Michanek & Zetterberg, p. 394, and Okidi et al, p. 173.

2.2 Norms

It is not only legal rules that direct human behavior.¹⁰⁷ Society consists of various types of norms which affect how people behave and thus influence whether or not individuals will behave in compliance with legal environmental requirements and in line with environmental goals.¹⁰⁸ These different types of norms interact and are mutually influencing.¹⁰⁹

According to Baier & Svensson, norms have three fundamental features: (A) they are imperative (directives of how to behave); (B) they are socially reproduced (communicated within a social context); and (C) they form the individual's perception of how the surrounding society expects him to behave.¹¹⁰

Furthermore, Baier & Svensson describe that different systems of norms have attributes which differentiate these, for example their origin, creation, form and the sanctions which these are connected with.¹¹¹ Through these attributes, different systems of norms can be categorised and analysed in relation to each other.¹¹² Baier & Svensson illustrate this by, based on Hydén's reasoning, identifying four attributes of legal rules.¹¹³ Legal rules are (1) adopted and prescribed in an authoritative and formal manner.¹¹⁴ This includes a requirement of having been (2) adopted by a sovereignty which the members of the society consider legitimate to adopt common rules or that the rules are enforced upon the members of the society.¹¹⁵ Furthermore, (3) violations of legal rules are connected with predetermined sanctions and these sanctions are (4) decided and executed by bodies that represent the society.¹¹⁶

Hydén describes legal rules as a type of norms which are reinforced and uphold a special position in relation to other norms.¹¹⁷ Legal rules are described as reinforced since individuals can be enforced to comply with these through predetermined sanctions, which are separate from the legal rules.¹¹⁸ Other norms are, according to Hydén, characterized by spontaneous compliance and the sanction for violating these form part of the norm itself.¹¹⁹ Figure 2 is inspired by how Hydén illustrates norms and legal rules in society.¹²⁰

¹⁰⁷ Baier & Svensson, p. 33-73, Hydén 2001, p. 9-10, and Hydén 2002, p. 31.

¹⁰⁸ Christiernsson, p. 62 and 64, Hydén 2002, p. 32, and Louka, p. 60. Louka makes the difference between formal and informal rules in international society, see Louka, p. 60-61.

¹⁰⁹ Christiernsson, p. 62, and Louka, p. 60.

¹¹⁰ Baier & Svensson, p. 69-72.

¹¹¹ Baier & Svensson, p. 73.

¹¹² Baier & Svensson, p. 73.

¹¹³ Baier & Svensson, p. 73, and Hydén 2001, p. 9-10.

¹¹⁴ Baier & Svensson, p. 73, and Hydén 2001, p. 9.

¹¹⁵ Baier & Svensson, p. 73, Hydén 2001, p. 9, and Hydén 2002, p. 32-33.

¹¹⁶ Baier & Svensson, p. 73, and Hydén 2001, p. 9-10.

¹¹⁷ Hydén 2001, p. 9-10, and Hydén 2002, p. 31-32. Hydén notes that even though legal rules are seen as a type of norm it is important to maintain the distinction between legal rules and other types of norms in society, Hydén 2002, p. 31.

¹¹⁸ Hydén 2002, p. 31-32.

¹¹⁹ Hydén 2002, p. 31-32.

¹²⁰ See Hydén 2002, p. 33.

3 Basics on Kenyan Law

This chapter is intended to provide a brief overview of a few basics on Kenyan law. First, a picture is given of the Kenyan legal system, its sources of law and their hierarchy. Thereafter, principles on how to interpret written law are described. Finally, the new Kenyan Constitution is presented.

3.1 Legal System, Sources of Law and their Hierarchy

The legal systems of the world can be classified into different families.¹²¹ A general division is for example made between common law and civil law.¹²² Since Kenya is a former British colony, its legal system is influenced by British common law.¹²³ Today, the Kenyan legal system however has a growing body of own written and common law.¹²⁴

The sources of law in the Kenyan legal system, which are relevant to mention in this essay, are in order of precedence: the Constitution; other written law; and common law.¹²⁵ Written law consists of for example acts of the parliament and subsidiary legislations and, in case of conflict between these, acts of the parliament prevail.¹²⁶ Subsidiary legislations must be developed under the authority of an act of the parliament and these take the shape of for example regulations, orders, directions and licenses.¹²⁷ Finally, since this essay focuses on written law, it is of relevance to note that that written law takes precedence over common law.

3.2 Interpretation of Written Law

As mentioned in the methodology, the legal investigation of this essay is based on a judge perspective. Relevant principles of how to interpret Kenyan written law can therefore be found in how Kenyan judges tend to interpret this. Jackson explains that a judge aims at discovering the meaning of a statute as this is expressed by its written words.¹²⁸ Furthermore, he explains that:

“[t]he statute must be read as a whole. Judges will, if necessary, examine the title, the preamble to a statute, the interpretation section (if any), schedules, even marginal notes to sections to determine the meaning of a statute. They can also revert to certain external aids in interpreting a statute, such as dictionaries, reports of Commissions, the law reports, but not to the Parliamentary debates as reported in Hansard. Basically, the words of a statute must be given their ordinary and natural meaning unless this would result in some absurdity.”¹²⁹

Jackson also cites a judge who explains that “in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used”.¹³⁰

Bogdan describes principles of how British judges tend to interpret British written law, which might also be of relevance to understand how Kenyan written law should be

¹²¹ Bogdan, p. 77-82.

¹²² Bogdan, p. 77-83. The Swedish legal system is based on civil law.

¹²³ See Bogdan, p. 69, 83 and 125-126, Jackson, p. 7-10 and 16-18, and Ojienda & Aloo.

¹²⁴ See for example Jackson, p. 5-10, 17-18 and 21-22.

¹²⁵ Judicature Act, sec. 3, and Jackson, p. 4 and 17-18. Other sources of law are for example specified British legislations and African customary law, Judicature Act, sec. 3, and Jackson, p. 15-16. African customary law only applies in civil cases and written law takes precedence over African customary law, Jackson p. 21-22.

¹²⁶ Jackson, p. 4-6 and 11-12.

¹²⁷ Jackson, p. 5 and 11-12.

¹²⁸ Jackson, p. 10 and Hydén 2002, p. 51.

¹²⁹ Jackson, p. 10.

¹³⁰ Jackson, p. 10, cites Lord Simon, L.C. in *King Emperor v. Benoari Sarma & others* (1945) 1 A11 E.R. 210.

interpreted.¹³¹ He explains that, since British judges view written law as a foreign element of law, they tend to interpret provisions of written law restrictively.¹³² A general principle is therefore to interpret the words of a statute strictly by their literal meaning. There are however exceptions made from this principle, for example in order to avoid absurdities. He also points out that British judges do not normally use preparatory legislative materials to interpret written law. These materials are not viewed as valid sources of law. Exception can be made if the preparatory legislative materials are needed to identify which phenomenon the statute aimed at regulating.¹³³ Bogdan also mentions that jurisprudential doctrine does not belong to the formal sources of law and has a weak standing in court, even though it can be considered to some extent by British judges.¹³⁴

3.3 Constitution of Kenya

A new Kenyan Constitution entered into force in August 2010.¹³⁵ In order to ensure the Constitution's full implementation, Kenyan law is currently undergoing a procedure where existing legislations are being reviewed and new legislations are being developed.¹³⁶ This is planned to be gradually completed within one to five years time from the effective date.¹³⁷

The Constitution contains a few aspects which are relevant to mention in this essay. It recognizes the importance respecting the environment and sustaining this for future generations.¹³⁸ Sustainable development is mentioned as a fundamental principle, which shall form the base of governance in Kenya.¹³⁹ The principle of sustainable development is therefore binding upon anyone who applies any legislation or who implements any public policy.¹⁴⁰

The Constitution also contains several provisions relating to environmental governance, which will be gradually implemented through legislative and other measures.¹⁴¹ The legislations that this essay focuses on existed before the Constitution entered into force and it does not at this stage seem clear how these will be affected in the review procedure.¹⁴²

¹³¹ See Bogdan, p. 92-127, and Jackson, p. 17, for more information. It varies with the judge's personal character how the principles are applied, Bogdan, p. 115.

¹³² Bogdan, p. 113. Normal law is then viewed as common law and the doctrine of equity, Bogdan, p. 113.

¹³³ Bogdan, p. 114-115.

¹³⁴ Bogdan, p. 118 and 123-124.

¹³⁵ Constitution, art. 260, 263-264 and Sixth Schedule, and the Constitution of Kenya Review Act, 2008, the New Constitution of Kenya, Promulgation (Constitution, p. 192).

¹³⁶ Constitution, art 261, Fifth Schedule and Sixth Schedule, sec. 7(1).

¹³⁷ Constitution, art. 260-261 and Fifth Schedule. See Chapter Eighteen and Sixth Schedule on transitional provisions.

¹³⁸ Constitution, preamble.

¹³⁹ Constitution, art. 4(2) and 10(2). The Constitution does not contain a definition of sustainable development. Other values recognized by the Constitution are for example: "sharing and devolution of power, the rule of law, democracy and participation of the people", Constitution, art. 10(2).

¹⁴⁰ Constitution, art. 10(1).

¹⁴¹ See for example Constitution, art. 22-23, 42, 59-60, 66, 68-70, 72, 162 (2b) and 259-260. See Constitution, Fifth Schedule, for the time schedule. See also Constitution, Sixth Schedule, sec. 19, and the former Constitution of Kenya, sec. 84(6).

¹⁴² Constitution, art. 262 and Sixth Schedule, sec. 7(1). Legislations that may be relevant for this essay are scheduled to be finished within four-five years from the effective date, Constitution, art. 260-261 and Fifth Schedule.

4 Environmental Management and Co-ordination Act

In the first subchapter beneath, the legal investigation in relation to EMCA and the regulations under this act is presented. Focus is on describing provisions that could result in legal environmental requirements in relation to marine tourist activities and legal possibilities to enforce these. In the second subchapter, empirical findings are presented to give indications on how EMCA and the regulations under this act regulate marine tourist activities in practice.

4.1 Environmental Management and Co-ordination Act

4.1.1 General

EMCA entered into force in January 2000 and it has the purpose of establishing an institutional and legal framework on environmental management in Kenya.¹⁴³ It introduced new mechanisms in Kenyan environmental law, such as environmental planning, preventive assessment of activities and requirements to pay the cost of reducing environmental impact.¹⁴⁴

The authority with the main responsibility of environmental regulation under EMCA is NEMA.¹⁴⁵ Its general purpose is to perform supervision and co-ordination of environmental matters and it has a lead role in the implementation of environmental policies.¹⁴⁶ Examples of NEMA's specific functions are to ensure that lead agencies' environmental management efforts are co-ordinated; encourage incorporation of environmental considerations in lead agencies projects, plans and policies; monitor activities' environmental impact; and build public awareness on sound environmental management.¹⁴⁷

It is important to note that EMCA did not repeal or synchronize earlier existing sectoral legislations relating to the environment.¹⁴⁸ Sectoral government agencies therefore still have central roles in implementing Kenyan environmental law and lead agencies are for example given responsibility of performing some of NEMA's functions in their respective sectors.¹⁴⁹ The lead agency in relation to marine national parks and reserves is KWS.¹⁵⁰

4.1.2 Fundamental Principles

A few general principles are viewed as underlying the provisions of EMCA.¹⁵¹ A fundamental principle is that everyone "in Kenya is entitled to a clean and healthy environment".¹⁵² This

¹⁴³ EMCA, preamble and p. 1, and Okidi et al, p. iii. Regulations can be issued to give full effect to EMCA, see for example EMCA, sec. 147.

¹⁴⁴ Okidi et al, p. 3, 143 and 172.

¹⁴⁵ EMCA, sec. 7, and Okidi et al, p. 146, 148-149, 203 and 320. NEMA's headquarter is in Nairobi and it has offices at local level, EMCA, sec. 29(1) and 30. It took more than three years after EMCA was enacted to start setting up the institutions established under EMCA and this is not yet finished, Okidi et al, p. 202. NEMA was established in 2005.

¹⁴⁶ EMCA, sec. 9(1), and Okidi et al, p. 146.

¹⁴⁷ See EMCA, preamble and sec. 9(2), and Okidi et al, p. 142-143, 146 and 440. For a full outline of the examples of NEMA's functions, see EMCA, sec. 9(2).

¹⁴⁸ Okidi et al, p. iii-iv, 132, 142 and 146. Before EMCA, the sectoral approach was considered to give Kenyan environmental law a diffuse character, resulting in jurisdictional conflicts and overlaps, including unclear and uncoordinated mandates of government agencies, Okidi et al, p. 142-143. Around 77 Kenyan statutes contained environmental provisions, which can be compared to Sweden where 16 statutes were replaced by the environmental code (Miljöbalken), Okidi et al, p. 142, and Michanek & Zetterberg, p. 22. A problem is that there are still conflicts and overlaps between sectoral legislations and that there is need to harmonize these with EMCA, Okidi et al, p. iv, x, xix-xx, 138 and 303, and EMCA, sec. 148.

¹⁴⁹ Okidi et al, p. 146, 178-179 and 201.

¹⁵⁰ EMCA, sec. 2, and Okidi et al, p. 301. See EMCA, sec. 2, for definition of lead agency. See also chapter 6 of this essay.

¹⁵¹ Okidi et al, p. 160. See also EMCA, preamble.

¹⁵² EMCA, sec. 3 (1).

entitlement, for example, includes being able to visit public areas for recreational purposes, but it is also connected with a duty of taking care of the environment.¹⁵³ Another essential principle is sustainable development, which includes for instance the precautionary principle, the principle of inter- and intragenerational equity, the polluter pays principle and the principle of public participation in environmental management.¹⁵⁴ Sustainable development is defined as “development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems”.¹⁵⁵

4.1.3 Project Report and Environmental Impact Assessment License¹⁵⁶

Before undertaking certain activities, proponents are required to submit a project report to NEMA.¹⁵⁷ This instrument is part of a procedure intended to ensure that NEMA has a sufficient decision-basis when assessing whether to grant an environmental impact assessment license (hereinafter ‘EIA-license’).¹⁵⁸ The purpose of this procedure is to ensure sustainable development through, for example, predicting possible environmental impacts of proposed activities, evaluating the significance of these impacts and identifying suitable mitigation measures.¹⁵⁹

The Second Schedule of EMCA contains a broad specification of activities that require the submission of a project report.¹⁶⁰ The Second Schedule, sec. 1, contains a general requirement relating to “an activity out of character with its surrounding”.¹⁶¹ The Second Schedule also contains more specified categories, for example, urban development, agriculture, mining,

¹⁵³ EMCA, sec. 3 (1-2). This duty does not in itself seem to be connected to any sanction, see EMCA, Part XIII. It might however be possible to enforce this duty through court proceedings under EMCA, sec. 3(3)-(5), but that is outside the limitation of this essay. Angwenyi mentions that this duty for example includes refraining from activities which are harmful to the environment, for example by performing proper waste disposal, and to monitor individuals and agencies performance of their duties, Okidi et al, p. 160.

¹⁵⁴ EMCA, sec. 3, and Okidi et al, p. 299. There seems to be consensus among Kenyan lawyers that the principles of sustainable development in EMCA, sec. 3, guide not only the High-Court, but also other agencies who implement EMCA. See EMCA, sec. 2, and Okidi et al, p. 160-165, for definitions and explanations of these principles. As mentioned above, it is now clear also from the Constitution that the principle of sustainable development is binding upon anyone who applies any Kenyan legislations, Constitution, art. 4(2) and 10(2).

¹⁵⁵ EMCA, sec. 2. See EMCA, sec. 2, for definitions of the other principles of sustainable development.

¹⁵⁶ In this subchapter I describe the licensing procedure as I understand it from EMCA, the EIA Regulation and the EIA Guideline. In Okidi et al, p. 166-168, this procedure is described somewhat different. Since only a general reference is made to the EIA Regulation, I am however not able to determine exactly how the description in the book relates to the words of the legislations. I should however point out that I find some of the details of this procedure unclear in the legal texts and that it is possible that I have misunderstood aspects of this procedure. For example, EMCA, sec. 60 and 62-64, refers to evaluation and review report. Evaluation and review report are not further defined in EMCA and these reports are not mentioned in the EIA Regulation or EIA Guideline. The EIA Regulation and EIA Guideline only mention project reports. When reading the legal texts together, I interpret them as that evaluation and review report is synonymous to, or part of, a project report. I therefore only refer to project report in the text. I have not been able to find any preparatory legislative materials to identify which activities this procedure aims at regulating.

¹⁵⁷ EIA Guideline, p. 2 and 6. See EIA Guideline, p. 4, for a schematic overview of the procedure. It should be noted that tourist activity organizers who were undertaking marine tourist activities before EMCA entered into force in January 2000 were not required to submit project reports.

¹⁵⁸ EIA Guideline, p. 2 and 6, and Okidi et al, p. 166.

¹⁵⁹ EIA Guideline, p. 2 and 6. Okidi et al, p. 166-167. Principles underlying this procedure include for example the precautionary principle, the polluter-pays principle and the principle of intra-generational and inter-generational equality, EIA Guideline, p. 6.

¹⁶⁰ EMCA, sec. 58(1) and Second Schedule, EIA Guideline, p. 2, and Okidi et al, p. 301.

¹⁶¹ EMCA, Second Schedule, sec. 1. I find it unclear whether the Second Schedule, sec. 1, applies in addition to other sections of the Second Schedule, or if sec. 1 and other sections are to be applied separately. The description of the activities in the Second Schedule in Okidi et al, p. 150 and 301, gives the impression that the sections can be applied separately.

waste disposal, processing and manufacturing industries.¹⁶² A category in the Second Schedule is also “(n)atural conservation areas”, which includes “commercial exploitation of natural fauna and flora”.¹⁶³ There is no definition of commercial exploitation in EMCA or the regulations under this act. In the Concise Oxford Dictionary, commercial is defined as “having profit as a primary aim rather than artistic etc. value” and exploit is defined as “make use of (a resource etc.); derive benefit from”.¹⁶⁴

According to the Environment Impact Assessment Guidelines and Administrative Procedures¹⁶⁵ (hereinafter ‘EIA Guideline’), it is the significance of a project’s impacts that is decisive on whether or not it requires the submission of a project report.¹⁶⁶ Among the factors that are relevant to consider when determining the significance are: the affected area’s sensitivity; “the possibility of having individually insignificant but cumulatively significant impacts; whether the proposed activity affects protected areas, endangered or threatened species and habitats”.¹⁶⁷ The EIA Guideline also mentions that a “hybrid of approaches”, for example including lists and thresholds, are used to determine whether a project report is required.¹⁶⁸

If a project report is required, this shall be submitted to NEMA in the form prescribed in the Environmental (Impact citation. Assessment and Audit) Regulations, 2003 (hereinafter ‘EIA Regulation’).¹⁶⁹ It shall include a description of the proposed project, for example, its location, possible environmental impacts and measures that will be taken to mitigate these.¹⁷⁰ Special consideration should be taken to certain factors, such as the effects on fragile ecosystems, biodiversity, oceans and wetlands.¹⁷¹ When receiving a complete project report, NEMA communicates this to different bodies, for example relevant lead agencies.¹⁷² These are thus given opportunity to give comments on the proposed activity.¹⁷³

If NEMA finds that the proposed activity is not likely to have any significant negative impact on the environment, or that the mitigation measures provided for in the project report are sufficient, an EIA-license may be issued.¹⁷⁴ In the EIA-license, NEMA has possibility to include such conditions that it finds suitable and necessary to ensure sustainable development.¹⁷⁵ If the proponent does not hear anything from NEMA within nine months

¹⁶² EMCA, Second Schedule.

¹⁶³ EMCA, Second Schedule, sec. 12.

¹⁶⁴ Thompson, p. 265 and 475.

¹⁶⁵ Republic of Kenya, National Environmental Management Authority, Draft, Environmental Management and Coordination Act (No 8 of 1999) - Environment Impact Assessment Guidelines and Administrative Procedures, November 2002.

¹⁶⁶ EIA Guideline, p. 7.

¹⁶⁷ EIA Guideline, p. 7.

¹⁶⁸ EIA Guideline, p. 7. See EIA Guideline, p. 7, for more information about the screening process.

¹⁶⁹ See EMCA, sec. 58(1). See EIA Regulation, sec. 6-7, First Schedule, Form 1, and Second Schedule and EIA Guideline, p. 8 for further details on the contents in a project report. Unfortunately I have not been able to identify the First Schedule of the EIA Regulation. It would have been interesting to see this to get a better picture of what is included in the application form.

¹⁷⁰ EIA Regulation, sec. 7(1), and EIA Guideline, p. 8. It can be noted that most of the prescribed contents in the project report is related to larger development activities, such as building.

¹⁷¹ EIA Regulation, sec. 7(2) and Second Schedule.

¹⁷² EMCA, sec. 60, and EIA Regulation, sec. 9. See EIA Regulation, sec. 2, for definition of lead agency.

¹⁷³ EIA Regulation, sec. 9.

¹⁷⁴ EIA Regulation, sec. 10(2) and First Schedule, Form 3, and EIA Guideline, p. 3. Unfortunately I have not been able to find the First Schedule. It would have been interesting to see this to get a better picture of what is included in the form for the license.

¹⁷⁵ EMCA, sec. 63, EIA Regulation, sec. 10(2), and EIA Guideline, p. 4 and 9. As mentioned above EMCA, sec. 63, refers to review or evaluation report, which I interpret as synonymous to, or part of, a project report. See EIA Guideline, p. 4, for an overview of the procedure, where it is clear that conditions can be included in the EIA-license at this stage.

from the submission of a project report to NEMA, he can start the activity without an EIA-license.¹⁷⁶

If an activity is not conducted in adherence with an EIA-license, NEMA can suspend or cancel the EIA-license for up to twenty-four months.¹⁷⁷ This can also be done if there are major changes in the project or unforeseen environmental threats.¹⁷⁸ The activity may then not be resumed until a new EIA-license has been issued.¹⁷⁹ NEMA also has power to require the holder of an EIA-license to conduct a fresh study or submit a new report in case of major changes in the project or unforeseen environmental threats.¹⁸⁰

An offence is committed if someone starts an activity without submitting a project report when this is required under EMCA or the EIA Regulation.¹⁸¹ Furthermore, an offence is committed if someone undertakes an activity without approval from NEMA, under the EIA Regulation, or if someone does not adhere to the conditions in an EIA-license.¹⁸² The sanction for the offence prescribed in EMCA is a fine of up to 2 000 000 Kenyan Shillings (hereinafter 'KSh') and/or imprisonment for up to two years.¹⁸³ EIA Regulation, sec. 45, refers to the sanction prescribed under EMCA. This could be the sanction prescribed in EMCA, sec. 138, outlined above, or the sanction prescribed in EMCA, sec. 144. In the latter case, the sanction would be a fine of up to 350 000 KSh and/or imprisonment for up to one and a half years.¹⁸⁴ There is no specification of which sanction to apply when the same offence is prescribed in EMCA as well as the EIA Regulation, for example when undertaking an activity without submitting a project report when required.¹⁸⁵

4.1.4 Strategic Environmental Plan

The EIA Regulation requires licensing authorities, under any Kenyan law, to make sure that a strategic environmental plan, including mitigation measures, has been developed and approved by NEMA before issuing a commercial license "for any micro project activity likely to have cumulative significant negative environmental impact".¹⁸⁶ Neither EMCA nor the regulations under this act contain any definition of micro project activity or cumulative significant negative environmental impact and neither any other provision on strategic environmental plan is.¹⁸⁷

¹⁷⁶ EMCA, sec. 58(8-9).

¹⁷⁷ EMCA, sec. 67(1), and EIA Regulation, sec. 28. NEMA, in consultation with relevant lead agency, is required to take immediate remedial action if an activity is found to be conducted in contravention with an EIA-license, EIA Regulation, sec. 40(3).

¹⁷⁸ EIA Regulation, sec. 28(2).

¹⁷⁹ EMCA, sec. 67(2).

¹⁸⁰ EMCA, sec. 64.

¹⁸¹ EMCA, sec. 58, 138, and EIA Regulation, sec. 7-8 and 45.

¹⁸² EIA Regulation, sec. 45(1) and (2)(d).

¹⁸³ EMCA, sec. 138.

¹⁸⁴ EMCA, sec. 144.

¹⁸⁵ See EIA Regulation, sec. 45(2), and EMCA, sec. 138 and 144.

¹⁸⁶ EIA Regulation, sec. 4 (3).

¹⁸⁷ See EIA Regulation, sec. 42-43, and EIA Guideline, p. 23-26, on strategic environmental assessment. It is possible that it is this is what EIA Regulation, sec 4(3), refers to, since there are no other provisions on strategic environmental plan. The EIA Guideline, p. 2, refers to EMCA, sec. 37-41, on the requirement of performing a strategic environmental assessment, but this contains provisions on the national environmental action plan, which does not seem to be what EIA Regulation, sec 4(3), refers to.

4.1.5 Offences Relating to Pollution

EMCA and the regulations under this act contain different provisions prescribing offences relating to pollution. Since these provisions appear to have similar content, three examples of offences are described beneath.¹⁸⁸

An offence is committed if someone disposes waste in a public place, for example a recreational area, otherwise than in designated waste receptacles.¹⁸⁹ The sanction is a fine of up to 350 000 KSh and/or imprisonment for up to one and a half year.¹⁹⁰ An offence is also committed if someone discharges waste in a manner which causes pollution to the environment.¹⁹¹ The sanction is a fine of up to 1 000 000 KSh and/or imprisonment for up to two years.¹⁹² Waste is defined as any matter discharged in a manner likely to cause a change in the environment.¹⁹³ The term pollution includes “any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting or depositing wastes so as to [...] cause a condition which is hazardous or potentially hazardous to [...] animals, birds, wildlife, fish or aquatic life, or to plants”.¹⁹⁴

An offence is also committed if someone discharges any hazardous substance or oil, for example diesel or fuel oil, into any water or other part of the environment contrary to EMCA or the regulations under this act.¹⁹⁵ Hazardous substance includes, for example, waste likely to be harmful to the environment and discharge includes emptying, escaping, spilling, leaking and disposing.¹⁹⁶ The sanction is a fine of up to 350 000 KSh and/or imprisonment for up to one and a half years.¹⁹⁷ The provision codifying this offence also prescribes other requirements and sanctions. In addition to fine or imprisonment, the convicted person has to pay the costs of cleaning up the polluted environment.¹⁹⁸ The owner or operator of a motor vehicle or vessel from where the discharge derives also has to take immediate measures to

¹⁸⁸ There are many similar offences relating to pollution prescribed in EMCA and the regulations under this act with different sanctions. I find the difference between some of these offences unclear, at least in relation to marine tourist activities. Since I do not go into detail on how to handle conflicting provisions under Kenyan law in this essay, I refer to the offences I find most relevant in the text. There are similar offences to those prescribed in EMCA, sec. 93(1), and Environmental Management and Co-ordination (Prevention of Pollution in Coastal Zone and other Segments of the Environment) Regulations, 2003 (hereinafter ‘Pollution Prevention Regulation’), sec. 3(1) and 9, prescribed in EMCA, sec. 55 (5) and 142. Water Quality Regulation, sec. 24 and 27, prescribing an offence for discharging pollutants into water meant for any use, for example wildlife. I find it unclear whether this applies to marine waters.

¹⁸⁹ Environmental Management and Co-ordination (Waste Management Regulations), 2006 (hereinafter ‘Waste Management Regulation’), sec. 4(1) and 42.

¹⁹⁰ EMCA, sec. 144, and Waste Management Regulation, sec. 42.

¹⁹¹ EMCA, sec. 87(1). See EMCA, sec. 2, for definitions of pollution and environment.

¹⁹² EMCA, sec. 87(6).

¹⁹³ EMCA, sec. 2.

¹⁹⁴ EMCA, sec. 2. Okidi is critical against the definition of pollution, since this requires alteration of the environment, which means that the pollution is dealt with afterwards, instead of at the preventive level. He compares this with the definition in UNCLOS, art.1(4), which places more emphasis on the action itself. See Okidi et al, p. 455-456.

¹⁹⁵ EMCA, sec. 93(1), and Pollution Prevention Regulation, sec. 3(1) and 9. The Pollution Prevention Regulation prescribes how to manage, for example, waste and oil at ships. The requirements include, for example, keeping an oil record book in accordance with the Merchant Shipping Act, having a certificate from a port waste reception facility and off-loading oil and waste at the port in Mombasa, see sec. 3 and 5-6. For clarification, it can be mentioned that the Pollution Prevention Regulation is enforced by NEMA, even though it is similar to the functions of the Kenya Maritime Authority under the Maritimes Authority Act, Okidi et al, p. 473.

¹⁹⁶ EMCA, sec. 2, and Pollution Prevention Regulation, sec. 2.

¹⁹⁷ EMCA, sec. 93(2) and 144, and Pollution Prevention Regulation, sec. 9.

¹⁹⁸ EMCA, sec. 93(3).

minimize the environmental impact, notify NEMA and follow any of its directions.¹⁹⁹ The court shall take these mitigation measures into account when handling a case relating to an offence under this provision.²⁰⁰ If the person does not take such mitigation measures, NEMA can seize the vessel or motor vehicle.²⁰¹ NEMA then has possibility to use this to meet the costs of cleaning up the polluted environment, in case the person does not take mitigation measures within reasonable time.²⁰²

4.1.6 Improvement Notice and Restoration Order

NEMA has possibility to issue an improvement notice or restoration order, for example, to ensure compliance with legal requirements in EMCA and the regulations under this act.²⁰³ An improvement notice can be issued by an environmental inspector, after consent from the Director General of NEMA, for example to require the operator or owner of a vessel, motor vehicle or other enterprise to stop any activities with deleterious environmental impacts and to take suitable measures to minimize these.²⁰⁴

NEMA can issue an environmental restoration order to one or more persons, “subject to any other provisions of [EMCA]”, in relation to any matter relating to environmental management.²⁰⁵ When using this power, NEMA shall “be guided by the principles of good environmental management in accordance with the provisions of [EMCA]”.²⁰⁶ EMCA contains a definition of good environmental practice, as practice which is in accordance with EMCA or any other relevant law.²⁰⁷ The restoration order can require a person not to undertake an activity likely to harm the environment, to restore the environment as close as possible to its state before the activity was undertaken or to pay a fee equal to the cost of restoring the environment.²⁰⁸ The restoration order should clearly specify what the person is required to do and can include mandatory conditions.²⁰⁹ For example, the person can be required to take measures to prevent or stop pollution or to remove waste from the sea.²¹⁰

An offence is committed if someone contravenes an environmental restoration order or improvement notice.²¹¹ The sanction for violating an improvement notice is a fine of up to 500 000 KSh and/or imprisonment for up to two years and the sanction for contravening an

¹⁹⁹ EMCA, sec. 93(4). If traces of oil are found in the water near a ship, NEMA is obliged to immediately perform an investigation on whether the provisions of the Pollution Prevention Regulation has been infringed, Pollution Prevention Regulation, sec. 8.

²⁰⁰ EMCA, sec. 93(7).

²⁰¹ EMCA, sec. 93(5).

²⁰² EMCA, sec. 93(6).

²⁰³ Okidi et al, p. 170-171.

²⁰⁴ EMCA, sec. 117(3)(g), and the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009 (hereinafter ‘Wetlands Regulation’), sec. 26. See EMCA, sec. 117(f), on the possibility of immediately closing an undertaking polluting the environment.

²⁰⁵ EMCA, sec. 108 and 109, and Okidi et al, p. 170. See EMCA, sec. 108-110, for details on environmental restoration orders.

²⁰⁶ EMCA, sec. 108(5). Such an order can for example be issued to anyone responsible of environmental degradation, Okidi et al, p. 170. It does however not seem necessary that the person has caused environmental degradation according to EMCA.

²⁰⁷ EMCA, sec. 2. EMCA does not contain any other provision relating to good environmental management and I therefore presume that it is synonymous to good environmental practice.

²⁰⁸ EMCA, sec. 108(2). See EMCA, sec. 108(4), for examples of what the order can include.

²⁰⁹ EMCA, sec. 108(2)-(4), 109(1)(4)-(5) and 143, and Okidi et al, p. 170. See EMCA, sec. 108(4), for examples of requirements that can be imposed. See EMCA, sec. 109(1), for specifications of what the restoration order should include.

²¹⁰ EMCA, sec. 108(4).

²¹¹ EMCA, sec. 137(h) and 143(a).

environmental restoration order is a fine of up to 500 000 KSh and/or imprisonment for up to one year.²¹²

4.1.7 Additional Orders in Relation to an Offence

The court handling a case where an offence under EMCA or the regulations under this act has been committed can issue orders, in addition to the sanctions outlined above.²¹³ It can direct any license issued under EMCA, relating to the offence, to be cancelled.²¹⁴ If the court is satisfied that an offence has been committed, it can also, whether or not someone is convicted, order that anything relating to the offence is forfeited to the state.²¹⁵ The court can also order the convicted person to restore the environment, at his own cost, to as close as possible to its state before the offence.²¹⁶

4.1.8 Supervision

EMCA and the regulations under this act contain various provisions on supervision and monitoring, of which the following seems relevant to mention. NEMA, in cooperation with lead agencies, has responsibility to monitor the performance of activities to determine their effects on the environment.²¹⁷ Monitoring can, for example, be done to investigate whether the activities are performed in adherence with legal environmental requirements.²¹⁸

Within NEMA, environmental inspectors have responsibility of supervising that activities are performed in compliance with environmental requirements in EMCA and the regulations under this act.²¹⁹ They have different powers to perform their duties, for example the following.²²⁰ An environmental inspector can enter any land in order to perform monitoring of the effects of activities carried out there.²²¹ He can enter any land, vessel or motor vehicle in order to investigate whether EMCA is complied with.²²² He can take samples of any substances that EMCA relates to.²²³ He can also require licenses and other documents, under any legislation relating to the environment, to be produced.²²⁴ Furthermore, he can seize anything believed to be related to the commission of an offence under EMCA or the regulations under this act.²²⁵ He can also, with the assistance of a police officer, arrest someone suspected of an offence under EMCA.²²⁶ Furthermore, the environmental inspector,

²¹² EMCA, sec. 137 and 143.

²¹³ EMCA, sec. 146.

²¹⁴ EMCA, sec. 146(3).

²¹⁵ EMCA, sec. 146 (1-2).

²¹⁶ EMCA, 146(4). The court also has possibility to issue an environmental restoration order, EMCA, sec 146 (5) and EMCA, sec. 111. This however only seems possible in court proceedings brought by individuals, why it seems to be outside the limitation of this essay, Okidi et al, p. 170.

²¹⁷ EMCA, sec. 69(1). See also EIA Regulation, sec. 40. Monitoring does not seem to be limited to projects that have undergone an environmental impact assessment, see EMCA, sec. 69 and EIA Regulation, sec, 40. The significance of the environmental impacts however affect the frequency of the monitoring, see EIA Guideline, p. 21. See EIA Regulation, sec. 40 and EIA Guideline, p. 21-22, for more details on monitoring.

²¹⁸ EIA Guideline, p. 21, and Okidi et al, p. 171. If a lead agency has monitored that an activity is performed in compliance with an EIA-license, a report of this should be submitted to NEMA, EIA Regulation, sec. 40-41. See EIA Regulation, sec. 41, for details on the contents of the report.

²¹⁹ EMCA, sec. 69, 109 and 117, and Okidi et al, p. 171 and 301.

²²⁰ See EMCA, sec. 117(3) and 118, for a details on the conditions for using the different powers.

²²¹ EMCA, 69(2).

²²² EMCA, sec. 117(3)(a). See also EMCA, sec. 69(2), and EIA Regulation, sec. 38 and 41(2).

²²³ EMCA, sec. 117(3)(a) and (c).

²²⁴ EMCA, sec. 117(3)(b).

²²⁵ EMCA, sec. 117(3)(e).

²²⁶ EMCA, sec. 117(3)(h).

under the directions of the Attorney-General, has possibility to prosecute a person suspected for an offence under EMCA.²²⁷

Environmental inspectors also have power to inspect whether activities are harmful to the environment and use evidence from such inspections when issuing an environmental restoration order.²²⁸

The committee PCC, within NEMA, also has a role in enforcing environmental requirements.²²⁹ It is intended to function as an environmental ombudsman, to which members of the society can make complaints relating to the state of the environment.²³⁰ It can also undertake investigations at its own incentive to inquire cases of environmental degradation.²³¹ A report of PCC's conclusions and recommendations is submitted to the National Environment Council (hereinafter 'NEC'), which in its turn can direct NEMA to take action if needed.²³²

4.2 Empirical Findings²³³

4.2.1 Project Report and Environmental Impact Assessment License

According to Officer Y, if a tourist activity organizer wants to operate marine tourist activities, such as jet-skiing and/or water-skiing, within a marine national park and reserve, the first step would be to submit a project report to NEMA.²³⁴ When assessing the project report, NEMA applies an ecosystem approach, according to Officer Y. NEMA then attempts to look at the larger picture and at the cumulative impact of tourism activities within an area, instead of only assessing the impact of single activities. In case a tourist activity organizer wants to operate for example jet-skis, NEMA would compare the number of jet-skis in the marine area with the carrying capacity of that area. If the area only has capacity to carry five jet skis, NEMA should not approve ten. He also explains that KWS, as a lead agency in relation to marine national parks and reserves, is involved to provide comments during the application procedure for an EIA-license. He does however not know if any marine tourist activities have EIA-licenses at the moment.

According to Officer Z, it has not been investigated whether a project report is required to be submitted by someone who wants to start undertaking marine tourist activities within a marine national park and reserve.

Officer X says that NEMA would only consider requiring a project report for marine tourist activities if it is advised to do so by KWS or MT. He has never seen a project report for this kind of activities. He confirms that NEMA applies an ecosystem approach when determining the environmental impact of proposed activities. He mentions that it is difficult to specify how large the environmental impact has to be in order to require the submission of a project report. Proponents of marine tourist activities are not required to submit this. Officer X also explains that 'commercially exploiting flora and fauna', in the Second Schedule of

²²⁷ EMCA, sec. 118, and Okidi et al, p. 171.

²²⁸ EMCA, sec. 109(2).

²²⁹ Okidi et al, p. 154.

²³⁰ EMCA, sec. 31(1) and 32-33, and Okidi et al, p. 154, 191 and 205.

²³¹ EMCA, sec. 31(1) and 32-33.

²³² EMCA, sec. 4-5 and 32, and Okidi et al, p. 143, 145 and 154. NEC is responsible of formulating goals, policies and priorities for environmental management, EMCA, sec. 4(1) and 5.

²³³ This subchapter is primarily based on interviews with: Officer X, NEMA, Nairobi; Officer Y, Senior Environmental Education Information & Public Participation Officer, NEMA, Mombasa; and Officer Z, Principal Officer, Coastal, Marine and Wetlands, NEMA, Nairobi. See Appendix 1 for details on all respondents.

²³⁴ I made a mistake during this interview and mentioned jet-skis, water skis and boating as examples. The answer might therefore be influenced by this, even though I asked the respondent a couple of times to make sure I did not misunderstand.

EMCA, includes activities such as taking material samples of viruses and enzymes. It does probably not include any kind of marine tourist activities.

Finally, none of the KWS officers or tourist activity organizers interviewed in Mombasa MNPR and Kisite Mpunguti MNPR mention that an EIA-license is required in order to undertake any kind of marine tourist activities. Officer E(M) is certain that tourist activity organizers are not required to submit a project report and that they do not have EIA-licenses.

4.2.2 Strategic Environmental Plan

Officer Z and Officer Y mention that a strategic environmental plan can be relevant in relation to marine tourist activities taking place within sensitive areas such as coral reefs. Officer Y explains that no strategic environmental plan has been developed for any coastal area this far. NEMA has however given advice to develop strategic environmental plans to assess the number of activities that can be take place in some coastal areas. NEMA has for example proposed development of such a plan in Diani, where many tourism activities take place.²³⁵

4.2.3 Enforcement

Officer Y explains that NEMA primarily is involved when environmental issues are cross cutting and there is no definitive lead agency. When there is a clear lead agency, NEMA does not usually interfere. It is therefore primarily KWS who is responsible of supervising marine tourist activities taking place within marine national parks and reserves. He says that, if an activity has an EIA-license, NEMA can occasionally monitor that this is conducted in compliance with the conditions in the license. If NEMA realizes that there are unforeseen impacts on the environment, an improvement notice can be issued or the conditions of the EIA-license can be varied. It is however primarily KWS which is supposed to ensure that NEMA's approvals are enforced in relation to activities within marine national parks and reserves. Officer Y also mentions that NEMA's environmental inspectors occasionally can visit areas for inspection. A problem is however lack of capacity, since there are very few environmental inspectors. The inspectors therefore tend to be more reactive and only perform inspections after complaints. He says that "the task is huge, so their impact cannot be felt soon. It takes time, because there are a lot of challenges out there."

Officer Z says that EMCA and the regulations under this act primarily regulate issues of pollution in relation to marine tourist activities. Compliance with these environmental requirements should be ensured by NEMA, through supervision and prosecution. He does however not think that this is working satisfying. The "poor surveillance and tedious prosecution procedures" result in a risk of harming the environment. Since enforcement is expensive, "adherence to the regulatory requirements is largely voluntary and non punitive".

The respondents from NEMA also mention that NEMA works through different incentives to raise awareness on environmental issues and promote environmental consideration in the tourism sector. This is done in collaboration with various stakeholders, for example KWS and tourist activity organizers. Officer Z for example mentions that tourist activity organizers were involved in a demonstration project in Mombasa MNPR under the proposed integrated coastal zone management plan. Officer Y and Officer Z think that education and awareness rising is important to ensure compliance with legal environmental requirements.

KWS officers and tourist activity organizers interviewed in Kisite Mpunguti MNPR and Mombasa MNPR mention that it is primarily KWS which is the government agency supervising the performance of marine tourist activities in these areas.

²³⁵ Diani is situated on the south coast of Kenya, between Mombasa MNPR and Kisite Mpunguti MNPR.

5 Tourist Industry Licensing Act and Tourism Act

TILA is the tourism legislation currently in force which regulates marine tourist activities. This is now in the process of being replaced by the recently assented TA. In order to illustrate the changes in progress, this chapter contains a description of TILA as well as TA. In the first two subchapters beneath, the legal investigations in relation to TILA, including the regulation under this act, and TA are presented. Focus is on describing provisions that could result in legal environmental requirements in relation to marine tourist activities and legal possibilities to enforce these. In the third subchapter, empirical findings are presented to give indications on how TILA and the regulation under this act regulate marine tourist activities in practice.

5.1 Tourist Industry Licensing Act

5.1.1 General

TILA was adopted in 1968 and has the objective of regulating the tourism sector in order to support its development and well-being.²³⁶ The kind of tourism businesses that are regulated by this act are specified in three classes.²³⁷ Relevant to mention in this context is that water sports and boat excursions (Class A) as well as local traditional boat operators and tour guides (Class C) are included.²³⁸ The regulation that has been issued under TILA is the Tourist Industry Licensing Regulations (hereinafter ‘TILR’).²³⁹

5.1.2 Tourism License

A tourism license is required to carry out the marine tourist activities specified above.²⁴⁰ Such a licence is obtained through an application to the licensing officer at MT.²⁴¹ The application shall be made in the form prescribed in TILR and include, among other things, a description of the type of tourism business the person wants to undertake.²⁴² The tourism license application shall also be supplemented by the information the licensing officer reasonably can require.²⁴³ MT has published guidelines outlining the documents that are generally required for different kinds of tourism licenses. This includes for example tour itineraries; certificate of good conduct; professional certificates; coxswain certificate; and insurance cover.²⁴⁴

During the performance of his functions under TILA, the licensing officer is to be guided by the promotion of “the well-being and development of the tourist industry as a whole”.²⁴⁵ When deciding upon a tourism license application, he has “power at his discretion to issue a licence or to refuse to issue a licence, or to vary or to refuse to vary a licence, and may in a licence impose such conditions as he thinks desirable in the interests of the tourist industry as a whole”.²⁴⁶ TILR includes a couple of specified considerations to be made by the licensing

²³⁶ TILA, preamble.

²³⁷ TILA, sec. 2 and First Schedule.

²³⁸ TILA, First Schedule.

²³⁹ Regulations can be issued to ensure better carrying out of TILA, for example to specify different forms of licenses and conditions for issuing or cancelling licences, TILA, sec. 12.

²⁴⁰ TILA, sec. 2-3 and First Schedule. See TILA, sec. 3(3), on what ‘carrying out an enterprise’ can include. A licensee may undertake all the kinds of tourism businesses that are included in the class (A-C) which he has obtained a tourism license for, TILA, First Schedule.

²⁴¹ TILA, sec. 4(1), TILR, sec. 2 and Schedule, Form 1, and MT, *Licensing in the Tourism Sector*, p. 4.

²⁴² TILA, sec. 4(1), and TILR, Schedule, Form 1.

²⁴³ TILA, sec. 4(1).

²⁴⁴ MT, *Licensing in the Tourism Sector*, p. 7, and MT, *Tourism License Requirements*, p. 2-4.

²⁴⁵ TILA, sec. 4(3).

²⁴⁶ TILA, sec. 4(2).

officer, which could be of relevance from an environmental perspective. These are that tourism licenses only should be issued for designated areas.²⁴⁷

It should also be mentioned that the Minister is empowered to give a licensing officer “directions of a general or special character as to the exercise and performance of his powers and duties under [TILA] which he may consider reasonable in the interests of the proper regulation of the tourist industry”.²⁴⁸ The licensing officer is bound to follow such directions.²⁴⁹

When a licensing officer grants a tourism license it shall be issued in the form prescribed in TILR.²⁵⁰ The conditions specified in the tourism license form concern such things as reporting change of prices, cases of injuries on tourists and disruption in a tourist’s tour itinerary.²⁵¹ The only prescribed condition that might have relevance from a perspective of environmental protection is that the tourism license has to be granted for a specified area.²⁵² However, as mentioned above, the licensing officer also seems free to impose other conditions in the tourism license which he considers desirable in the interests of the tourism industry.²⁵³

A licensed tourist activity has to be conducted in adherence with the conditions in the tourism license.²⁵⁴ The licensing officer can, at his own incentive, vary or cancel a tourism license for a good cause.²⁵⁵ Anyone who carries out a regulated tourism enterprise without a tourism license or who does not comply with its conditions, commits an offence.²⁵⁶ The sanction is a fine of up to 10 000 KSh and/or imprisonment for up to one year.²⁵⁷

5.1.3 Supervision

Licensing officers at MT, persons authorised by the Minister and police officers have powers to supervise tourism businesses compliance with TILA and TILR.²⁵⁸ They can stop and seize vessels and other vehicles in order to search for evidence of an offence.²⁵⁹ They can enter and inspect premises where a regulated tourism business is suspected to take place and, within those premises, examine or seize documents and require information from persons engaged in the enterprise.²⁶⁰ They can also, in writing, require a person to hand over documents that seem to relate to a regulated tourism business.²⁶¹

²⁴⁷ TILR, sec. 4.

²⁴⁸ TILA, sec. 7(2).

²⁴⁹ TILA, sec. 7(2). It would be interesting to know if such a direction would be valid under the new Constitution, since “sharing and devolution of power” is a governance principle to be followed, Constitution, art. 2(4) and 10(2). Jackson means that this link between the legislature and the executive is “essential for the effective administration of government services”, Jackson, p. 60.

²⁵⁰ TILR, sec. 3 - 4 and Schedule, Form 2. The license is personalized and valid one year, TILA, sec. 6(1)-(2).

²⁵¹ See TILR, Schedule, Form 2.

²⁵² TILR, sec. 4 and Schedule, Form 2.

²⁵³ See TILA, sec. 4(2).

²⁵⁴ TILA, sec. 2-3.

²⁵⁵ TILA, sec. 5(1) and 6(3). This can also be done after application by the licensee, TILA, sec. 5(1)(a). A cancelled license has to be returned to the licensing officer, TILA, sec. 6(3).

²⁵⁶ TILA, sec. 3.

²⁵⁷ TILR, sec. 3(2).

²⁵⁸ TILA, sec. 8. For details on the conditions for using the different powers, see TILA, sec. 8. See also TILA, sec. 5(1)(b).

²⁵⁹ TILA, sec. 8(1)(a).

²⁶⁰ TILA, sec. 8(1)(b)-(c) and 8(2).

²⁶¹ TILA, sec. 8(1)(d).

5.2 Tourism Act

5.2.1 General

TA was assented in September 2011.²⁶² This act will enter into force when noticed in the Gazette and repeal TILA and three other tourism related legislations.²⁶³ TA consists of a comprehensive regulatory framework on tourism with the objective of promoting “development, management, marketing and regulation of sustainable tourism and tourism-related activities and services”.²⁶⁴ It will be possible to supplement this act by regulations, for example to specify how tourism activities are to be regulated.²⁶⁵

TA will establish a new structure of institutions within the tourism sector. Most relevant to mention in this context is TRA.²⁶⁶ Examples of the functions TRA will have are to regulate tourism activities in conformity with the national tourism strategy and to develop measures for sustainable tourism.²⁶⁷

According to TA, different instruments will be developed to guide tourism development in Kenya.²⁶⁸ For example, a national tourism strategy will be developed. The objective of this strategy will be to guide the marketing, management, development and regulation of the tourism sector.²⁶⁹ Anything the Minister considers necessary to promote sustainable tourism in Kenya will be possible to include in the strategy, for example: “standards for tourism area development plans”; and “adaptation and mitigation measures to avert adverse impacts of climate change on tourism”.²⁷⁰ A Tourism Research Institute (hereinafter ‘TRI’) will, for example: determine carrying capacities, as well as conservation needs and priorities, of tourism destinations; provide information for tourism development area plans; and gather information about sustainable tourism.²⁷¹

5.2.2 Fundamental Principles

Sustainable tourism is a concept referred to in several provisions of TA.²⁷² This is defined as “tourism development that meets the needs of present visitors and hosts while protecting and enhancing opportunity for the future”.²⁷³ TA also contains a definition of ecotourism as “responsible travel to natural areas to view the flora and fauna without disturbance to the economical, ecological and cultural status of the areas”.²⁷⁴ This concept is however not further mentioned in the legislation.

²⁶² TA, p. 1.

²⁶³ See TA, sec. 1, 124, and Tenth Schedule. TA, sec. 124, refers to the Twelfth Schedule, but since this does not exist, I assume it is the legislations in the Tenth Schedule that will be repealed.

²⁶⁴ TA, preamble.

²⁶⁵ TA, sec. 2 and 122.

²⁶⁶ TA, sec. 4(1), 6 and 7(1)(k).

²⁶⁷ TA, sec. 7. See the section for a full outline of the TRA’s functions.

²⁶⁸ See for example TA, sec. 3, 51-53, 61, 65 and 104.

²⁶⁹ TA, sec. 2-3 and First Schedule.

²⁷⁰ TA, sec. 3(2). See the section 3 for further details on the National Tourism Strategy.

²⁷¹ TA, sec. 51-53. KWS would probably be included as lead agencies in relation to marine tourist activities within marine national parks and reserves, see definition of lead agency in TA, sec. 2.

²⁷² See for example TA, preamble and sec. 3, 7, 53 and 106.

²⁷³ TA, sec. 2. A host is a resident or a member of the local community at a tourist destination and a visitor is a “person travelling to a place outside his or her usual abode for not more than one consecutive year for leisure, business or other purposes, not being a work-related activity remunerating from the place visited”, TA, sec. 2.

²⁷⁴ TA, sec. 2.

5.2.3 Tourism License

The kind of marine tourist activities that require a tourism license under TILA, will also require a tourism license under TA.²⁷⁵ An application for such a license will be made to TRA and, when assessing a tourism license application, TRA will have to consider the following:

- “(a) the standard for the tourism area development plan as prescribed by the Minister under section 3(2)(b);
- (b) the protection of fragile environmental resources, ecosystems and habitats as provided for by the ministry for the time being responsible for matters relating to the environment;
- (c) an environmental impact assessment licence issued under Part VI of the Environmental Management and Co-ordination Act, 1999 No.8 of 1999;
- (d) any representations received from members of the public; and
- (e) a recommendation or approval from any other relevant authority as may be necessary.”²⁷⁶

TRA will also be bound by the national tourism strategy when performing its functions.²⁷⁷ Furthermore, it will be possible to specify conditions for granting tourism licenses in regulations under TA.²⁷⁸ When issuing a tourism license, it will be possible for TRA to include such conditions that it considers necessary.²⁷⁹

If a licensee is suspected of having committed an offence under TA, has contravened a provision of TA, or is subject to an allegation of misconduct, it will be possible for TRA to suspend his tourism license.²⁸⁰ If a licensee is convicted of having committed an offence under TA or no longer is qualified for the tourism license, TRA will have to cancel the licence.²⁸¹

If a person fails to comply with the provisions of TA or the conditions of a tourism license, he will commit an offence.²⁸² The sanction will be a fine of up to 100 000 KSh and/or imprisonment for up to one and a half years.²⁸³

5.2.4 Offence Relating to Pollution

An offence will be committed under TA if someone, against the provisions of TA or any other law, discharges “any dangerous materials, substances or oil into a designated tourism development area” or pollutes “wildlife habitats and ecosystems, or discharge[s] any pollutant detrimental to the environment”.²⁸⁴ The sanction will be a fine of up to 500 000 KSh and/or imprisonment for up to three years.²⁸⁵ Furthermore, it will be possible for the court to order a convicted person to “clean up the polluted habitats and ecosystems”, mitigate “effects of pollution to the satisfaction of” TRA and/or finance the costs for such measures.²⁸⁶ TA does not contain any further specifications relating to this provision.

²⁷⁵ TA, sec. 2, 98(1)-(4) and Ninth Schedule. Specifications on the application procedure can be prescribed in regulations, TA, sec. 98(2)-(3) and 122. Class C includes boat excursions and water sports and Class E includes local traditional boat operators and tour leaders, TA, sec. 2, 98 and Ninth Schedule.

²⁷⁶ TA, sec. 98(5). It seems like the Minister is only responsible for developing standards for the tourism area development plan, specifying what this should include. It would have been interesting to know by whom and for which areas these plans will be developed. In relation to the requirement of considering an EIA-license, compare with EIA Regulation, sec. 4(2).

²⁷⁷ TA, sec. 3(4) and 7(1)(b). All relevant public bodies will be bound by this strategy when performing their legal functions, TA, sec. 3(4).

²⁷⁸ See TA, sec. 122.

²⁷⁹ TA, sec. 98(6). A license will expire on the 31st of December each year, see TA, sec. 98(7)-(8).

²⁸⁰ TA, sec. 100 and 102-103.

²⁸¹ TA, sec. 101-103.

²⁸² TA, sec. 112(1). See the section for further details.

²⁸³ TA, sec. 112(2).

²⁸⁴ TA, sec. 111(1).

²⁸⁵ TA, sec. 111(2).

²⁸⁶ TA, sec. 111(3).

5.2.5 Supervision

Authorized officers will be responsible of carrying out the provisions of TA.²⁸⁷ According to TA, such an officer will have possibility to prosecute a person for an offence under TA, under the leave of the Attorney-General.²⁸⁸ TA does not specify how tourist activity organizers compliance with TA will be supervised.

5.3 Empirical Findings²⁸⁹

5.3.1 General

According to Officer T, the tourism legislations are not strong on environmental matters at the moment, but this is something he thinks will change with the new TA. He says that the Minister has indicated that a task force will be established by December 2011 to develop regulations to implement TA.²⁹⁰ This has to be completed before TA can enter into force. At the moment, MT normally leaves environmental matters to KWS and NEMA. Issues relating to the marine environment are usually handed over to KWS.

5.3.2 Tourism License

Officer T explains that TILA ensures the well-being of the tourism industry by regulating, for example, the kind of people undertaking tourism businesses, ensuring good relationship between tourist activity organizers and ensuring tourist's well-being. Until recently, environmental considerations have not usually been made by MT when assessing tourism license applications. He refers to a guideline outlining documents required to be submitted to MT before a licensing officer considers a tourism license application (similar to the guidelines referred to under subchapter 5.1.2). He also says that no environmental considerations made by licensing officers when determining whether an area is suitable for a tourist activity.

Officer T explains that the licensing officer can include legally binding conditions in the tourism license. The specific conditions are based on the circumstances of each case and are normally related to negative demeanor of a tourist activity organizer, such as fraud, harassment and bad behavior. Environmental conditions are not included in tourism licenses. Also tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR mention that their tourism licenses do not include environmental conditions.

At a later stage of the interview, Officer T mentions that environmental considerations sometimes can be made in the licensing of tourist activities. Examples of considerations that could theoretically be made in relation to marine tourist activities, are problems with littering and driving into sensitive corals. He also mentions that the Minister has issued threats of withholding tourism licenses when there have been environmental concerns. For example, the Minister has given directions that it is not acceptable for hotels to deposit waste into the ocean and that the hotel's tourism license can be cancelled if this continues.

Officer T also explains that, even though the tourism legislations are not strong on environmental matters at the moment, MT has developed a working structure to ensure that different considerations are made in the licensing procedure. Before issuing a tourism license, the licensing officer makes sure that the applicant has submitted different kinds of documents and this includes approvals from other relevant government authorities. MT can for instance

²⁸⁷ TA, sec. 2 and 115. A Tourism Protection Service will be established under TA, which will be a specialized service of the National Police Service, TA, sec. 28. Its exact functions are not further outlined in TA.

²⁸⁷ TA, sec. 115-116.

²⁸⁸ TA, sec. 115-116.

²⁸⁹ The section is primarily based on an interview with Officer T, Regional Tourism Officer, MT. See Appendix 1 for an outline of all respondents, including KWS officers and tourist activity organizers.

²⁹⁰ Unfortunately I have not been able to find more information on how this is proceeding.

require a letter of consent from KWS before granting a tourism license for a marine tourist activity (e.g. jet-skiing) intended to take place within a marine national park and reserve. KWS then has to approve that the marine tourist activity can take place as the applicant has suggested. This is also something which is explained by Officer E(M) (see subchapter 6.2.2.2).

5.3.3 Enforcement

Officer T explains that MT regularly supervises that tourism businesses have a tourism license. In marine national parks and reserves, these controls are performed by the licensing officer in conjunction with KWS. If a tourist activity organizer is found to contravene TILA, he is prosecuted and MT withdraws his tourism license. Officer T mentions that the supervision is facilitated when tourist activity organizers are organized in associations, since these usually require their members to have a tourism license. Also KWS officers and tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR mention that MT controls that tourist activity organizers have a tourism license.

6 Wildlife (Conservation and Management) Act

In the first subchapter beneath, the legal investigation in relation to WCMA and the regulations under this act is presented. Focus is on describing provisions that could result in legal environmental requirements in relation to marine tourist activities and legal possibilities to enforce these. In the second subchapter, empirical findings are presented to give a picture of how marine tourist activities are regulated by KWS and tourist activity organizers in practice in Mombasa MNPR and Kisite Mpunguti MNPR. The empirical findings are intended to illustrate the role of environmental requirements in legal rules as well as more informal norms in the regulation of marine tourist activities and how these requirements are enforced.

6.1 Wildlife (Conservation and Management) Act

6.1.1 General

WCMA entered into force in 1976, to implement the wildlife policy in Sessional Paper No. 3 of 1975.²⁹¹ It has the purpose of governing matters related to the management, conservation and protection of Kenyan wildlife.²⁹² WCMA does not contain a definition of wildlife, why it seems uncertain exactly what this includes according to the act.²⁹³ An area of land, including marine areas, can be declared a national park or a national reserve under WCMA and Mombasa MNPR and Kisite Mpunguti MNPR are protected under this legislation.²⁹⁴ As mentioned in the introduction of this essay, a problem in relation to marine national parks and reserves is described to be that WCMA and the regulations under this act were developed for the terrestrial environment.²⁹⁵ These legislations are therefore considered vague in relation to activities taking place within marine national parks and reserves.²⁹⁶

KWS is the authority responsible for wildlife management and conservation under WCMA.²⁹⁷ Its objective is to ensure that the management and conservation of wildlife in individual areas, but also in Kenya as a whole, ensures “optimum returns in terms of cultural, aesthetic and scientific gains as well as such economic gains as are incidental to proper wildlife management and conservation and which may be secured *without prejudice* to such proper management and conservation [my italicization]”.²⁹⁸ According to the wildlife policy, economical gains are to be made from for instance tourism.²⁹⁹ The term service was chosen to mark that KWS is “to contribute to the welfare of local communities”.³⁰⁰ The functions of KWS, according to WCMA, include for example: developing policies concerning the conservation; management and use of flora and fauna; maintaining wildlife in accordance

²⁹¹ WCMA, preamble, Wildlife Policy, 2011, p. 8, and Okidi et al, p. 291. I have not been able to get a copy of the Sessional Paper. Since WCMA is considered inadequate to handle management and conservation of biodiversity and wildlife resources, it is currently undergoing a reform procedure and a new legislation has been proposed in the Wildlife Bill, 2011, Okidi et al, p. 275, 291-297 and 303-304.

²⁹² WCMA, preamble.

²⁹³ Kameri-Mbote points out that there is no definition of wildlife in WCMA and that WCMA only contains a narrow definition of animal and game, Okidi et al, p. 297. According to Situma, wildlife includes flora, Okidi et al, p. 256.

²⁹⁴ WCMA, sec. 2, 6, 8 and 18. See definitions of national park, national reserve and land in WCMA, sec. 2.

²⁹⁵ Muthiga, p. 1.

²⁹⁶ Muthiga, p. 1.

²⁹⁷ WCMA, preamble and sec. 3. KWS was established in 1990, Okidi et al, p. 291-292.

²⁹⁸ WCMA, preamble, and Okidi et al, p. 292.

²⁹⁹ Okidi et al, p. 291.

³⁰⁰ Okidi et al, p. 292.

with conservation and management goals; conducting wildlife related research; and giving education and creating public awareness on wildlife conservation.³⁰¹

KWS is also responsible of managing, controlling and maintaining marine national parks and reserves.³⁰² This is conducted by the Director, via the members, of KWS.³⁰³ Within these areas WCMA, for instance, specifies that the Director can set aside areas for nursing of vegetation or breeding of animals.³⁰⁴ Furthermore, KWS shall develop and implement management plans, including for example how to display “fauna and flora in their natural state for the promotion of tourism”.³⁰⁵

6.1.2 Requirements within National Parks and Reserves

WCMA does not contain any provisions relating specifically to marine national parks and reserves. Legal rules relating to these areas are instead found in the general provisions on national parks and reserves.³⁰⁶ Furthermore, the provisions in WCMA mainly refer to national parks. The main rule is however that the provisions of WCMA described in this subchapter apply to national reserves, in the same manner as to national parks.³⁰⁷ Since it has not been possible to identify any modifications in relation to Mpunguti Marine National Reserve or Mombasa Marine National Reserve, the presumption in this essay is that the provisions in WCMA apply to these areas in the same manner as to national parks.³⁰⁸

WCMA contains a provision outlining behaviours which are generally prohibited within national parks and reserves.³⁰⁹ An offence is committed if someone unauthorised:

“(a) enters or resides in a National Park [...];

³⁰¹ WCMA, sec. 3A. It is generally considered important to involve local stakeholders in the management of the marine environment, for example public authorities, private companies and local communities. See for example Christiernsson, p. 55-1 and 63, Ikiara & Okech, p. 3, Kameri-Mbote & Cullet, p. 1-3, IUCN Eastern Africa Programme, p. 20, Okidi et al, p. 126 and 303, Muthiga, p. 5-6 and Wildlife Policy, 2011, p. 9, 19, 27-28 and 32. A problem in relation to WCMA seems to be that it is developed with a centralized (top-down) approach to environmental management, which does not reflect the more decentralized (bottom-up) approach which KWS in practice appears to be moving towards.

³⁰² WCMA, sec. 2, 3A, 9(1) and 18(3).

³⁰³ WCMA, sec. 9(1) and 18(3). The Director of KWS is KWS’s Head and Chief Executive, WCMA, sec. 3C. Wildlife Advisory Councils can be established for certain areas to inform KWS of suitable measures to handle problems facing wildlife management and conservation, WCMA, sec. 5B.

³⁰⁴ WCMA, sec. 9(2). There is no offence prescribed for entering such areas, why I have chosen not to mention this as an environmental requirement in the text. According to Situma, areas within national parks and reserves can be declared protection areas under WCMA, sec. 15, to regulate activities in order to protect the environment, Okidi et al, p. 256. According to my understanding of WCMA, sec. 15, it is only areas adjacent to (outside) the national parks and reserves, and activities within those adjacent areas, which can be regulated through such declaration, why WCMA, sec. 15, is not mentioned in the text.

³⁰⁵ WCMA, sec. 3A(d). It has not been possible for me to see the management plans for Kisite Mpunguti MNPR and Mombasa MNPR. According to Wildlife Policy, 2011, p. 11-12, there have been general challenges in implementing management plans. According to Tuda and Lermakat (personal communication), the management plans in place are too old and new management plans are under development for Mombasa MNPR and Kisite Mpunguti MNPR.

³⁰⁶ See for example WCMA, Part III and sec. 2.

³⁰⁷ WCMA, sec. 18(2-3). WCMA, Part III, contains sec. 6 – 20.

³⁰⁸ Modifications on their applicability can be provided in the agreement required to establish a national reserve or by the Minister responsible of wildlife, WCMA, sec. 18(2-3). I have tried to search for relevant Gazette notices at the database National Council for Law Reporting, Kenya Law Reports (<http://kenyalaw.org>), but not been able to identify any relevant.

³⁰⁹ WCMA, sec. 13(3). It should be mentioned that kiting could be prohibited within marine national parks and reserves according to WCMA, sec. 2 and 12, and the Wildlife (Conservation and Management) (Recognized Airfields) Regulations, since ‘airplane’ includes any type of kite and since there are no recognized air fields within marine national parks and reserves. Seen together with the marginal note of WCMA, sec. 12, this provision however seems to relate to kites flying on higher altitude, not the type of kiting performed within marine national parks and reserves. This requirement is therefore not mentioned in the text.

- (b) cuts, injures or sets fire to any vegetation in a National Park, [...]
- (d) willfully damages any object of geological, prehistoric, archaeological, historic, marine or other scientific interest within a National Park, or knowingly removes or attempts to remove any such object or any portion thereof from a National Park;
- (e) is, without lawful excuse in possession of any animal or trophy within or without a National Park; [...]
- (g) deliberately disturbs or stampedes any animal in a National Park [...]³¹⁰

The sanction is a fine of up to 10 000 KSh and/or imprisonment for up to one year.³¹¹ If an offence under WCMA relates to more than one animal, the fine can be increased.³¹² The criminalized behaviours can be authorised by the regulations under WCMA or by a written permission from a KWS officer, provided that the behaviour is conducted in accordance with any conditions in such a written permission.³¹³

According to WCMA, animal includes animal's eggs and young, but not domestic animals.³¹⁴ WCMA does not contain any definition of vegetation, but there is a definition of vegetable as "any form of vegetable matter, alive or dead".³¹⁵ According to the Concise Oxford Dictionary, vegetation is defined as "plants collectively, plant life".³¹⁶ Furthermore, there are no definitions of for example disturb, injure or stampede in WCMA. Relevant definitions used in the Concise Oxford Dictionary are the following. Injure is defined as "do physical harm or damage to; hurt", disturb is defined as "break the rest, calm or quiet of; interrupt" and stampede is defined as "cause to act hurriedly or unreasonably".³¹⁷

Regulations can be issued under WCMA in relation to specific national parks and reserves or in relation to these areas in general.³¹⁸ As mentioned above, specific regulations have not been adopted for marine national parks and reserves. The regulation in place relates to Kenyan national parks and reserves in general, namely the Wildlife (Conservation and Management) (National Parks) Regulations (hereinafter 'WCMR').³¹⁹ According to the definition of national park in WCMR, its provisions referring to national park apply to marine national parks and reserves, "where specified", "unless the context otherwise requires".³²⁰ Reference is also made to the definition of national park in WCMA, where this term includes marine national parks.³²¹

It is only in relation to the prescription of entry fees that WCMR specifically refers to marine national parks and reserves.³²² Everyone, as a main rule, has to pay a prescribed fee to enter a national park and reserve.³²³ Exceptions can be made by, for example, KWS officers

³¹⁰ WCMA, sec. 13(3). According to the Concise Oxford Dictionary, possession is defined as "the act or state of actual holding or occupancy" or "power or control similar to lawful ownership but which may exist separately from it", Thompson, p. 1067 and 1603. It should be noted that the Fisheries (General) Regulations prescribe offences for collecting corals, alive or dead (including the calcareous skeleton), and for collecting shells without a shell's collectors license, Fisheries (General) Regulations, sec. 2, 19 and 46.

³¹¹ WCMA, sec. 13(3).

³¹² See WCMA, sec. 56(2).

³¹³ WCMA, sec. 13(4) and 16(1)(c).

³¹⁴ WCMA, sec. 2.

³¹⁵ WCMA, sec. 2.

³¹⁶ Thompson, p. 1553.

³¹⁷ Thompson, p. 394, 700 and 1356. When stampede is used as a noun it is for example defined as "a sudden flight and scattering of a number of horses, cattle, etc.", Thompson, p. 1356.

³¹⁸ See WCMA, sec. 18(2-3), 16 and 67, for details. Regulations can, for example, prescribe opening hours, conditions for allowing or refusing permission to enter, conditions for authorizations, and regulations for traffic and carriage of passengers.

³¹⁹ These regulations are issued under WCMA, sec. 16.

³²⁰ WCMR, sec. 2.

³²¹ See WCMR, sec. 2, and WCMA, sec. 2 and 6.

³²² WCMR, sec. 3(1-1B), and WCMR, 2010. Compare WCMR, 2010, with WCMR, Schedule.

³²³ See WCMR, sec. 2-3(1-1B) and Schedule, and WCMR, 2010, sec. 2-3 and 9-11.

with the specified rank.³²⁴ The specific entry fees are currently prescribed in the Wildlife (Conservation and Management) (National Parks) Regulations, 2010 (hereinafter ‘WCMR, 2010’), which partly modifies WCMR.³²⁵ Daily and annual fees are prescribed for any person who wants to enter a marine national park and reserve.³²⁶ Furthermore, single and annual fees are prescribed for vehicles, boats and vessels.³²⁷

According to WCMR, it is prohibited to “(a) discard any refuse or litter; or (b) in any other way disfigure the National Park or part thereof; or (c) unnecessary cause or make any noise or do any act which is likely to disturb or annoy any other *person* [my italicization]” within a national park.³²⁸ Exceptions can be made by, for example, the Director or an officer of KWS.³²⁹ Furthermore, the following behaviours are, as a main rule, prohibited within national parks, according to WCMR (exceptions can be made by the Director or an authorized officer of KWS):

- “(a) enter or leave any National Park elsewhere than at a place approved by the Director as an entrance or exit; or
- (b) be within any National Park unless he is in a stopping place, or unless he is in a motor vehicle designed to travel on not less than four wheels; or
- (c) be within any National Park or any portion thereof between the hours of 7.15 p.m. and 6 a.m.; or
- (d) drive, or cause to be driven, a motor vehicle at a speed greater than 40 km. an hour; or
- (e) cause a vehicle to be stopped on any road in such a manner as to obstruct or impede the passage of any other vehicles; or
- (f) drive or cause to be driven, a motor vehicle than on open and maintained roads; or
- (g) alight from or get out of, or stand up in/on a motor vehicle, except in a stopping place; or
- (h) display any notice or advertisement within a National Park, or on any boundary of a National Park; or
- (i) collect any money from members of the public, or sell any goods, or offer any goods for sale, or purchase any goods or carry on any trade, within a National Park.”³³⁰

It should also be mentioned that, for example, the Director or an officer of KWS can close areas within a national park from the public, from certain classes of people or from certain kinds of traffic, according to WCMR.³³¹ This can be done for any reason, for example to protect flora and fauna, and for such periods which are considered suitable.³³²

An offence is committed if someone contravenes a provision of WCMR or a directive of the Director or an officer of KWS under WCMR.³³³ The sanction is a fine of up to 2 000 KSh and/or imprisonment for up to two months.³³⁴

³²⁴ See WCMR, sec. 3 (1).

³²⁵ WCMR, 2010, Parts II-III.

³²⁶ See WCMR, sec. 2-3, and WCMR, 2010, sec. 2, 5, 8 and 11. It is not totally clear from WCMR, 2010, if personal entry fees are prescribed for marine national reserves and which the amounts would be, see WCMA, sec. 3 and 11. Since WCMR prescribes entry fees for marine national reserves it however seems likely that payment of entry fee is also required to enter marine national reserves under WCMR, 2010.

³²⁷ WCMR, 2010, sec. 9 and 10. According to the Concise Oxford Dictionary boat is defined as “a small vessel propelled on water by an engine, oars or sails”, vehicle is defined as “any conveyance for transporting people, goods etc., esp. on land” and vessel is defined as “ship or boat, esp. a large one”, Thompson, p. 142, 1559 and 1553. It can be noted that WCMR, 2010, only mentions marine national reserves in relation to annual fees for vehicles, boats and airplanes, WCMR, 2010, sec. 9 (e and f) and sec. 10. It is therefore not clear which the daily fees are.

³²⁸ WCMR, sec. 6.

³²⁹ WCMR, sec. 6.

³³⁰ WCMR, sec. 5. See WCMR, sec. 2, for definition of stopping place and road.

³³¹ WCMR, sec. 4. It can be done by placing some type of sign, notice or mark indicating that the area is closed, WCMR, sec. 4(2).

³³² WCMR, sec. 4(1).

³³³ WCMR, sec. 9.

³³⁴ WCMR, sec. 9.

6.1.3 Requirements in Relation to Trophies

WCMA contains requirements in relation to animals recognized as trophies or government trophies which apply whether inside or outside a national park and/or reserve.³³⁵ A trophy is defined as “any protected animal, (...) alive or dead, and any (...) durable portion whatsoever of that animal or bird or fish or other aquatic life”.³³⁶ The protected animals under WCMA include the marine animals: Dugong; Green Marine Turtle; and Hawksbill Turtle.³³⁷ Furthermore, under specified circumstances animals are government trophies and thereby owned by the state.³³⁸ This as, a main rule, includes a trophy without an owner, a protected animal accidentally killed or dead and also “any animal or trophy in respect of which a breach of any of the provisions of [WCMA] or the rules has been committed”.³³⁹

If someone obtains possession of a government trophy, he must report this to an authorized officer, for example a KWS officer or a police officer, and hand it over to him.³⁴⁰ An offence is committed if this is not reported or if the person unlawfully possesses a government trophy.³⁴¹ The sanction is a fine of up to 10 000 KSh and/or imprisonment for up to a year.³⁴² Furthermore, a forfeiture offence is, as a main rule, committed if someone possesses any trophy without having a certificate of ownership.³⁴³ The sanction is a fine of up to 10 000 KSh and/or imprisonment for up to three years.³⁴⁴ If an offence under WCMA relates to more than one animal the fine can be increased.³⁴⁵

6.1.4 Cancellation and Forfeiture

If someone is convicted of an offence under WCMA, or the regulations under this act, any authorisation, permit or permission issued under WCMA or the regulations under this act is as a main rule cancelled.³⁴⁶ Furthermore, the person cannot, as a main rule, get a new permit before a period of three years has passed from the conviction.³⁴⁷

³³⁵ See WCMA, sec. 2, for definition of animal. It should also be mentioned that WCMA, Part IV, contains provisions relating to hunting. Since some of the provisions in the chapter include formulations such as “in any circumstances whatsoever” and “for any purpose whatsoever”, those might also be applicable under other circumstances than hunting. Relevant to mention in this essay is that a forfeiture offence is, as a main rule, committed if a mechanically propelled vessel is used in a way which stampedes, drives or unduly disturbs a protected animal, WCMA, sec. 2, 33(a), 35(3 and 6). Seen in the context of the chapter in WCMA, it however seems most likely that the offences only are applicable in relation to hunting and they are therefore not described in the text.

³³⁶ WCMA, sec. 2. The Minister responsible of wildlife can make exceptions from WCMA, Part V, to any classes of trophies, WCMA, sec. 46.

³³⁷ WCMA, sec. 2 and Third Schedule.

³³⁸ WCMA, sec. 39.

³³⁹ WCMA, sec. 39. Exception is made for if something else is provided in WCMA.

³⁴⁰ WCMA, sec. 39(2) and 2.

³⁴¹ WCMA, sec. 39(3). A dealer’s license is required to be a trophy dealer. Acting a dealer without having the required license is also criminalized, see WCMA, sec. 2 and 43, and Wildlife (Conservation and Management) Regulations, sec. 10 - 14 and First Schedule, Form 9-11. Since dealing is not an ordinary part of a tourist activity organizers business, the specific rules relating to dealers are not described.

³⁴² WCMA, sec. 39(3).

³⁴³ WCMA, sec. 2, 42(1) and 42(3). An exception is if something else is provided in WCMA, WCMA, sec. 42(2). See WCMA, sec. 42(3), and Wildlife (Conservation and Management) Regulations, sec. 9 and First Schedule, Form 8, on certificate of ownership.

³⁴⁴ WCMA, sec. 42(1)(b). The sanction is higher if someone has a dealer’s license, WCMA, sec. 42(1)(a). It can also be mentioned that an offence is, as a main rule, committed if someone transfers the ownership of a trophy without holding a certificate of ownership and handing that certificate over to the receiver, WCMA, sec. 44.

³⁴⁵ See WCMA, sec. 56(2).

³⁴⁶ WCMA, sec. 51.

³⁴⁷ WCMA, sec. 53. Exception is made if it is expressly provided otherwise in WCMA. Furthermore, the Minister can, in specific cases, restrict the period or decide that the section shall not apply, WCMA, sec. 53. It can be noted that the section only refers to permits and licenses, not other kind of permissions.

If someone is convicted of a forfeiture offence, anything relating to the performance of the offence is generally forfeited to the state.³⁴⁸ Seized and detained things, other than government trophies, can also be forfeited to the state if a person charged with a forfeiture offence does not appear to answer within a period of three months.³⁴⁹ Furthermore, any seized or detained things, except trophies, are forfeited to the government after three months, unless someone is charged of a forfeiture offence in relation to the thing.³⁵⁰

6.1.5 Suspension

According to WCMR, a person can be suspended from a national park if the Director or an officer of KWS believes that the presence of the person “would be detrimental to the proper management and control of the (n)ational (p)ark”.³⁵¹ The person can then be refused to enter or stay in the national park.³⁵²

6.1.6 Supervision and Prosecution

As mentioned above, KWS has mandate to control marine national parks and reserves.³⁵³ Authorized officers, including for example KWS officers, have powers to ensure that requirements in WCMA and the regulations under this act are complied with.³⁵⁴ If a person is doing something for which a permit is required under WCMA, or the regulations under this act, an authorized officer can stop and detain him and demand him to show the required document.³⁵⁵ If the person is not able to do so, the officer can arrest him without warrant.³⁵⁶

When an authorized officer suspects someone of having committed an offence under WCMA or the regulations under this act he has powers to investigate the suspected act.³⁵⁷ He can require the person to bring objects for inspection, for example animals in his possession, any materials which seem to be connected to the offence and any documents required to be had by the person under WCMA or the regulations under this act.³⁵⁸ Furthermore, the officer has powers to enter and search, for example, vehicles and boats, and to open and search things.³⁵⁹ He can seize and detain for example materials, boats and suspected government trophies.³⁶⁰ Furthermore, the suspected person can be arrested and detained if the officer believes that there is a risk that he will not appear to answer a charge.³⁶¹ A KWS warden has possibility to perform the prosecution of a person suspected of having committed an offence under WCMA or the regulations under this legislation, under direction of the Attorney General.³⁶²

³⁴⁸ WCMA, sec. 52(1). Forfeiture offences are for example found in WCMA, sec. 35 and 42.

³⁴⁹ WCMA, sec. 52(2).

³⁵⁰ WCMA, sec. 50(2).

³⁵¹ WCMR, sec. 3(2).

³⁵² WCMR, sec. 3(2).

³⁵³ WCMA, sec. 2, 3A, 9(1) and 18(3).

³⁵⁴ WCMA, Part VI and sec. 2. See the respective provision for details on the conditions for using different powers.

³⁵⁵ WCMA, sec. 49(1).

³⁵⁶ WCMA, sec. 49(1).

³⁵⁷ See WCMA, sec. 49, for more details.

³⁵⁸ WCMA, sec. 49(2)(a).

³⁵⁹ WCMA, sec. 49(2)(b).

³⁶⁰ WCMA, sec. 49(2)(c). See WCMA, sec. 50(2-3) and 52, on treatment of seized things.

³⁶¹ WCMA, sec. 49(2)(d). See WCMA, sec. 50(1), on the treatment of arrested persons.

³⁶² See WCMA, sec. 54. See WCMA, sec. 2 and Forth Schedule, for definition of warden.

6.2 Empirical Findings

In this subchapter, the empirical findings from Mombasa MNPR and Kisite Mpunguti MNPR are presented. The first subchapter contains general information, intended to provide a background understanding of how KWS regulates marine tourist activities. In the following two subchapters, the empirical findings from Mombasa MNPR and Kisite Mpuguti MNPR are presented. First, the kind of marine tourist activities taking place within each area are described. Secondly, the environmental requirements which KWS demands tourists and tourist activity organizers to comply with during marine tourist activities are presented. Thereafter, a picture is given of how these environmental requirements are enforced. Finally, tourist activity organizers regulation of marine tourist activities through own collective norms is described.

A summary is made when many respondents have given similar responses. When one or two respondents have given unique or more elaborate answers, reference is made to the respondent or respondents. An indication is also made when groups of respondents (tourist activity organizers or KWS officers) have given different answers. When the term 'respondents' is used this includes tourist activity organizers and KWS officers.

6.2.1 General³⁶³

Most of the respondents mention that WCMA and the regulations under this act regulate marine tourist activities within marine national parks and reserves satisfactory. KWS officers however also mention challenges in applying these legislations in relation to marine tourist activities taking place within Mombasa MNPR and Kisite Mpunguti MNPR. Several KWS officers mention that they would prefer if there were regulations under WCMA, adjusted to handle issues in relation to marine national parks and reserves. WCMA and the regulations under this act were developed for the terrestrial environment and KWS officers mention that it can therefore be difficult to fully apply the provisions within the marine national parks and reserves.

Officer F(K) explains that WCMA and the regulations under this act sometimes result in different environmental requirements in different marine national parks and reserves, for example in relation to feeding of fish and passing the areas with boat. Officer A(M) and Officer I(K) say that issues relating to marine national parks and reserves have been left out, or not properly included, in WCMA and WCMR. These legal acts are mostly based on the terrestrial environment and unclear in relation to marine areas. Officer I(K) explains that KWS therefore has developed codes of conduct to regulate marine tourist activities within Kenyan marine national parks and reserves, which are adapted to the situation of the particular area. Through these codes of conduct, KWS attempts to ensure that the environment is protected from negative impacts. He says that most of the codes of conduct are also found in the legislations, but not clearly articulated. He does not know which exact legal provisions that each code of conduct relates to. It is only if KWS brings a case to court that they would assess this. Officer A(M) mentions that it is difficult to separate the codes of conduct from the legal rules, since most of the codes of conduct also are found in the legislations.

Also Officer E(M) explains that it is a problem that Kenyan marine national parks and reserves do not have specific regulations. WCMA and the regulations under this act do not address problems in these areas satisfactory. The environmental requirements in relation to marine tourist activities are not specific enough. It is also a problem that the regulation is not area based. Furthermore, the legislations do not provide enough guidelines on how to administer the areas. The regulation of marine tourist activities therefore depends on the

³⁶³ This subchapter is based on interviews with KWS officers and tourist activity organizers in Kisite Mpunguti MNPR and Mombasa MNPR. See Appendix 1 for details.

individual KWS wardens understanding of how a marine national park and reserve should be managed and controlled. He explains that each marine national park and reserve in Kenya has developed its own practices and codes of conduct over time. In relation to marine tourist activities, KWS is working more with codes of conduct and education, than applying WCMA and the regulations under this act.

Officer E(M) explains that the type of marine tourist activities taking place within Mombasa MNPR and the environmental requirements that these should comply with have to do with the history of the area. When Mombasa MNPR was established, there were already marine tourist activities taking place. In order to be able to establish Mombasa MNPR, KWS had to make compromises, for example by allowing hotels to have jet-skis and tourist activity organizers to feed fish. The specific environmental requirements applied by KWS are thus based on how people agreed when the marine protected area was established and these have been passed down through history. He says that in Kisite Mpunguti MNPR, KWS enforced the legislations from the day the marine national park and reserve was established.

Officer E(M) also mentions, as an example of how the history of an area affects the specific environmental requirements that are applied by KWS, that it is forbidden to feed fish in Kisite Mpunguti MNPR, but not in Mombasa MNPR. Initially, tourists were mainly going to Kisite Mpunguti MNPR for dolphin-watching. Furthermore, there are no glass-bottom-boats in Kisite Mpunguti MNPR and the reef system is deeper than in Mombasa MNPR. People therefore have to go into the water if they want to see the marine life in Kisite Mpunguti MNPR. In Mombasa MNPR, the reef system is shallow and there are glass-bottom-boats. People who cannot swim can therefore feed fish and enjoy the marine life from the boat, which has encouraged feeding of fish. He also mentions that it is not written in WCMA that it is forbidden to feed fish. Officer I(K) explains that in Kisite Mpunguti MNPR they enforce the legal prohibition against feeding fish. He thinks that a reason for this difference between Kisite Mpunguti MNPR and Mombasa MNPR is that it is easier to view the marine life in Kisite Mpunguti MNPR, since the fish are more abundant. In Mombasa MNPR, he thinks someone probably allowed feeding fish and it became a problem to stop this.

Officer E(M) also mentions that tourism as well as environmental conservation are important in a marine national park and reserve, since one feeds the other. It is not possible to conserve the marine environment without money. All marine tourist activities have environmental impact to some extent and KWS has to guard against the extent of the impacts. He mentions that KWS has mandate is to protect the environment. Tourism is important since it creates value for the environment and justifies the reason for the protection. It is also important since it supports people's livelihoods.

6.2.2 Mombasa Marine National Park and Reserve³⁶⁴

6.2.2.1 Marine Tourist Activities

Marine tourist activities that the respondents mention takes place within Mombasa MNPR are snorkeling, diving, motor-boating (including glass-bottom boats), sailing, jet-skiing, pedal boating, canoeing, reef-walking, water skiing, wind surfing and kiting.

6.2.2.2 Environmental Requirements

The specific environmental requirements (also referred to as e.g. rules, regulations, codes of conduct and do's and don'ts) that KWS applies in Mombasa MNPR to regulate environmental

³⁶⁴ This subchapter is based on interviews with the following respondents: Officer A(M), KWS; Officer B(M), Sergeant, KWS; Officer C(M), Ranger, KWS; Officer D(M), Coxswain, KWS; Officer E(M), Senior Warden, KWS; Organizer A(M); MBOA(A), consisting of two respondents; MBOA(B), consisting of three respondents (MBOA(A) and MBOA(B) are collectively referred to as 'MBOAs'); NCBOF, consisting of two respondents; and Trainer. See Appendix 1 for details.

impact from marine tourist activities are not written down. Instead, the KWS officers learn the specific environmental requirements through educating each other. The respondents however also refer to different written sources where environmental requirements are found, including the following: WCMA and WCMR; marine wildlife code on KWS's webpage and in the brochure for Mombasa MNPR (see Appendix 2), dos and don'ts on the entry ticket (see Appendix 3), posters and signboards.

Environmental requirements that the respondents mention that KWS applies in Mombasa MNPR to regulate environmental impacts from marine tourist activities are:

It is not allowed to

- stand on corals;
- harass, disturb or touch any marine life;
- pick and show up, or collect, any marine life;
- leave anything, for example litter;
- anchor at coral reefs (the boat has to be fastened to KWS's buoys, where these are placed out, or anchored in the sand);
- damage anything;
- perform certain marine tourist activities without paying entry fee; or
- perform jet-skiing during low tide or outside the jet-ski zones.

There is a requirement of paying an entry fee to visit the marine national park, and sometimes the marine national reserve, when performing certain marine tourist activities. Officer B(M) explains that payment of entry fee is only required if the person will be able to view the marine life, for example when diving, snorkeling and going with glass-bottom boat. Activities such as canoeing and jet-skiing do therefore not require payment of an entry fee. He also mentions that there are restricted areas (coral gardens) in the marine national reserve, where KWS requires payment of entry fee to view the marine life. Officer E(M) mentions that it should not be a problem for a vessel to only pass through the marine national park. Officer A(M) says that payment of entry fee is required to visit the park as well as the reserve. He also explains that there is a memorandum of understanding between KWS and the MBOAs, according to which the members of these associations do not have to pay entry fees. MBOA(A) mentions that they have to pay the same entry fee and follow the same rules of how to behave in the park and the reserve. They do not only have to pay for glass-bottom boats, but also for example for canoes. They are required to pay even when tourists only want to be transported from one place to another within the marine national park and reserve.

Jet-skis are only allowed to operate during high tide and within specified zone in the intertidal zone. The jet-skis are not allowed to go into the marine national park. Officer B(M) explains that there was a high mortality rate of turtles during a period. He says that studies showed that jet-skis killed turtles and that it might be one of the reasons for the jet-ski zones. Officer E(M) explains that the jet-ski zones were established because of conflicts that existed between different jet-ski operators, not because of environmental consideration.

There are no official speed limits in Mombasa MNPR. Officer D(M) however mentions that the boat should be slowed down when approaching snorkeling and diving sites, for example since the noise can scare away marine life.

Officer B(M) explains that KWS sometimes does not apply provisions in WCMA, which are not suited for the marine national park and reserve. He says that feeding of animals is prohibited under WCMA. In Mombasa MNPR, KWS however allows feeding of fish, after having received a study which showed that feeding of fish does not harm these. A reason for this was also that tourist activity organizers wished to continue feeding fish. Officer D(M) mentions that it is important to treat tourists well, for example by feeding fish, since that is what they have paid for. MBOA(A) says that they were in the area before KWS arrived and that they had some rules which KWS continued to apply. For example, KWS saw tourist activity organizers feeding fish and that it pleased tourists. KWS therefore chose not to enforce the prohibition against feeding fish in WCMA. Officer E(M) explains that nowhere in

WCMA or the regulations under this act can it be found that it is prohibited to feed fish. He says that KWS in Mombasa MNPR ordered a study which showed that this does not result in negative impact.

Officer E(M) explains how KWS can control the type of marine tourist activities taking place within a marine national park and reserve. KWS does not license marine tourist activities, but a letter of consent is required from KWS in order for a tourist activity organizer to receive a tourism license from MT. Furthermore, the KWS warden can deny a marine tourist activity to take place by using the power to stop activities which are prejudicial to the management of the marine national park and reserve (WCMR, sec. 3(2)). Officer E(M) says that WCMR, sec. 3(2), was intended to be used to stop ongoing activities, but that KWS uses this power indirectly. He mentions an example where tourist activity organizers had bought jet-skis and asked KWS for consent to receive a tourism license from MT. He explains that KWS then had to balance different interests. KWS had previously decided not to allow more jet-skis to be licensed in relation to Mombasa MNPR. The tourist activity organizers had however struggled to buy jet-skis and the question arose if KWS only allows hotels to use jet-skis. KWS then had to consider both what functions within a marine national park and reserve and how to get goodwill from the local community, by showing that KWS supports their income source. The KWS warden decided to give approval. Officer E(M) says that he would prefer if a regulation outlined the procedure to be followed when deciding which marine tourism activities to allow in the marine national park and reserve. It would then be easier to disallow or re-distribute the jet-skis between tourism enterprises.

6.2.2.3 Enforcement

How are Tourist Activity Organizers Informed about the Environmental Requirements?

In Mombasa MNPR, KWS collaborates with different stakeholders, including tourist activity organizers, to ensure that the environmental requirements in the area are followed. Tourist activity organizers are informed of the requirements by KWS through verbal communication, educations, meetings and workshops. KWS educates tourist activity organizers on for example the importance of the marine national park and reserve and which environmental requirements to adhere to during marine tourist activities in order to avoid harming the marine environment. As mentioned above, tourist activity organizers can also get written information about the environmental requirements from, for example, the entry ticket, posters and signboards.

Officer E(M) says that KWS does not have a formal structure of communicating the environmental requirements to tourist activity organizers. The requirements are mainly explained verbally to tourist activity organizers, for example through the MBOAs, and sometimes by a written letter.

MBOA(A) says that they are only given written information about the environmental requirements in the form of for example posters, which are not the actual legal rules. They believe that when KWS officers inform tourist activity organizers of how to behave during marine tourist activities, the KWS officers cite rules from their heads, not from the actual legal rules.

How are Tourists Informed about the Environmental Requirements?

Tourist activity organizers have a central role in informing tourists of the environmental requirements applied by KWS in Mombasa MNPR. Tourist activity organizers are educated by KWS on how to inform tourists about these. For example, before getting to the marine national park for snorkeling, the tourist activity organizer should do a debriefing about the requirements with the tourists. The tourist activity organizer should also guide the tourists on how to behave in the water.

As mentioned above, KWS also has written information about environmental requirements for example at KWS's website, in brochures, at signboards and on the entry ticket. Officer D(M) explains that KWS officers are present in Mombasa MNPR, and can sometimes inform tourists about the environmental requirements. MBOA(A) however mention that it is only the tourist activity organizers who inform tourists of the environmental requirements and that KWS officers do not normally talk to tourists.

How are Marine Tourist Activities Supervised?

KWS is the authority supervising that marine tourist activities taking place within Mombasa MNPR are conducted in adherence with the environmental requirements. KWS officers perform this supervision through daily boat patrols in the water and foot patrols on the beach. According to the KWS officers, they supervise both behaviors of tourist activity organizers and tourists. Officer D(M) explains that, during boat patrols, the KWS officers control that tourists and tourist activity organizers have paid entry fees. He also mentions that KWS officers supervise, for example, if there are shells or corals in the boats and that the captain is careful not to drive into corals. He says that KWS officers sometimes join tourist activity organizers on the boat, or go into the water where snorkeling takes place, to supervise the activities. The MBOAs say that the main focus of KWS officers is to collect entry fees and control entry fee tickets, but that they sometimes also supervise other behaviors. The MBOAs mentions that KWS officers do not normally go into the water.

Tourist activity organizers have a central role in supervising that tourists comply with the environmental requirements during marine tourist activities. Tourist activity organizers also supervise each other's behaviors during marine tourist activities (see more about this in subchapter 6.2.2.4). The MBOAs say that it is mainly tourist activity organizers who supervise how tourists are behaving during marine tourist activities, not KWS officers. Officer D(M) explains that the tourist activity organizer is the person nearest the tourist. The tourist activity organizer should therefore snorkel together with the tourists during snorkelling excursions and make sure they follow the environmental requirements. Officer B(M) explains that KWS works closely with the people of the local community, for example tourist activity organizers, to ensure environmental protection. They support KWS with supervising that the environmental requirements are complied with and can contact KWS in case of problems. Officer C(M) says that it would not be possible to effectively supervise the compliance with the environmental requirements if KWS was not working with the local community. He explains that the people of the local community are present in the field most of the time and therefore have a lot of knowledge. KWS often becomes aware of problems through a call from someone in the local community.

What Happens if a Tourist Violates the Environmental Requirements?

If a tourist violates an environmental requirement, he is informed to stop the behavior and educated about the requirement. According to the KWS officers, they normally inform tourists to stop the behavior and can also help the tourist activity organizers with educating tourists about the environmental requirements. According to the MBOAs, KWS officers sometimes tell a tourist to stop contravening the environmental requirements. KWS officers however normally go through tourist activity organizers and do not talk directly to tourists. It is therefore mainly tourist activity organizers who inform tourists that are violating the environmental requirements.

What Happens if a Tourist Activity Organizer Violates the Environmental Requirements?

If a tourist activity organizer violates the environmental requirements, the KWS officers normally start by educating him, and it can also be followed by a verbal or written warning.

KWS officers sometimes suspend the tourist activity organizer from Mombasa MNPR for a period of time. It is unusual that KWS takes tourist activity organizers to court.

MBOA(B) says that if a tourist activity organizer violates the environmental requirements, KWS will first give one or two warnings. If the behavior is repeated a third time, the tourist activity organizer might be taken to court. He could also be suspended from Mombasa MNPR. In serious cases, the tourist activity organizer can get a lifetime suspension. MBOA(A) says that if a tourist activity organizer violates the environmental requirements, he can be given warnings, but that this depends on the individual KWS officer and how the tourist activity organizer behaves towards him. They mention that KWS officers also can suspend a tourist activity organizer from Mombasa MNPR for a period of time, sometimes forever, depending on the individual KWS officer. MBOA(A) emphasizes that the rules are unclear and that they are therefore uncertain whether the decisions of KWS officers are legal. Furthermore, they mention that it has become more common that tourist activity organizers are taken to court by KWS, for example when they have failed to pay the entry fee.

Officer B(M) explains that if a tourist activity organizer violates an environmental requirement, KWS officers educate the person, explain the purpose of the requirement and the consequences of not following these. He says that KWS officers most often solve problems in this manner, instead of using sanctions. According to Officer B(M) and Officer E(M), a tourist activity organizer who has violated an environmental requirement is also usually given one or several warnings by KWS. The warnings provide justification to suspend the person from Mombasa MNPR, if the violations were to continue. The decision to suspend someone would be taken by the KWS warden. Officer B(M) explains that WCMA can give the impression that KWS works more with command and control, than they actually are. He explains that, in order to preserve the marine environment, it is important to not use too much force to ensure compliance with the legal rules. KWS is not present in Mombasa MNPR only to arrest people, but to also help the people of the local community to improve their livelihoods. Only when cooperating will it be possible to preserve Mombasa MNPR. Officer E(M) says that it is only in extreme cases that someone would be suspended, not for example for picking shells. He explains that KWS applies WCMR, sec. 3(2), when suspending someone and that this can be applied even if the environmental requirement which the tourist activity organizer has violated is not found in the legislations.

Officer A(M) mentions that a tourist activity organizer can also be arrested and taken to court if he violates environmental requirements, but that the fines are very low. The convicted person can therefore simply pay the fine and return. He mentions that it is sometimes not possible to take a person who has committed an offence to court. KWS can also suspend the person as a disciplinary measure. The KWS warden then writes a letter with the decision to the tourist activity organizer and the MBOA where he holds a membership. The time period of the suspension is usually two weeks to six months, depending on the circumstances. He says that suspension can be more effective than taking a tourist activity organizer to court, since the person is cut off from his source of income.

Officer B(M) explains that, since KWS enforces WCMA and the regulations under this act, they have to be able to determine which legal provisions a person has breached if he is taken to court. For example, the specific environmental requirements in relation to jet-skiing are not found in the legal acts. If a person is jet-skiing within the marine national park, he could however be prosecuted for disturbing the marine life, under WCMA, sec. 13. Officer E(M) explains that, because of the lack of specific regulations in relation to marine national parks and reserves, it is difficult to prosecute someone for violating the environmental requirements. KWS avoids going to court, since it can be difficult to defend the case and since KWS therefore risks losing it. The provisions are too vague and do not define what is prohibited and not, such as for example the prohibition against disturbing wildlife (WCMA, sec. 13). There can therefore be problems in court when interpreting what the provisions

mean. He says that there are a few clear legal rules in the legislations, for example that it is forbidden to enter the marine national park and reserve without paying the entry fee and that it is prohibited to pick corals or shells. Other issues in relation to marine tourist activities than failure to pay entry fees are not brought to court, since it is unclear which provisions to apply. Officer E(M) also mentions that it is a problem that the sanctions prescribed in WCMA and WCMR are no longer deterrent. He also explains that when KWS prosecutes someone, they look for a suitable provision in any legislation that deal with the environment, for example EMCA.

6.2.2.4 Norms of Tourist Activity Organizers

General

There are two associations of tourist activity organizers in Mombasa MNPR: the Mombasa Boat Owners Association and the Mombasa Boat Operators Association (referred to as MBOA(A), MBOA(B) and collectively MBOA). The MBOAs explain that tourist activity organizers within Mombasa MNPR were initially doing business individually. Since they found themselves disorganized, they came together and formed an association in 1992, with help of KWS. This association was later divided into two associations, MBOA(A) and MBOA(B). The MBOAs are in their turn members of the umbrella organization NCBOF, which in total has twelve affiliate associations with members undertaking tourism enterprises within Mombasa MNPR.

Tourist activity organizers are required to be members of one of the MBOAs in order to be allowed to undertake marine tourist activities within Mombasa MNPR. This requirement is mentioned by both the MBOAs and the KWS officers. The reason for this requirement is that it is easier to control the behaviors of tourist activity organizers if these are organized in groups. Officer A(M) explains that this is a decision made by KWS and not a requirement found in the legislations. Officer B(M) explains that both KWS and MT require tourist activity organizers to be members of an association. Officer E(M) explains that, since there are no clear and specific regulations developed for marine national parks and reserves, it is important to find alternative ways of ensuring that the management of the area functions properly. He says that most people working with tourism businesses in the area are organized in associations. KWS is trying to empower these associations so that they regulate themselves, instead of only KWS regulating them.

Part of the tourist activity organizers from the MBOAs, operating glass-bottom-boat excursions, have recently been involved in workshops and trainings, organized by Trainer through KWS (hereinafter referred to as 'Project Explore the Ocean Together').³⁶⁵

Officer E(M) explains that the fact that tourist activity organizers are organized into associations that have codes of conduct makes KWS's work easier. He perceives the associations' codes of conduct as another level of regulation, which is important for KWS's regulations. The associations' codes of conduct regulate people at a lower level, before KWS's regulations are applied.

Codes of Conduct

Both of the MBOAs have constitutions and codes of conduct (also referred to as for example norms and dos and don'ts) which regulate their member's behaviors. The MBOAs' codes of conduct are similar and these include requirements of how tourist activity organizers should behave during marine tourist activities in order to avoid harming the marine environment. The

³⁶⁵ Trainer is doing his PhD through KWS on using interpretation to influence visitors' behaviours.

codes of conduct are communicated to all members of the MBOAs and the members have agreed to follow these.

Officer E(M) mentions that the tourist activity organizers' codes of conduct have an important role in regulating environmental impacts from marine tourist activities within Mombasa MNPR. He thinks that these codes of conduct make tourist activity organizers more responsible. MBOA(A) mentions that, since the main focus of KWS is to collect entry fees, the marine environment would be destroyed if tourist activity organizers were not regulating each other's behaviors within the association. NCBOF say that associations' codes of conduct have an important role in regulating tourism activities within Mombasa MNPR. Since the codes of conduct derive from the people of the local communities, people support them and enforce them.

MBOA(B) gives me a copy of their constitution and codes of conduct. According to the Constitution, MBOA(B)'s general objective is: "Marine conservation, tourism business to benefit the members and the local people of Kenya and the world at large". The Constitution also includes more specified objectives including, for example: "provide a framework for good conduct, discipline and behavior for all parties operating in and a round Mombasa marine park and reserve in the area of tourism"; "conserve and promote conservation education in and around al Kenyan marine parks and national parks and reserve"; "promote a forum (...) to discuss matters which bear directly and indirectly on marine conservation and tourism development" and "promote tourism and education awareness on marine conservation". According to the Constitution, the MBOA(B)'s disciplinary committee has power to develop codes of conduct, in accordance with the objectives of the Constitution, which members of the association should follow. Examples of codes of conduct that have been developed are to: "conserve MARINE"; "not harass marine life e.g. picking marine life for example corals, shells and fishing at the marine park, anchoring on corals and among others" and that they "should educate the clients about the DOs and DONTs at the marine National Park and Reserve". MBOA(B) also mentions that they are not allowed to touch marine life or stand on corals according to the associations codes of conduct. According to the Constitution, in order to become a member of the MBOA(B), a tourist activity organizer has to agree to follow the association's codes of conduct. He also has to be obedient to its leaders, follow Kenyan laws and accept appropriate disciplinary measures if he fails to comply with these rules.

The goal with Project Explore the Ocean Together is to train all glass-bottom-boat operators within Mombasa MNPR. At the workshops, glass-bottom-boat operators were educated on issues such as marine conservation, sustainable tourism and eco-tourism. Furthermore, the glass-bottom-boat operators developed codes of conduct for their snorkeling excursions (see Appendix 7). Trainer explains that it was important that the codes of conduct came from the glass-bottom-boat operators, in order to ensure that only codes of conduct they find suitable and will adhere to are included. The KWS officers, who also were involved in the workshops as stakeholders, emphasize that the codes of conduct come from the glass-bottom-boat operators. Officer B(M) explains that the MBOAs have own codes of conduct from before and that the workshop can be seen as a review of these. Officer E(M) explains that these codes of conduct were developed in a participatory process with the glass-bottom-boat operators. Through Project Explore the Ocean Together, they tried to develop agreeable codes of conduct which KWS and the glass-bottom-boat operators can use together and which can be placed on the beach. He says that during the trainings, they review whether the codes of conduct are functioning.

Enforcement

The MBOAs' codes of conduct are communicated to their members by the associations' leaders and through regular meetings. The tourist activity organizers compliance with the

codes of conduct during marine tourist activities is primarily supervised by members and leaders of the MBOAs and, in case a tourist activity organizer contravenes the codes of conduct, they try to handle this problem within the associations. When a tourist activity organizer violates the codes of conduct, he is normally first given warnings. If the behavior continues, he can be suspended from the MBOA for a period of time. In more serious cases, the tourist activity organizer can get a lifetime suspension from the association. If the tourist activity organizer refuses to follow a disciplinary measure, KWS can get involved in enforcing this. In serious cases, the MBOAs contact KWS directly. This is explained in more detail by the respondents as follows.

MBOA(A) explains that the leaders of MBOA(A) supervise the behavior of the members. If they notice that a member is violating the codes of conduct, they warn him that the behavior can be reported to KWS if continued. If the leaders become aware that a member continues the behavior (with evidence), he can be taken to KWS. A member who violates the codes of conduct of MBOA(A) can also be suspended from the association. An example of when a tourist activity organizer can be suspended is if he picks corals for tourists, since this can harm the marine environment. MBOA(A) explains that, when the association suspends a member, they write a letter to KWS. This ensures that KWS can take action, if the person would to return to Mombasa MNPR.

MBOA(B) says that it is important to educate members of the codes of conduct, since tourists will not be interested in visiting Mombasa MNPR if the marine environment is destroyed, which would bring their business to an end. According to the Constitution of MBOA(B), the disciplinary committee of MBOA(B) can summon a member who has breached the association's Constitution or codes of conduct. If the member is found guilty of violating the codes of conduct, the disciplinary committee can, according to the Constitution, issue a warning, impose a fine of up to 500 KSh, or suspend the person from the association for up to one month. The person can also be completely excluded from MBOA(B) after a general meeting with the members of the association. MBOA(B) explains that if a member violates the codes of conduct, he is normally first given one or two warnings. If the member repeats the behavior a third time, he is normally suspended from the association for a period of time (usually two or three weeks). The time period of the suspension depends on the magnitude of the offence and is decided by the disciplinary committee. MBOA(B) explains that they try to handle minor mistakes within the association. In serious cases, they can contact KWS. They explain that, when suspending someone from MBOA(B), a letter is written to KWS and MT, in order to ensure that these authorities are ready to take action in case the person returns to Mombasa MNPR. If the person comes back, the association contacts KWS, who can arrest the person and take him to court for an offence. The member can then also be excluded from MBOA(B).

Officer B(M) explains that the MBOAs can contact KWS in case a member, who has violated the association's codes of conduct, does not adhere to the association's decision to suspend him. KWS can then help the association to enforce its codes of conduct. He says that it is within the mandate of the KWS officer to decide how to solve each case. The KWS officer normally assesses the problem through for example looking at whether the behavior of the tourist activity organizer is also an offence under WCMA or if the tourist activity organizer has only violated the codes of conduct of the MBOA. If the tourist activity organizer is suspected of having committed an offence, the KWS officer can decide to arrest the person. If the tourist activity organizer has only contravened the MBOAs' codes of conduct, the KWS officer orders the person to leave work in accordance with the codes of conduct of the association.

Also Officer E(M) explains that it is not necessary that a tourist activity organizer has violated WCMA or the regulations under this act for KWS to help an association enforce its suspension. He says that KWS attempts to make members of the MBOAs accept their

constitution and codes of conduct, since there is no purpose of having codes of conduct which members do not adhere to. KWS normally gets involved through a report from the committee of an association, describing what the member has done and that he has refused to accept the association's sanction. He says that this is an example of an extreme case where KWS can decide to suspend a tourist activity organizer from Mombasa MNPR. First, the KWS officer has a hearing, where he listens to the association's (chairman's) and the accused person's versions. The KWS officer usually follows the association's decision, but can sometimes decide to overrule it. He says that the KWS officer can, for example, decide to overrule the association's decision if he notices that the sanction of the association is used against a member in business rivalry. He mentions that KWS acts more or less like a court and that the tourist activity organizers respect that.

At the trainings within Project Explore the Ocean Together, the glass-bottom-boat operators were educated on how and why to follow the codes of conduct developed through this project. The tourist activity organizers who have participated in the project have also been provided with information materials, containing the codes of conduct. KWS has also developed signboards with the codes of conduct, which are being placed on the beach. Officer E(M) mentions that a problem with the codes of conduct, developed through Project Explore the Ocean Together, could be that glass-bottom-boat operators only have agreed willfully to follow these. He questions what would happen if they would violate the codes of conduct. Trainer mentions that, since KWS has been involved in developing these codes of conduct, KWS officers remind the glass-bottom-boat operators to follow these. Since there is no authority with responsibility of enforcing these codes of conduct, he thinks there is however a risk that glass-bottom-boat operators might stop following these if they consider that the codes of conduct are not functioning.

6.2.3 Kisite Mpunguti Marine National Park and Reserve³⁶⁶

6.2.3.1 Marine Tourist Activities

The type of marine tourist activities that the respondents mention takes place within Kisite Mpunguti MNPR are: snorkeling, diving, sailing (mostly dhows), motor-boating (do not have glass-bottom boats), dolphin-watching and also watching for whales and turtles.

6.2.3.2 Environmental Requirements

The environmental requirements (also referred to as e.g. rules, regulations, codes of conduct and do's and don'ts) that KWS applies in Kisite Mpunguti MNPR to regulate environmental impacts from marine tourist activities are found in written sources. The respondents refer to different sources, including the following: WCMA and WCMR; codes of conduct for dolphin-watching (see Appendix 4); signboards at the KWS headquarters and at the jetty (see Appendix 5); marine park and reserve regulations (see Appendix 6); dos and don'ts on the entry ticket (see Appendix 3); marine wildlife code on KWS's webpage and in the brochure for Kisite Mpunguti MNPR (see Appendix 2).

Environmental requirements that the respondents mention that KWS applies to regulate environmental impact from marine tourist activities within Kisite Mpunguti MNPR are:

- It is not allowed to
- stand on corals;
- disturb or touch any marine life;
- pick and show up, or collect, any marine life;

³⁶⁶ This subchapter is based on interviews with the following respondents: Officer F(K), Ranger, KWS; Officer G(K), Ranger, KWS; Officer H(K), Corporal, KWS; Officer I(K), Warden, KWS; Organizer B(K); Organizer C(K); Organizer D(K); Organizer F(K); and GVI, consisting of two respondents. See Appendix 1 for details.

- litter or drop oil into the ocean;
- anchor at coral reefs (the boat has to be fastened to KWS's buoys);
- enter the marine national park without a valid entry fee ticket, or a letter from KWS;
- cross the marine national park by boat without paying the entry fee;
- feed any animals;
- swim with dolphins;
- drive the boat too close to dolphins; or
- exceed the speed limit in the marine national park.

Officer I(K) says that it is clearly illegal to feed any animals within a marine national park according to WCMA. Officer F(K) explains that feeding of fish is forbidden since it can harm fish and disturb the marine ecosystem. He mentions that tourist activity organizers might want to feed fish to please tourists, but that this is unsuitable within a marine national park and reserve.

The respondents mention that, in order to avoid scaring or hitting the dolphins, it is forbidden to jump into the water to swim with dolphins and that the captain has to keep distance between his boat and the dolphins. Officer H(K) explains that tourist activity organizers can benefit from the Kisite Mpunguti MNPR through tourism. He says that it is however important to adhere to the codes of conduct for dolphin-watching, since the dolphins might disappear, and then also tourists, if tourist activity organizers would continue to chase dolphins or to let tourists swim with them.

KWS does not allow jet-skiing and water-skiing in Kisite Mpunguti MNPR, since these activities can harm the marine environment and are therefore considered unsuitable within a marine national park and reserve. Officer G(K), for example, mentions that these activities can knock dolphins and turtles when these animals come to the surface to breath.

6.2.3.3 Enforcement

How are Tourist Activity Organizers Informed about the Environmental Requirements?

In Kisite Mpunguti MNPR, tourist activity organizers are informed of the environmental requirements applied by KWS through verbal communication, educations, workshops, seminars and meetings. As mentioned above, tourist activity organizers can also get written information about the environmental requirements from, for example, entry tickets and signboards. The KWS officers mention the importance of collaborating with tourist activity organizers to ensure compliance with the environmental requirements during marine tourist activities, since they are the direct users of the marine national park and reserve. They also mention the importance of educating tourist activity organizers on the value of the marine national park and reserve and the reasons to follow the environmental requirements.

GVI is currently undertaking workshops and trainings with tourist activity organizers, through KWS.³⁶⁷ GVI educates them on marine issues and how to behave during marine tourist activities in order to avoid harming the marine environment. They have recently retrained tourist activity organizers on how to follow the codes of conduct for dolphin-watching (see Appendix 4). GVI mentions that education has an important role in enforcing the environmental requirements of how to behave during marine tourist activities within Kisite Mpunguti MNPR. When tourist activity organizers realize the benefits of following the environmental requirements, they become more supportive. GVI says that swimming with dolphins used to be popular, but that it has almost stopped after the development of codes of conduct. They think that it is probably a result of codes of conduct, education, and improved relations.

³⁶⁷ GVI is a non-governmental organization educating tourist activity organizers on the codes of conduct for dolphin watching through KWS.

How are Tourists Informed about the Environmental Requirements?

Tourist activity organizers have a central role in informing tourists about the environmental requirements applied by KWS in Kisite Mpunguti MNPR. During workshops and trainings, tourist activity organizers are educated by KWS and GVI on how to communicate the environmental requirements to tourists. Tourist activity organizers usually have a briefing about the excursion at the boat, while heading to the marine national park, during which he informs tourists about the environmental requirements.

According to Officer H(K), KWS officers also inform tourists about the environmental requirements. Officer F(K) says that the KWS ticketing officer does not have time to inform tourists about the environmental requirements, while tourist activity organizers have a lot of time with the tourists. KWS has therefore passed the duty of informing tourists about the environmental requirements to the tourist activity organizers. Officer I(K) says that it is primarily tourist activity organizers who are to implement the environmental requirements in relation to tourists, since they are the ones in direct contact with the visitors. According to the tourist activity organizers, it is primarily tourist activity organizers who inform tourists about the environmental requirements.

As mentioned above, tourists can also get written information about the environmental requirements at, for example, signboards, the entry ticket, KWS's website and in brochures. Officer I(K) says that a difficult part of the tourism industry is to ensure that tourists are informed of the environmental requirements. Tourists usually travel by group, with a tour leader, to Kisite Mpunguti MNPR. When the group arrives, the tour leader usually organizes his clients and takes care of the entry tickets. The entry tickets should however be given to tourists, so that they can read the do's and don'ts. Officer I(K) also explains that one of the purposes with the codes of conduct is to ensure that tourists get correct information about the environmental requirements that are applied by KWS within Kisite Mpunguti MNPR, since there are for example tourists coming from Mombasa MNPR, where other behaviors are allowed by KWS.

How are Marine Tourist Activities Supervised?

KWS is the authority supervising that marine tourist activities taking place within Kisite Mpunguti MNPR are conducted in compliance with the environmental requirements. Inspection of entry fee tickets is performed by KWS officers at three places: the ticket office, the jetty, and the marine national park. In the marine national park, KWS has a patrol boat which moves between the tourist activity organizer's boats to check the entry tickets. Officer F(K) explains that KWS has zero tolerance on revenue loss. Officer G(K) explains that Kisite Mpunguti MNPR is different from other marine national parks and reserves in Kenya, since it is situated further out in the ocean. There are three islands within the area. KWS has a base and a watch tower at one of the islands, and from the watch tower, it is easy to observe if boats are entering the marine national park. KWS officers can therefore see if a tourist boat is arriving directly from another place than the jetty in Shimoni, where most tourists come from. He thinks that this makes it easier to control this marine national park than for example Mombasa MNPR.

According to the KWS officers, during boat patrols, KWS officers also supervise that tourists and tourist activity organizers behave in accordance with the other environmental requirements mentioned above. They for example mention that KWS officers supervise the boat captains driving mode while dolphin-watching, that no tourists swim with dolphins and that no one stands on corals or picks shells. They say that, if a KWS officer gets suspicious, he can sometimes go into the water to supervise tourists and tourist activity organizers behaviors while snorkeling. According to the tourist activity organizers, KWS officers mainly supervise tourist activity organizers behaviors, meanwhile the behaviors of tourists are

supervised by tourist activity organizers. They mean that KWS officers mainly focus on inspecting entry tickets. They say that KWS officers usually stay in the patrol boats and only go into the water in case of emergency. Organizer D(K) mentions that KWS officers also supervise the mooring of boats and if anyone is picking shells or corals, but that collection of entry fees is most important for KWS officers. Organizer C(K) mentions that KWS officers only inspect the entry tickets and stay at the moorings. He says that KWS officers cannot see how tourists are behaving in the water and that it is therefore only tourist activity organizers who supervise tourists' behaviors. Officer I(K) mentions that a challenge for KWS is that they do not have enough equipment and personnel. KWS normally has 1-2 patrol boats in the marine national park and reserve, supervising over 20 tourist boats spread out over the marine national park and reserve.

Tourist activity organizers have a central role in supervising tourists' behaviors during marine tourist activities. They also supervise each others' behaviors. Tourist activity organizers should, for example, swim with tourists and guide them in the water while snorkeling, in order to avoid harming the marine environment. Organizer D(K) for example mentions that the tourist activity organizer looks so that no one picks anything, except litter, and that no one stands on corals.

What Happens if a Tourist Violates the Environmental Requirements?

If a tourist violates an environmental requirement, he is informed to stop the behavior and is educated about the requirements by a tourist activity organizer or KWS officer. Officer H(K) explains that, when something less serious has happened, for example that a tourist has been allowed to swim with dolphins, the KWS officer initiates a conversation with the tourist activity organizer and the tourist. The problem is usually that they have inadequate information. The tourist activity organizers say that it is mainly them who inform tourists if they are violating the environmental requirements.

What Happens if a Tourist Activity Organizer Violates the Environmental Requirements?

If a tourist activity organizer observes another tourist activity organizer violating an environmental requirement, he informs the tourist activity organizer of the requirement and warns him that KWS will be informed if the behavior continues. If he continues the behavior, the tourist activity organizer can report this to KWS.

If a KWS officer observes that a tourist activity organizer violates the environmental requirements, he normally educates the tourist activity organizer and can give him a warning. If the behavior continues, the tourist activity organizer could be suspended from Kisite Mpunguti MNPR for a period of time. The time period depends on the seriousness of the violation. In serious cases, KWS can take tourist activity organizers to court, but this is unusual. This is explained in more detail by the respondents as follows.

Officer H(K) says that KWS primarily works with education and increasing of awareness towards tourist activity organizers. It is unusual that a tourist activity organizer is suspended from Kisite Mpunguti MNPR or taken to court, since their misbehaviors are normally not serious. Also Organizer D(K) says that sanctions are not often used in relation to tourist activity organizers, since they are well aware of the environmental requirements.

Officer I(K) explains that the KWS warden would take the decision of suspending a tourist activity organizer from Kisite Mpunguti MNPR. The tourist activity organizer will suffer from his behavior during the suspension through economic loss. If the tourist activity organizer wishes to return to undertake marine tourist activities within Kisite Mpunguti MNPR, he needs to rethink his behavior and write a letter to the KWS warden, promising not violate the rules again. If the KWS warden is convinced, which most often is the case, he writes an official letter to the tourist activity organizer, allowing him to resume his business and warning him that there will be severe consequences if the environmental requirements are

violated again. If the tourist activity organizer would repeat the behavior, he can be completely suspended from Kisite Mpunguti MNPR. Also Officer F(K) mentions that a tourist activity organizer can be suspended if he violates environmental requirements. This can for example be used as a disciplinary measure if a tourist activity organizer has only contravened the codes of conduct and not the legal rules, why it is not possible to take court proceedings. He means that suspending a tourist activity organizer can actually be more effective than taking him to court, since the fines are not high enough to be deterrent. Examples, mentioned by Organizer B(K), of when a tourist activity organizer could be suspended from Kisite Mpunguti MNPR are if a boat is anchored at a coral reef or if a tourist is allowed to swim with dolphins.

Officer F(K) explains that KWS used to take people to court more often. WCMA still gives the impression that KWS mostly works with law enforcement through prosecution and sanctions, but people are nowadays only taken to court in serious cases. He says that KWS has realized that it is more effective to work with communication and education towards tourist activity organizers to ensure compliance with the environmental requirements.

Officer I(K) explains that, if someone would be taken to court, KWS would have to assess which provision of the legislations that could be applied, since the codes of conduct are not themselves legally binding. He says that most of the codes of conduct are also found in WCMA and therefore legally binding through this act. KWS usually applies WCMA, sec. 13, when taking someone to court. He explains that if a person for example swims with dolphins, which is not allowed according to the codes of conduct, KWS could apply the prohibition against disturbing wildlife in WCMA, sec. 13. He also mentions that KWS can apply other legislations than WCMA in court, for example EMCA.

The KWS officers emphasize the importance of collaborating and having a good relationship with tourist activity organizers. Officer I(K) explains that KWS does not want to intimidate people of the local community by using too much force. In order to achieve environmental conservation, a strategic objective of KWS is to partner with the local community to ensure that they support conservation. He explains that conservation has been a conflict area and that too stringent law enforcement makes people of the local community dissatisfied.

6.2.3.4 Norms of Tourist Activity Organizers

Tourist activity organizers undertaking marine tourist activities within Kisite Mpunguti MNPR are doing business independently, as individuals or families. They are not organized into associations and have not developed own collectively applied norms. Organizer E(K) and Officer I(K) mention that there have been efforts to establish associations by the tourist activity organizers, but that there have been challenges in getting this to function.

7 Analysis

In this chapter, the material presented in Chapter Four to Six is analyzed in order to answer the questions of this essay. Parts of the analysis are connected to the theories presented in Chapter Two. The basics on Kenyan law, presented in Chapter Three, have also been considered when analyzing the materials. In the first four subchapters beneath, legal environmental requirements in EMCA, TILA, TA and WCMA in relation to marine tourist activities, and possibilities to enforce these, are identified. Based on the empirical findings, the analysis also gives indications on how this seems to be reflected in practice. The fourth subchapter also contains an analysis of the environmental requirements (in legal rules and more informal norms) which KWS demands tourist activity organizers and tourist to comply with during marine tourist activities. In subchapter five, the regulation of marine tourist activities through norms of tourist activity organizers in Mombasa MNPR is analyzed.

7.1 Environmental Management and Co-ordination Act

7.1.1 Environmental Requirements

7.1.1.1 Project Report and Environmental Impact Assessment License

The type of activities that require the submission of a project report to NEMA are broadly defined in the Second Schedule of EMCA. The Second Schedule primarily seems to include development activities of a larger scale than marine tourist activities. It however also contains a couple of definitions which might be relevant in relation to marine tourist activities, namely: ‘an activity out of character with its surrounding’ (Second Schedule, sec. 1); and ‘natural conservation areas’, ‘commercial exploitation of natural fauna and flora’ (Second Schedule, sec. 12).

It seems unclear whether the Second Schedule, sec. 1, should be applied separately or in addition to the Second Schedule, sec. 2-14. For example, would a marine tourist activity require the submission of a project report if it is out of character with the surrounding marine environment (sec. 1), or does the activity also have to commercially exploit flora and fauna (sec. 1 and sec. 12)? It for example seems as jet-skiing activities might be out of character with its surrounding within a marine national park or reserve, since the overriding objective of the area appears to be marine conservation.

It seems clear that marine national parks and reserves are a type of natural conservation areas and that the Second Schedule, sec. 12, applies to these areas. It however seems uncertain whether any kind of marine tourist activities could be commercial exploitation of natural flora and fauna according to the Second Schedule. Marine tourist activities seem to be commercial activities, since these are undertaken to make profit. The question is however if any marine tourist activities could be included as exploitation of fauna and flora? EMCA does not define exploitation. According to the definition in the Concise Oxford Dictionary, exploitation seems to include making use of or deriving benefit from natural flora and fauna. It seems unclear whether this, according to the Second Schedule, sec. 12, has to be direct or if it also includes more indirect use or derivation of benefits. Seen in the context of the Second Schedule, it seems most likely that exploitation only includes direct use or derivation of benefits. This seems to be in line with how Officer X interprets the provision, since he means that it probably only includes activities such as taking material samples. It does however not seem possible to exclude the possibility that activities making indirect use of and deriving indirect benefit from natural fauna and flora could be included. This could then include marine tourist activities such as dolphin-watching, snorkeling and diving, but probably not for example water-skiing or jet-skiing activities. According to the answer of Officer Y, it does not seem like this possibility has been investigated.

According to the EIA Guideline, NEMA appears to take various factors into account when assessing an activity's environmental impact and several of these factors could be relevant in relation to marine tourist activities taking place within marine national parks and reserves. It however seems unclear from EMCA and the regulations under this act how high the environmental impact of a marine tourist activity has to be in order to require the submission of a project report. It is possible that the Second Schedule of EMCA should be interpreted as that an activity generally has to fulfill a requirement in the Second Schedule, sec. 1, in order to require the submission of a project report. This might for example mean that a marine tourist activity, which commercially exploits flora and fauna, only requires the submission of a project report if it is out of character with its surrounding (sec. 1 and sec. 12). According to the EIA Guidelines, it seems as the likely environmental impact of a marine tourist activity at least has to have some significance to require the submission of a project report. It is however relevant to note that, according to the EIA Regulation, an EIA-license could be issued if NEMA finds that an activity would not have significant environmental impact. It might be possible to interpret this as that a marine tourist activity has to be connected with at least a risk of a significant environmental impact in order to require the submission of a project report, but this seems unclear.

According to the above reasoning, it seems uncertain from EMCA and the regulations under this act whether any kind of marine tourist activities require the submission of a project report. Marine tourist activities such as snorkeling, diving and dolphin-watching do probably not have high enough environmental impact to require this. Jet-skiing seems to be the marine tourist activity most likely to require the submission of a project report, but this seems to depend on how the Second Schedule, sec. 1, should be applied. If a tourist activity organizer is required to submit a project report, he commits an offence when undertaking marine tourist activities without issuing this and, in that case, it seems like this could be a legal environmental requirement in relation to marine tourist activities.

In the empirical findings, there appear to be different opinions among the officers at NEMA on whether or not a project report is required for any kind of marine tourist activities intended to be undertaken within a marine national park and reserve. According to responses of respondents from NEMA, KWS and the tourist activity organizers, it however seems clear that project reports have not been issued for any kind of marine tourist activities within Mombasa MNPR or Kisite Mpunguti MNPR in practice. Tourist activity organizers do consequently not seem to have EIA-licenses with specified legal environmental requirements of how to perform marine tourist activities.

7.1.1.2 Pollution

Various provisions in EMCA and the regulations under this act appear to prescribe similar offences relating to pollution. A difference between the provisions seems to be for example whether the provision requires that a discharge of for instance waste or fuel oil during marine tourist activities causes a change in the receiving environment or if it criminalizes already the discharge. For the purpose of this essay, it appears suffice to establish that a tourist or tourist activity organizer who discharges waste, likely to be harmful to the environment, or fuel oil into the marine environment, seems to commit an offence under EMCA or a regulation under this act. Furthermore, depending on which provision that would be applied, it appears like a tourist activity organizer could be required to undertake immediate measures to minimize impacts on the marine environment from the discharge. It seems like this clearly could be seen as legal environmental requirements in relation to marine tourist activities.

7.1.2 Enforcement

According to EMCA, NEMA seems to have a responsibility of supervising tourists' and tourist activity organizers' compliance with legal environmental requirements in EMCA and

the regulations under this act. Environmental inspectors at NEMA seem to have powers to perform investigations for this purpose. Since KWS appears to be the lead agency in relation to marine national parks and reserves, it seems like NEMA's supervision should be performed in collaboration with KWS. It appears unclear, from EMCA and the regulations under this act, exactly how the responsibility of performing supervision is divided between these authorities. According to the empirical findings, it mainly seems to be KWS which supervises tourists' and tourist activity organizers' compliance with environmental requirements during marine tourist activities within Mombasa MNPR and Kisite Mpunguti MNPR. According to EMCA, the general public could also have a role in performing supervision, since it seems like they could make complaints to PCC in case of environmental degradation from marine tourist activities.

In case NEMA becomes aware of environmental concerns in relation to marine tourist activities, NEMA might perhaps have possibility to issue an improvement notice or a restoration order.³⁶⁸ It however seems unclear from EMCA and the regulations under this act whether improvement notices and restoration orders only can be issued to enforce specified legal environmental requirements, and in that case which these are, or if these are instruments to prescribe new legal environmental requirements in order to ensure for example sustainable development or a clean and healthy environment. It seems as though it might be possible to view improvement notices as a mechanism to enforce specified legal environmental requirements as well as a possibility to prescribe new legal environmental requirements, but this seems uncertain. The power to issue restoration orders is subject to the other provisions of EMCA and NEMA is to be guided by the principles good environmental management. This seems to indicate that it might only be possible to issue restoration orders to enforce specified legal environmental requirements in EMCA and perhaps other laws relating to the environment, but this also seems unclear. Because of the uncertainties, it is not possible to determine whether these instruments could have a role in regulating marine tourist activities.

According to EMCA, environmental inspectors at NEMA seem to have possibility to arrest and prosecute a tourist or tourist activity organizer suspected of having committed an offence under EMCA or the regulations under this act. The prescribed sanctions are fine or imprisonment. The court also seems to have possibility to issue orders, in addition to these sanctions, for example it seems possible to order a tourist or tourist activity organizer to restore the marine environment affected by discharge of waste or fuel oil. According to the responses of Officer Z and Officer Y, it however seems unlikely that a tourists or tourist activity organizer, who violates a legal environmental requirement in EMCA or the regulations under this act, would in practice be prosecuted by environmental inspectors.

Finally, EMCA seems to recognize the importance of awareness rising and education in order to ensure compliance with legal environmental requirements. Officer Y and Officer Z also mention the value of this and it seems like such incentives by NEMA have a role in ensuring compliance with legal environmental requirements during marine tourist activities in practice.

7.2 Tourist Industry Licensing Act

7.2.1 Environmental Requirements

It seems clear that a tourist activity organizer undertaking marine tourist activities without a tourism license, or who does not comply with its conditions, commits an offence under TILA. Whether or not this could be seen as resulting in legal environmental requirements seems to

³⁶⁸ These instruments are mentioned in this subchapter since Okidi et al primarily appear to describe these as mechanisms to enforce legal environmental requirements.

depend on if the licensing officer at MT takes environmental considerations into account when issuing, varying or cancelling tourism licenses and if legally binding environmental conditions are included in these.

The objective of regulating tourist activities is generally defined in TILA as promoting the development and well-being of the tourism industry. The act does not contain any specification on what is meant by the well-being of the tourist industry. Since the well-being of the tourist industry seems dependent on a healthy environment, it seems like this possibly might include environmental aspects.

The substantive considerations to be made by the licensing officer when assessing a tourism license application are not further specified in TILA, than TILA's general objective. It therefore seems like the licensing officer, within this scope, might have a margin of discretion to decide whether or not to take environmental considerations into account when licensing marine tourist activities. He might have possibility under TILA to decide not to issue a tourism license, or to include legally binding environmental conditions in this, because of environmental reasons.

It does not seem to be only TILA which is relevant for the licensing officer to consider when assessing a tourism license application. The principle of sustainable development in the Constitution could perhaps entail that tourism licenses should not be issued for marine tourist activities if the carrying capacity of a marine ecosystem would be exceeded. Furthermore, according to the EIA Regulation, sec. 4(3), Kenyan authorities are hindered to issue commercial licenses to micro project activities likely to have cumulative significant negative environmental impact, until a strategic environmental plan has been approved. There is no specification of which kind of licenses that are included as commercial licenses. As mentioned above, marine tourist activities appear to be commercial activities and it therefore seems like a tourism license could be a commercial license under this provision. Furthermore, there is no definition of which kind of activities that are included as micro project activities under EIA Regulation, sec. 4(3). Seen in the context of the provision, it seems like this includes activities with minor individual environmental impact and it therefore seems possible that this could include marine tourist activities. Also the empirical findings seem to indicate that this provision could be relevant in relation to marine tourist activities. The reasoning seems to show that according to EIA Regulation, sec. 4(3), MT is hindered to issue tourism licenses to marine tourist activities likely to have cumulative significant negative impact on the marine environment, until a strategic environmental plan has been approved.

An indication of the type of considerations that are normally made by licensing officers, when assessing a tourism license application, appears to be found in the kind of information a tourist activity organizer is usually required to submit to a licensing officer, since this seems to form the officer's decision-basis. It does not seem like this information is relevant from an environmental perspective. The answer of Officer T also indicates that the licensing officer does not normally himself take environmental aspects into account when assessing tourism license applications. From the answer of Officer T, it seems like the MT leaves the responsibility of environmental issues in relation to marine tourist activities to KWS. This seems to indicate that a licensing officer would only consider the possibility of impacts on the marine environment from marine tourist activities if informed of the likeliness of such impacts by KWS. According to the answers of Officer E(M) and Officer T, it seems like a licensing officer in practice can require consent from KWS when assessing tourism license applications for marine tourist activities. If KWS does not consent, it seems as the licensing officer could reject an application for a tourism license. Whether this could be seen as resulting in a legal environmental requirement seems to depend on whether or not environmental considerations are made by KWS when refusing to give consent (see subchapter 8.4.1.8 on the considerations to be made by KWS).

A picture of the kind of conditions usually included in a tourism license can be found in TILR. A condition which could have relevance from an environmental perspective seems to be that a marine tourist activity is required to be conducted within a designated area. From the answer of Officer T, it however seems like the area is not specified of environmental reasons. According to the answers of Officer T and tourist activity organizers, no environmental conditions appear to be included in tourism licenses in relation to marine tourist activities in practice.

A licensing officer has possibility to vary or cancel a tourism license for a good cause under TILA. In the exercise of this power, it also seems like he should be guided by the interest of the well-being and development of the tourist industry. Within this scope, it seems like the licensing officer could perhaps cancel a tourism license, or vary this by adding environmental conditions, in order to prevent marine tourist activities from harming the marine environment. The answer of Officer T also appears to indicate that this power could be used to handle environmental issues. There does however not seem to be any indications in the empirical findings that this power has been used in relation to environmental impacts from marine tourist activities and, according to the reasoning above, it seems likely that this would in practice only be done if a licensing officer was advised to do this by KWS.

Finally, the Minister appears to have possibility to give licensing officers directions of how to perform duties under TILA. Since it seems like such directions could include anything the Minister considers reasonable in order to properly regulate the tourism industry, such directions could possibly have relevance from an environmental perspective. According to the answer of Officer T, it seems like the Minister could direct licensing officers to take environmental considerations, but there does not seem to be any such directions in place in relation to marine tourist activities at the moment.

7.2.2 Enforcement

The above reasoning seems to indicate that the legal environmental requirement which TILA would be most likely to result in is that a tourist activity organizer could be forbidden to undertake a marine tourist activity, by being denied a tourism license. According to TILA, the requirement of having a tourism license can be supervised by authorized persons and these seem to have powers to perform investigations. A tourist activity organizer suspected of having committed an offence, could be prosecuted and the sanctions are fine or imprisonment. According the empirical findings, MT appears to regularly supervise tourist activity organizer's compliance with the requirement of having a tourism license within Mombasa MNPR and Kisite Mpunguti MNPR. According to the answer of Officer T, it seems as a tourist activity organizer who is suspected an offence under TILA could be prosecuted.

7.3 Tourism Act

7.3.1 Environmental Requirements

7.3.1.1 Tourism License

It seems clear that tourist activity organizers operating marine tourist activities without a tourism license, or who do not comply with its conditions, will commit an offence also under TA. As mentioned in relation to TILA, whether or not this could result in legal environmental requirements in relation to marine tourist activities seems to depend on whether TRA will take environmental considerations into account when granting tourism licenses under TA and whether TRA will include legally binding environmental conditions in these.

The considerations that will be made by TRA when assessing a tourism license application appear more specified in TA than in TILA and it seems like some of the specified considerations might have relevance from an environmental perspective. As mentioned in

subchapter 8.1.1.1, it does not seem like tourist activity organizers have EIA-licenses for any type of marine tourist activities, why this consideration might not be relevant. Something which could perhaps lead to environmental consideration in the licensing of marine tourist activities seems to be if the ministry responsible of environmental matters would provide that relevant fragile environmental resources, ecosystems or habitats should be protected. Furthermore, it seems like consent from KWS could be required under TA when licensing marine tourist activities. As mentioned in relation to TILA, whether or not this could result in legal environmental requirements however seems to depend on whether or not environmental considerations are made by KWS when refusing to give consent.

There also seem to be a couple of new instruments that will be developed under TA, which TRA should consider when assessing tourism license applications and which might entail environmental consideration in the licensing of marine tourist activities. Firstly, TRA will have to consider tourist area development plans when assessing tourism license applications under TA. TA does not specify which contents such plans will have or which areas these will be developed for. It therefore seems unclear at this stage if these will contain environmental aspects which could affect the licensing of marine tourist activities. An indication in TA of an environmental aspect that such plans might be intended to contain is that, since TRI will provide information for this plan, it might include carrying capacities and conservation needs and priorities of tourist destinations. This could in that case be relevant in relation to marine tourist activities. Secondly, TRA will be bound to consider and give effect to a national tourism strategy. According to the objective of this strategy, it seems like it could include matters related to the regulation of tourist activities. The content of this strategy is broadly defined as anything the Minister considers necessary in order to ensure sustainable tourism. The definition of sustainable tourism in TA seems to emphasize meeting the needs of visitors and hosts, but TA does not specify which factors that could be considered relevant to fulfil their needs. It therefore appears uncertain at this stage if the national tourism strategy will contain environmental aspects.

According to the above reasoning, it seems possible that TRA will, depending on the contents of the materials to be considered, take environmental consideration when licensing marine tourist activities. TA does however not contain any specified substantive conditions for granting tourism licenses. There are for example no guidelines on how TRA should balance and prioritise different aspects, such as possible economical, social and environmental factors, in these materials. Furthermore, the only specification of which conditions that could be included in tourism licenses seems to be that the conditions have to be necessary. TA thus appears to leave a margin of discretion to TRA and it therefore seems uncertain at this stage whether the licensing of marine tourist activities under TA could result in any further legal environmental requirements compared to TILA.

7.3.1.2 Pollution

A new legal environmental requirement in TA, compared to TILA, is that TA prescribes an offence relating to pollution of the environment. The provision seems to criminalize behaviours which are contrary to requirements in TA or any other law. TA does not contain any other provisions relating to pollution, why the reason for the reference to TA appears unclear (reference is not made to regulations under TA). It also seems uncertain at this stage which provisions of other laws that the provision in TA is intended to refer to.

Furthermore, it appears unclear how the offence prescribed in TA relates to similar offences prescribed in EMCA in relation to pollution. One difference between these offences might be that the offence prescribed in TA could be intended to prevail over similar offences in EMCA when the pollution relates to the tourism sector, for example when polluting a designated tourism development area. The offence prescribed in TA however also seems generally formulated as discharging any pollutants detrimental to the environment, which

appears similar to the offences prescribed under EMCA. Because of the described uncertainties, it seems unclear whether the offence prescribed in TA will result in any further legal environmental requirement in relation to marine tourist activities compared to EMCA.

7.3.2 Enforcement

TRA will have possibility to cancel or suspend a tourism license under TA. The conditions for using this power appear more specified in TA than in TILA and it seems as though it primarily will be possible to use this to enforce legal requirements in TA. Of relevance in relation to enforcement of legal environmental requirements for example seems to be that it will be possible to suspend or cancel a tourism license if a tourist activity organizer would be suspected or convicted of polluting the environment under TA.

TA does not specify how compliance with legal requirements under TA will be supervised. It seems like a tourist or tourist activity organizer suspected of committing an offence under TA could be prosecuted. In comparison with the sanctions prescribed in TILA, the fine in TA is higher and the time period of the imprisonment is longer. Furthermore, if a tourist or tourist activity organizer is convicted of polluting the environment under TA, it seems like it will be possible for the court to order him to clean up, or finance the costs of cleaning up, the polluted environment. This seems to remind of the sanctions prescribed under EMCA in relation to similar offences.

7.4 Wildlife (Conservation and Management) Act

7.4.1 Environmental Requirements

7.4.1.1 Entering or Residing in a Marine National Park and Reserve

It seems clear that a tourist or tourist activity organizer who enters or resides in a marine national park or reserve, without a written authorization from a KWS officer or an authorization in the regulations under WCMA, commits an offence according to WCMA, sec. 13. WCMR, sec. 3(1), *e contrario*, together with WCMR, 2010, appear to constitute an authorization to enter a marine national park and reserve upon payment of an entry fee. From WCMR and WCMR, 2010, it also seems clear that a tourist or tourist activity organizer, as a main rule, commits an offence when entering a marine national park or reserve without paying a prescribed entry fee. It seems like these offences could be seen as legal environmental requirements in relation to marine tourist activities, since they appear to limit the number of visitors to a marine national park and reserve.

Exception from the legal environmental requirement of paying an entry fee can be made through permission by specified KWS officers according to WCMR. The KWS officer appears to have a margin of discretion when issuing such permissions. According to the empirical findings in Mombasa MNPR, there appear to be various exceptions from the requirement of paying an entry fee in this area. It seems as these could be valid exceptions under WCMR, provided that they derive from KWS officers with the specified rank. There does not seem to be as many exceptions from the requirement of paying an entry fee in Kisite Mpunguti MNPR, according to the empirical findings.

7.4.1.2 Cutting or Injuring Marine Vegetation

It seems clear that a tourist or tourist activity organizer who, during a marine tourist activity, cuts or injures any vegetation within a marine national park or reserve, without written authorization from a KWS officer or an authorization in the regulations under WCMA, commits an offence under WCMA, sec. 13. There does not seem to be any authorization in the regulations under WCMA relating to this offence which is of relevance in relation to marine tourist activities.

WCMA does not contain any definition of how vegetation should be interpreted. The definition of vegetable in WCMA might indicate that vegetation should be broadly interpreted. In the Concise Oxford Dictionary, vegetation is defined as any plant life. This could indicate that vegetation in WCMA, sec. 13, includes any marine vegetation, for example sea-grass, seaweed and algae. WCMA neither defines how injure is to be interpreted. According to its definition in the Concise Oxford Dictionary, it seems as this could include causing any physical harm or damage. It might consequently be possible to interpret WCMA, sec. 13, as that an offence is committed if a tourist or tourist activity organizer cuts or causes any physical harm or damage to any marine vegetation during marine tourist activities. This could then clearly be seen as a legal environmental requirement in relation to marine tourist activities.

7.4.1.3 Object of Scientific Interest

A tourist or tourist activity organizer who, during a marine tourist activity, wilfully damages or attempts to remove any object of scientific interest within a marine national park or reserve, without written authorization from a KWS officer or an authorization in the regulations under WCMA, clearly seems to commit an offence according to WCMA, sec. 13. There does not seem to be any authorization in the regulations under WCMA relating to this offence which is of relevance in relation to marine tourist activities.

Neither WCMA nor the regulations under this act specify when an object has a scientific interest under WCMA, sec. 13. Various marine objects within a marine national park and reserve, for example marine animals, coral reefs and marine vegetation, could theoretically be included as objects with scientific interest. It however seems more likely that only objects with some kind of specific scientific interest, for example a marine object in relation to which research is being performed, are included as objects with scientific interest under WCMA, sec. 13. Although it thus seems uncertain exactly which marine objects that this could include, it seems clear that this offence could be seen as a legal environmental requirement in relation to marine tourist activities.

7.4.1.4 Disturbing or Stamping Marine Animals

A tourist or tourist activity organizer who, during a marine tourist activity, wilfully disturbs or stampedes any animal within a marine national park or reserve, without written authorization from a KWS officer or authorization in the regulations under WCMA, clearly appears to commit an offence under WCMA, sec. 13. There does not seem to be any authorization in the regulations under WCMA relating to this offence which is of relevance in relation to marine tourist activities.

The term animal appears to be broadly defined in WCMA and it therefore seems as this could be interpreted as including any kind of marine animals, for example dolphins, turtles, fish, clams, starfish and sea-urchins. Also living corals and inhabited shells seem to be included as animals under WCMA. It however seems uncertain whether behaviors of tourists or tourist activity organizers in relation to empty shells or calcareous skeletons of coral reefs (without living corals) could be criminalized under WCMA, sec. 13. This seems to depend on whether or not this offence includes disturbing marine animals by harming their habitat.

WCMA does not contain any definitions of disturb or stampede, why the extent of the disturbance of a marine animal required to commit an offence under WCMA, sec. 13, seems uncertain. The definitions of disturb and stampede in the Concise Oxford Dictionary might indicate that WCMA, sec. 13, could be interpreted as criminalizing any behaviours of tourists or tourist activity organizers during marine tourist activities that interrupts or breaks the rest, calm or quiet of marine animals or that cause marine animals to act hurriedly. It thus seems as this could be seen as a legal environmental requirement in relation to marine tourist activities.

7.4.1.5 Possession of Marine Animals

It appears clear that a tourist or tourist activity organizer who is in possession of any animal or trophy during a marine tourist activity within a marine national park and reserve, without written authorization from a KWS officer or authorization in the regulations under WCMA, as a main rule commits an offence under WCMA, sec. 13. There does not seem to be any authorization in the regulations under WCMA relating to this offence which is of relevance in relation to marine tourist activities. Furthermore, a tourist or tourist activity organizer who keeps a government trophy instead of reporting and handing this over to for example a KWS officer clearly seems to commit an offence under WCMA, sec. 39. Also a forfeiture offence seems to be committed under WCMA, sec. 42, if a tourist or tourist activity organizer possesses a trophy or government trophy without having a certificate of ownership.

As mentioned above, the term animal seems broadly defined in WCMA and it therefore seems as this could be interpreted as including any kind of marine animals, for example turtles, starfish, sea-urchins, inhabited shells and living corals.³⁶⁹ The marine animals Green Marine Turtle, Hawksbill Turtle and Dugong, alive or dead, and any durable portion of these animals are included as trophies under WCMA. Since these kinds of animals, found within a marine national park and reserve, do not appear to have an owner, they also seem to be government trophies under WCMA. Furthermore, any marine animal seems to become a government trophy if, for example, any of the offences described in this subchapter is committed in relation to the animal. It thus seems as the offences described in this subchapter could be seen as legal environmental requirements in relation to marine tourist activities.

7.4.1.6 Written Authorization

As mentioned above, behaviours of tourists and tourist activity organizers which are criminalized under WCMA, sec. 13, can be authorized through a written permission by a KWS officer. Such permissions could thus constitute exceptions from the legal environmental requirements in WCMA, sec. 13. WCMA and the regulations under this act do not specify substantive conditions for issuing such permissions. KWS officers therefore appears to have a margin of discretion when deciding whether or not to issue written permissions in relation to marine tourist activities and whether to take environmental considerations into account when doing this. A principle to guide KWS officers when issuing written permissions, found in the preamble of WCMA, might however possibly be that marine tourist activities only should be permitted to be conducted in a manner which is without prejudice to the proper management and conservation of the marine environment (see more under subchapter 8.4.1.8). Furthermore, the principle of sustainable development in the Constitution might entail that carrying capacities of ecosystems in the area should not be exceeded.

In a written permission to a tourist or tourist activity organizer, a KWS officer seems to have possibility to include conditions of how marine tourist activities should be conducted. WCMA and the regulations under this act do not include any specifications in relation to the issuance of such conditions and KWS officers thus seem to have a margin of discretion concerning whether or not to include conditions in a written permission and which character these should have. It seems like KWS officers could for instance have possibility include environmental conditions in the permission. For example, if jet-skiing or dolphin-watching is considered to disturb marine animals under WCMA, sec. 13, it seems like KWS officers could issue written permissions to nonetheless undertake such marine tourist activities, including environmental conditions of how to conduct these in order to avoid disturbing marine animals. It might be possible to view such conditions as legal environmental requirements, but this seems uncertain. It should be noted that WCMA does not appear to criminalize

³⁶⁹ See subchapter 8.4.1.4 on whether it could include empty shells and calcareous skeletons of coral reefs.

contravening the conditions themselves. An offence only seems to be committed if a tourist or tourist activity organizer, when contravening the environmental condition in the written permission, simultaneously commits an offence under WCMA, sec. 13. This might mean that it is only environmental conditions in the written permission relating to behaviours which would otherwise be criminalized under WCMA, sec. 13, that could be seen as legally binding environmental requirements.

Except in relation to the requirement of paying entry fees, respondents in Mombasa MNPR and Kisite Mpunguti MNPR do not mention that there are written permissions issued in relation to marine tourist activities under WCMA, sec. 13. This seems to indicate that there are no other exceptions made from legal environmental requirements in WCMA, sec. 13, in relation to marine tourist activities taking place within Mombasa MNPR and Kisite Mpunguti MNPR. This also appears to indicate that there are no legal environmental requirements prescribed in written permissions in these areas. It does however not seem possible to exclude the possibility that certain documents issued by KWS officers in Mombasa MNPR and Kisite Mpunguti MNPR could be seen as written permissions under WCMA, sec. 13. For example, the entry tickets could possibly be viewed as written permissions, not only to enter the marine national park and reserve, but also for example to disturb marine animals to a certain extent during marine tourist activities and that some of the dos and don'ts on the entry ticket (see Appendix 3) thus constitute legal environmental requirements. This however seems uncertain, since the entry ticket does not specifically provide this.

7.4.1.7 The Wildlife (Conservation and Management) (National Parks) Regulation

According to the definition of national park in WCMR, sec. 2, WCMR only seems to apply to marine national parks and reserves where specified, unless the context otherwise requires. It is only in the prescription of entry fees that reference is made to marine national parks and reserves in WCMR. It should however be noted that the definition of national park in WCMR, sec. 2, refers to the definition to national park in WCMA, sec. 2, where this term includes marine national parks. This might entail that provisions of WCMR are applicable to marine national parks (not reserves) also when no reference is made to such areas and the context does not require this. This however seems unlikely, since WCMR, sec. 2, clearly appears to define that WCMR only applies to marine national parks and reserves where specified, unless the context otherwise requires.

Does the context require that legal environmental requirements in provisions of WCMR, which do not refer to marine national parks and/or reserves, should apply to these areas? 'Unless the context otherwise requires' appears to relate to the context of the provision in WCMR. It does thus not seem to be the practical context within a marine national park and reserve that is of relevance to determine whether a provision in WCMR is applicable in these areas. The context of WCMR, sec. 5, does not seem to require that this provision is applicable within marine national parks and reserves. The provision seems to be specifically developed for terrestrial areas, since it makes reference to for example roads, vehicles on four wheels and speed limits in kilometres per hour. WCMR, sec. 4 and 6, are more generally formulated and seem relevant within marine as well as terrestrial national parks and reserves. There does however not seem to be anything in these provisions either that require that these apply within marine national parks and reserves. It thus seems unlikely that WCMR, sec. 4-6, constitute legal environmental requirements in relation to marine tourist activities.

According to WCMR, sec. 3(2), it is possible to suspend a person from a national park if his presence is believed to be detrimental to its proper management and control. This power is found in the same provision of WCMR as the authorization to enter a marine national park and reserve upon payment of an entry fee (see subchapter 8.4.1.1). The context of WCMR, sec. 3(2), might therefore require that it applies to marine national parks and reserves. If WCMR, sec. 3(2), does apply to marine national parks and reserves, it might be possible to

interpret this provision as containing an legal environmental requirement, being that tourists and tourist activity organizers not are allowed to perform marine tourist activities in a manner which is detrimental to the proper management and control of a marine national park or reserve. This however seems uncertain, since it is not formulated as an imperative in the provision.

7.4.1.8 Allowed Marine Tourist Activities

According to the empirical findings, KWS appears to regulate the type of marine tourist activities that are allowed to take place within Mombasa MNPR in two manners.³⁷⁰ Firstly, as mentioned above, MT can require consent from KWS before issuing tourism licenses. Secondly, KWS seems to use WCMR, sec. 3(2), to regulate the kind of marine tourist activities taking place.³⁷¹

As mentioned in subchapter 8.2.1.1, if KWS does not give consent to the issuance of a tourism license, it seems like a licensing officer, because of this reason, could reject a tourist activity organizer's application for such a license. Whether or not this could result in a legal environmental requirement appears to depend on whether environmental consideration is made by KWS when deciding to refuse to give consent.

It seems like a similar reasoning could perhaps be made in relation the application of WCMR, sec. 3(2), in order to regulate the kind of marine tourist activities taking place within Mombasa MNPR. This provision might make it possible for KWS to suspend a tourist activity organizer if the marine tourist activity he wants to undertake could be detrimental to the proper management and control of the area. If this is the case, whether or not this could be seen as resulting in a legal environmental requirement also seems to depend on whether or not environmental considerations are made by KWS when allowing or disallowing the marine tourist activity to take place.

WCMA and the regulations under this act do not appear to contain any provisions which specifically regulate the type of marine tourist activities allowed to take place within a marine national park and reserve. These legal acts neither seem to specifically provide which considerations that KWS should make in such cases. This is something which Officer E(M) mentions as a problem in practice.

There might however be a general principle in the preamble of WCMA, which could be of relevance when KWS decides which kind of marine tourist activities to allow within a marine national park and reserve. According the preamble of WCMA, KWS seems to have a duty of ensuring that wildlife management and conservation fulfils various interests, for example social, economical and ecological, provided that these are without prejudice to proper wildlife management and conservation. WCMA does not define the term wildlife, why it seems uncertain whether this includes the marine environment. If this part of the preamble does apply to the marine environment, it could possibly be interpreted it in the following manner. According to the preamble of WCMA, it seems like KWS should optimize the returns from a marine national park and reserve, without prejudicing the proper management and conservation of the marine environment within this area. When KWS decides whether or not to allow marine tourist activities to take place, various interests thus appear relevant to take into consideration, for example social, economical and ecological factors. It seems like KWS could, for example, take into account the possibilities of tourist activity organizers and KWS to benefit from marine tourist activities and the environmental impacts that such activities could cause. However, when balancing different interests, proper management and

³⁷⁰ It is possible that KWS in Kisite Mpunguti MNPR regulates the kind of marine tourist activities that are allowed to take place in the same manner, but I have not been able to certify this.

³⁷¹ It seems uncertain whether WCMR, sec. 3(2), applies within marine national parks and reserves, see subchapter 8.4.1.7 and 8.4.2.

conservation seems to take precedence over other interests. This could thus mean that, according to the preamble of WCMA, marine tourist activities should only be allowed to be conducted within a marine national park and reserve if they are without prejudice to the proper management and conservation of the marine environment. As mentioned, it however appears uncertain whether the preamble of WCMA could be interpreted in this manner.

Furthermore, the principle of sustainable development in the Constitution might possibly entail that KWS should not allow marine tourist activities to take place if the carrying capacity of marine ecosystems in the area would be exceeded.

According to the empirical findings, there appear to be various factors influencing which kind of marine tourist activities that are allowed to take place within Mombasa MNPR. Examples of factors mentioned by respondents are the kind of marine tourist activities that have taken place in the areas historically, their environmental impact, environmental conditions in the areas and needs to make compromises with tourist activity organizers. Proper management and conservation of the marine environment seems to be one factor that is taken into consideration by KWS, but it does not seem like this necessarily takes precedence over other interests.

If KWS, because of environmental consideration, refuses to give consent to the issuance of a tourism license, it seems like this could result in a legal environmental requirement under TILA (see more under subchapter 8.2.1.1). Furthermore, if a tourist activity organizer is suspended from a marine national park and reserve under WCMR, sec. 3(2), because KWS, of environmental consideration, decides not to allow the kind marine tourist activity he wants to undertake, this might possibly also result in a legal environmental requirement. According to the above reasoning, it does however not seem possible to determine from the legal acts which considerations that should be made by KWS when allowing or disallowing marine tourist activities to take place.

7.4.2 Enforcement

According to the empirical findings, KWS seems to primarily enforce the environmental requirements mentioned by the respondents in Mombasa MNPR and Kisite Mpunguti MNPR in relation to marine tourist activities. KWS does thus not appear to strictly enforce the legal environmental requirements identified in WCMA and the regulations under this act, they appear to concentrate on those environmental requirements which are mentioned by the respondents in the respective area (see more in subchapter 8.4.3).

According to WCMA, KWS appears to have responsibility of supervising tourist activity organizers' and tourists' compliance with the legal environmental requirements identified in WCMA and the regulations under this act during marine tourist activities. Authorized officers, including for example KWS officers, seem to have powers in WCMA to perform investigations for this purpose. According to the empirical findings, KWS officers seem to perform supervision of marine tourist activities through daily patrols within Mombasa MNPR and Kisite Mpunguti MNPR. During these patrols they appear to supervise tourist activity organizers', and to some extent tourists', compliance with the environmental requirements mentioned by the respondents in the areas. According to the majority of the respondents, it seems like KWS officers generally prioritize supervising that tourists and tourist activity organizers have paid entry fees. KWS officers however also to some extent seem to supervise tourists' and tourist activity organizers' compliance with other environmental requirements.

If a tourist or tourist activity organizer is suspected of having committed an offence under WCMA or the regulations under this act, KWS officers seem to have possibility to arrest and prosecute the person according to WCMA. The sanctions prescribed are fine or imprisonment. Furthermore, it seems like any permission issued under WCMA could be cancelled and any things relating to the offence could be forfeited to the state. It does however not seem mandatory for KWS officers to arrest and/or prosecute a tourist or tourist activity organizer

suspected of having committed an offence under WCMA or the regulations under this act. KWS officers seem to have a margin of discretion when deciding how to handle such cases. According to the empirical findings in Mombasa MNPR and Kisite Mpunguti MNPR, it seems unusual that tourists or tourist activity organizers are prosecuted for violating legal environmental requirements during marine tourist activities. The empirical findings seem to indicate that KWS primarily prosecutes tourist activity organizers suspected of having contravened the legal environmental requirement of paying an entry fee. KWS does not seem to prosecute tourists for violating legal environmental requirements during marine tourist activities, according to the empirical findings.

As mentioned under subchapter 8.4.1.7, KWS officers might have a possibility to suspend a tourist or tourist activity organizer from a marine national park and reserve according to WCMR, sec. 3(2). If WCMR, sec. 3(2), does apply to marine national parks and reserves, it does not seem mandatory for KWS officers to suspend anyone whose presence is believed to be detrimental to the proper management and control of a marine national park and reserve. KWS officers thus appear to have a margin of discretion when deciding how to use this power. According to the empirical findings, WCMR, sec. 3(2), seems to be applied by KWS officers in Mombasa MNPR and Kisite Mpunguti MNPR to enforce some of the environmental requirements KWS applies in the areas (see more under subchapter 8.4.3). WCMR, sec. 3(2), primarily appears to be applied in relation to tourist activity organizers if the behaviour is considered serious by the KWS officer and the time period of the suspension seems to depend on the KWS officer's perception of the seriousness of the behaviour. It does not seem like KWS officers in Mombasa MNPR or Kisite Mpunguti MNPR apply WCMR, sec. 3(2), in relation to tourists.

A function of KWS, according to WCMA, is also to give education and create public awareness on wildlife conservation. According to the empirical findings, KWS in Mombasa MNPR and Kisite Mpunguti MNPR appear to use education and awareness rising as central mechanisms to ensure that tourists and tourist activity organizers comply with the environmental requirements KWS applies in the areas. Tourist activity organizers in Mombasa MNPR and Kisite Mpunguti MNPR appear to be informed these environmental requirements through for example educations, meetings and workshops, according to the empirical findings. If KWS officers notice a tourist activity organizer violating the environmental requirements, they normally seem to educate him and give a warning. Furthermore, various information materials also seem to inform tourists and tourist activity organizers of environmental requirements. In relation to tourists, KWS in Mombasa MNPR and Kisite Mpunguti MNPR mainly seem to use education to enforce environmental requirements, according to the empirical findings.

Finally, collaboration between KWS and tourist activity organizers also appears to have a central role in ensuring compliance with the environmental requirements KWS applies in relation to marine tourist activities within Mombasa MNPR and Kisite Mpunguti MNPR, according to the empirical findings. Tourist activity organizers seem to have a central role in informing tourists about the environmental requirements and in supervising that tourists comply with these during marine tourist activities. Tourist activity organizers also seem to have a role in supervising other tourist activity organizers compliance with these environmental requirements. According to the empirical findings, it seems like behaviours which are perceived serious by tourist activity organizers are reported to KWS. In Mombasa MNPR, tourist activity organizers also seem to have own common norms with environmental requirements, which also could be seen as having a role in enforcing the environmental requirements which KWS applies and also legal environmental requirements, according to the empirical findings (see more under subchapter 8.5).

7.4.3 Relation between Norms of the Kenya Wildlife Service and Legal Rules

KWS in Mombasa MNPR and Kisite Mpunguti MNPR appears to demand tourists and tourist activity organizers to comply with the environmental requirements which are mentioned by respondents in the respective area during marine tourist activities. The purpose of this subchapter is to, on a general level, create an understanding of how these environmental requirements seem to relate to legal environmental requirements. It should be noted that the analysis in this subchapter is made on a general level and constitutes a simplification of something which in reality seems complex.

The environmental requirements which are applied by KWS in Mombasa MNPR and Kisite Mpunguti MNPR seem to be found in sources with varying degrees of formality. Some environmental requirements seem to be applied by KWS in both Mombasa MNPR and Kisite Mpunguti MNPR, meanwhile other environmental requirements seem to differ between the areas. In order to enable a general analysis, the environmental requirements which KWS demands tourists and tourist activity organizers to comply with during marine tourist activities, which are not clearly derived directly from legislations, regulations or licenses, are hereinafter collectively referred to as ‘KWS’s norms’.

Most of the environmental requirements in KWS’s norms seem to correlate to legal environmental requirements. When enforcing environmental requirements in KWS’s norms, compliance thus simultaneously appears to be ensured with legal environmental requirements. As an illustration, the following figure is intended to show examples of how a few environmental requirements in KWS’s norms seem to correlate to the legal environmental requirement of not disturbing marine animals (WCMA, sec. 13). As previously mentioned, it seems like WCMA, sec. 13, could be interpreted as criminalizing any behaviours of tourists or tourist activity organizers during marine tourist activities which interrupts or breaks the rest, calm or quiet of marine animals or which cause marine animals to act hurriedly. It seems like various behaviours during marine tourist activities could cause such reactions to marine animals and thus constitute an offence under WCMA, sec. 13. The figure is therefore also intended to illustrate that the legal environmental requirement of not disturbing marine animals appears more broadly defined than the environmental requirements in KWS’s norms. Compliance thus only appears to be ensured with part of the legal environmental requirement when enforcing environmental requirements in KWS’s norms.

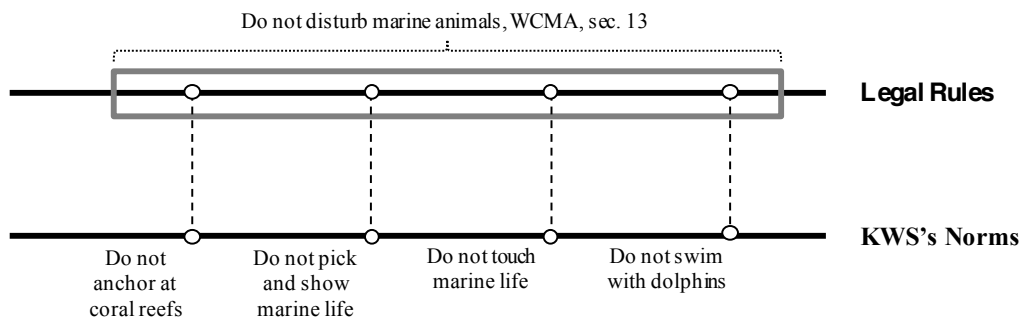


Figure 3. This figure illustrates how environmental requirements in KWS’s norms seem to correlate to the legal environmental requirement of not disturbing marine animals in WCMA, sec. 13. The circles illustrate environmental requirements and the gray square illustrates the scope of the legal environmental requirement. Note however that the illustration is simplified and not according to scale.

As mentioned above, the environmental requirements that KWS demands tourists and tourist activity organizers to comply with during marine tourist activities seem to be found in sources with varying degrees of formality. The following analysis is on a general level intended to illustrate examples of how environmental requirements that KWS enforces seem to relate to legal environmental requirements.

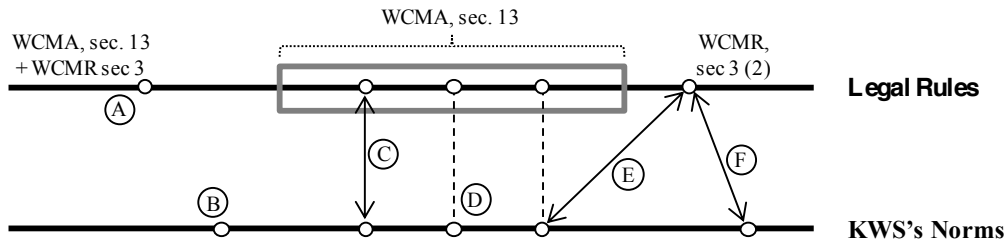


Figure 4. This figure is intended to illustrate examples of how environmental requirements that KWS demands tourists and tourist activity organizers to comply with during marine tourist activities relate to legal environmental requirements. The circles illustrate environmental requirements, the dotted lines illustrate correlations between environmental requirements and the arrows illustrate that environmental requirements in KWS's norms could be viewed as part of legal rules.

KWS sometimes appears to enforce the environmental requirement of paying an entry fee through prosecution. The violation of this requirement thus appears connected to the predetermined sanctions fine or imprisonment. It thus seems clear that KWS in this case enforces a legal environmental requirement in WCMA, sec. 13, or WCMR, sec. 3 (illustrated by A in Figure 4).

It does not seem possible to exclude the possibility that some environmental requirements in KWS's norms could fall outside the scope of legal environmental requirements. If that is the case, it seems as these environmental requirements in KWS's norms should be perceived as more informal norms, which do not clearly relate to legal environmental requirements (illustrated by B in Figure 4).

It appears more uncertain whether KWS, when enforcing environmental requirements in KWS's norms which seem to correlate to legal environmental requirements, enforces legal rules or more informal norms. KWS does not appear to have a delegated power to issue subsidiary legislations and the environmental requirements in KWS's norms do not seem to have been prescribed as legally binding conditions in written permissions or licenses. The environmental requirements in KWS's norms do therefore not appear to be adopted or prescribed in a manner required to become legal sources. It however seems like it might be possible to view environmental requirements in KWS's norms as specifications of how tourists and tourist activity organizers should behave in order to comply with for example WCMA, sec. 13. When KWS enforces environmental requirements in KWS's norms through supervision, education and warnings, it thus seems like KWS could be viewed enforcing legal environmental requirements (illustrated by C in Figure 4).

It however appears more uncertain whether environmental requirements in KWS's norms could be viewed as part of for example WCMA, sec. 13, when considering the sanctions which appear to be connected to a violation of certain environmental requirements in KWS's norms. If KWS strictly enforced WCMA, sec. 13, a tourist or tourist activity organizer violating the environmental requirement would risk the predetermined sanctions fine or imprisonment. According to the empirical findings, violations of certain environmental requirements in KWS's norms rather seem connected to the sanction suspension. This might indicate that these environmental requirements in KWS's norms should rather be viewed as more informal norms (illustrated by D in Figure 4). It could also indicate that these environmental requirements in KWS's norms should be perceived as KWS's interpretation of a legal environmental requirement in WCMR, sec. 3(2), rather than WCMA, sec. 13 (illustrated by E in Figure 4).³⁷² This could also be the case with environmental requirements

³⁷² As mentioned in subchapter 8.4.1.7 and 8.4.2 it seems uncertain whether WCMR, sec. 3(2), applies within marine national parks and reserves and whether it fulfils the fundamental features of norms, which might mean that this reasoning is not correct.

in KWS's norms which appear to fall outside the scope of for example WCMA, sec. 13, but which seem to be enforced through WCMR, sec. 3(2) (illustrated by F in Figure 4).

The above reasoning appears to illustrate that it is difficult to determine whether the environmental requirements which KWS demands tourists and tourist activity organizers to comply with during marine tourist activities form part of legal rules or are more informal norms. The environmental requirements in KWS's norms seem to relate to and interact with legal environmental requirements in various manners. It seems like the environmental requirements applied by KWS in Mombasa MNPR and Kisite Mpunguti MNPR comprises a greyscale, from legal to more informal norms.

7.5 Norms of Tourist Activity Organizers in Mombasa

7.5.1 Environmental Requirements

Tourist activity organizers in Mombasa MNPR, as members of the MBOAs, seem to have requirements of how marine tourist activities should be conducted in order to avoid harming the marine environment, according to the empirical findings. With Baier & Svenssons' fundamental features of norms in mind, these requirements seem to form directives of how tourist activity organizers should behave, appear to be communicated to the members of the MBOAs and seem to form tourist activity organizers' perception of how they, as members of the MBOAs, are expected to behave. Tourist activity organizers, through the MBOAs, thus appear to have own collective norms with environmental requirements which they should comply with during marine tourist activities. These norms are hereinafter collectively referred to as 'MBOAs' norms'.

According to the empirical findings, a group of tourist activity organizers, who have participated in Project Explore the Ocean Together, also seem to have requirements of how marine tourist activities should be conducted in order to avoid harming the marine environment through this project. Again with Baier & Svenssons' fundamental features of norms in mind, these requirements also seem to form directives of how tourist activity organizers should behave, appear to be communicated to the tourist activity organizers through the project and it seems like this group of tourist activity organizers perceive that they are expected to adhere to these requirements. It thus seems like a group of tourist activity organizers, through Project Explore the Ocean Together, have collective norms with environmental requirements which they should comply with during marine tourist activities. These norms appear to form a norm system separate from MBOAs' norms and KWS's norms, since attributes such as for example their origin and creation appears to differ from KWS's norms and MBOAs' norms. These norms are hereinafter referred to as 'Explore the Ocean Together's norms'.

7.5.2 Enforcement

Environmental requirements in MBOAs' norms seem to be enforced primarily by tourist activity organizers, according to the empirical findings. The members of the MBOAs seem to supervise each other's compliance with these environmental requirements during marine tourist activities. If a member violates an environmental requirement in MBOAs' norms, he appears to be informed of this and could be given warnings by the MBOA. If a tourist activity organizer continues to violate the environmental requirement after warnings, it seems like he could be suspended from the MBOA, according to the empirical findings. Since a tourist activity organizer seems required, by KWS and the MBOAs, to be a member of an MBOA in order to undertake marine tourist activities, the suspension seems to entail that he is not allowed to undertake marine tourist activities within Mombasa MNPR during the suspension. If the tourist activity organizer would refuse to accept the suspension from the MBOA, it seems like KWS could get involved to suspend the tourist activity organizer from Mombasa

MNPR by applying WCMR, sec. 3(2), according to the empirical findings (see more in subchapter 8.5.3).

Environmental requirements in Explore the Ocean Together's norms appear to be enforced by KWS and Trainer, through for example organizing trainings and workshops, providing information materials and reminding tourist activity organizers of these environmental requirements, according to the empirical findings.³⁷³ Since most of the environmental requirements in Explore the Ocean Together's norms seem similar to those in MBOAs' norms and KWS's norms, it seems like environmental requirements in Explore the Ocean Together's norms might also be enforced through MBOAs' norms and/or KWS's norms.

7.5.3 Relation between Norms of Tourist Activity Organizers and Legal Rules

The purpose of this subchapter is to, on general level, create an understanding of how environmental requirements in MBOAs' norms and Explore the Ocean Together's norms relate to legal environmental requirements. It should be noted that the analysis constitutes a simplification of something which in reality seems non-formalized and complex.

Most of the environmental requirements in MBOAs' norms and Explore the Ocean Together's norms appear to correlate to legal environmental requirements. When enforcing environmental requirements in MBOAs' norms and Explore the Ocean Together's norms, compliance thus simultaneously seems to be ensured with legal environmental requirements. Figure 5 is intended to illustrate examples of how a few environmental requirements in MBOAs' norms and Explore the Ocean Together's norms seem to correlate to the legal environmental requirement of not disturbing marine animals (WCMA, sec. 13). The figure is also intended to illustrate that, by enforcing these environmental requirements, compliance simultaneously seems to be ensured with part of the legal environmental requirement.

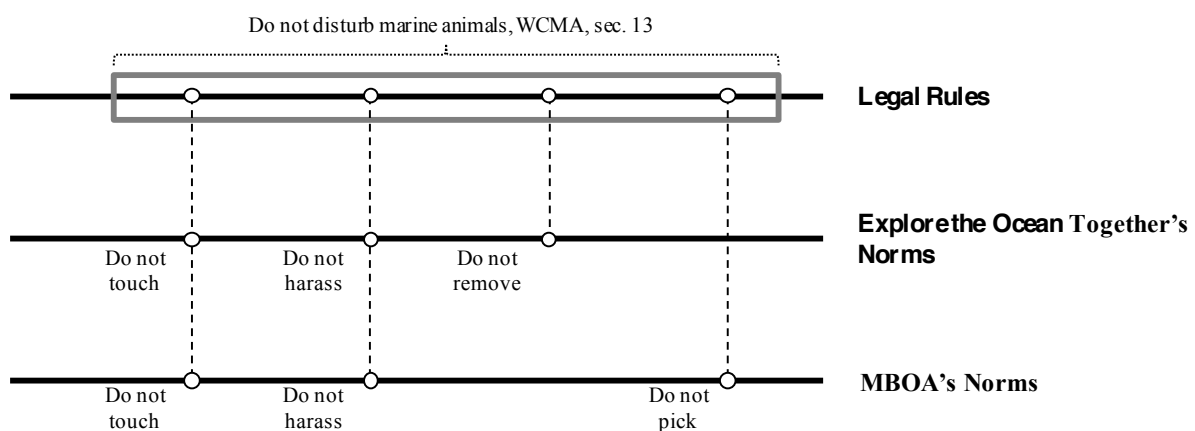


Figure 5. This figure illustrates how a few environmental requirements in MBOAs' norms and Explore the Ocean Together's norms seem to correlate to the legal environmental requirement of not disturbing marine animals in WCMA, sec. 13. The circles illustrate environmental requirements and the gray square illustrates the scope of the legal environmental requirement. The illustration is simplified and not according to scale.

As mentioned in the previous subchapter, KWS seems involved in enforcing environmental requirements in MBOAs' norms, according to the empirical findings. Figure 6 is intended as an illustration of how MBOAs' norms, KWS's norms and legal rules seem to relate to each other in these cases. As in subchapter 8.4.3, KWS's norms are illustrated at a different level than the legal rules, in order to make the analysis clearer.

³⁷³ The tourist activity organizers might also enforce these environmental requirements, but I have not been able to certify how this differs from the enforcement of MBOAs' norms.

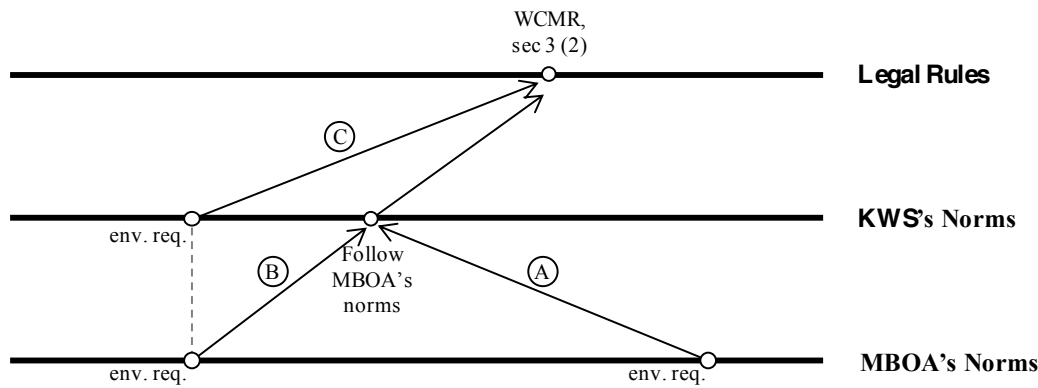


Figure 6. This figure illustrates how requirements in MBOAs' norms, KWS's norms and legal rules seem to relate to each other when KWS enforces a decision of an MBOA to suspend a tourist activity organizer, as a sanction for violating an environmental requirement in MBOAs' norms.

According to the empirical findings, it seems like the MBOAs can contact KWS in case a tourist activity organizer, who has violated an environmental requirement in MBOAs' norms, refuses to accept a suspension as a disciplinary measure from the MBOA. It seems like a KWS officer handling such a case functions fairly similar to a court, according to the empirical findings. If he decides to follow the decision of the MBOA, it seems like he could be seen as applying norms at two or three levels and that the relation between these, in a simplified manner, could be described as follows. If the environmental requirement which the tourist activity organizer has violated is only found in MBOAs' norms, the KWS officer seems to apply norms at three levels (illustrated by A in Figure 6). At the first level, the KWS officer seems to apply the environmental requirement in MBOAs' norms. It does not, according to the empirical findings, seem necessary that a similar environmental requirement is found in KWS's norms or the legal rules. At the second level, the KWS officer seem to apply a requirement in KWS's norms of being a member of an MBOA, and to follow MBOAs' norms, in order to be permitted to perform marine tourist activities. At the third level, the KWS officer seems to apply WCMR, sec. 3(2), which as earlier mentioned above might perhaps constitute a legal environmental requirement.³⁷⁴ It thus seems as the KWS officer perceives the presence of a tourist activity organizer, who does not comply with environmental requirements in MBOAs' norms, as detrimental to the proper management and control of Mombasa MNPR. If the tourist activity organizer has contravened an environmental requirement in MBOAs' norms, which correlates to a similar environmental requirement in KWS's norms, the KWS officer could be seen as either applying norms at three levels, similarly as described above (illustrated by B in Figure 6), or applying norms at two levels, namely a similar environmental requirement in KWS's norms and WCMR, sec. 3(2) (illustrated by C in Figure 6). Through the collaboration between the MBOAs and KWS, it thus seems as the environmental requirements in MBOAs' norms indirectly can be enforced through WCMR, sec. 3(2). With Hydéns reasoning in mind, it seems like the environmental requirements in MBOAs' norms, through this collaboration, could be viewed as being somewhat reinforced in practice.

³⁷⁴ As mentioned in subchapter 8.4.1.7 and 8.4.2 it seems uncertain whether WCMR, sec. 3(2), applies within marine national parks and reserves and whether it could be seen as a legal environmental requirement.

8 Conclusions and Reflections

In the first four sub chapters beneath, the conclusions of this essay are summarized and a few reflections are made. In the fifth subchapter, suggestions for how the knowledge gained through this study could be taken one step further through further research are presented.

8.1 Legal Environmental Requirements

There are legal environmental requirements which tourists and tourist activity organizers must comply with during marine tourist activities. These are primarily found in provisions prescribing offences in WCMA and EMCA, including regulations under these acts. Legal environmental requirements that tourists and tourist activity organizers must comply with in WCMA and regulations under this act seem to be that it is, as a main rule, prohibited to: enter or reside in a marine national park or reserve without paying an entry fee; injure marine vegetation; damage or attempt to remove any marine object of scientific interest; disturb, stampede or possess any marine animal. Exceptions can be made from most of these legal environmental requirements and KWS officers appear to have a margin of discretion when making such exceptions. In practice there appear to be various exceptions from the requirement of paying an entry fee in Mombasa MNPR, meanwhile exceptions from this requirement seem less common in Kisite Mpunguti MNPR. It seems uncertain whether tourists or tourist activity organizers are given written permissions with exceptions from other legal environmental requirements by KWS in Mombasa MNPR and Kisite Mpunguti MNPR.

EMCA and regulations under this act contain legal environmental requirements prohibiting pollution of the marine environment during marine tourist activities. Furthermore, a tourist activity organizer could be required to undertake measures to minimize impacts from pollution. TA will also contain a prohibition against polluting the environment. It however appears uncertain whether this will result in any additional requirement of how to perform marine tourist activities compared to EMCA.

There might also be other legal environmental requirements that tourists and/or tourist activity organizers must comply with during marine tourist activities. It seems like KWS officers might have a possibility to include legal environmental requirements of how tourist and tourist activity organizers should behave during marine tourist activities in written permissions under WCMA. It however appears uncertain whether such legal environmental requirements are prescribed in practice in Mombasa MNPR or Kisite Mpunguti MNPR. Furthermore, WCMR could possibly be seen as containing a legal environmental requirement, being that tourists and tourist activity organizers should not perform marine tourist activities in a manner which is detrimental to the proper management and control of a marine national park or reserve. In practice, it seems like the application of this provision could be seen as resulting in legal environmental requirements, for example through regulating the kind of marine tourist activities allowed to take place within Mombasa MNPR.

According to EMCA and regulations under this act, tourist activity organizers might be required to submit a project report to NEMA before undertaking certain marine tourist activities (e.g. jet-skiing) within marine national parks and reserves. This could in that case result in legal environmental requirements. In practice, tourist activity organizers do not seem to have issued project reports and there do thus not seem to be legal environmental requirements prescribed in EIA-licenses in relation to marine tourist activities taking place in Mombasa MNPR or Kisite Mpunguti MNPR. Furthermore, NEMA might have possibility to prescribe legal environmental requirements in improvement notices or restoration orders, which could in that case have a role in regulating marine tourist activities.

Furthermore, the licensing of tourist activity organizers under TILA could perhaps lead to legal environmental requirements, but it seems uncertain whether it results in this in practice.

It does not seem like legal environmental requirements are prescribed in tourism licenses in relation to marine tourist activities taking place in Mombasa MNPR or Kisite Mpunguti MNPR. Whether the licensing of tourist activity organizers under TA will entail further legal environmental requirements than TILA appears unclear at this stage.

As described in chapter 2, environmental goals and legal environmental requirements are interconnected. Mombasa MNPR and Kisite Mpunguti MNPR have the objective of conserving marine biodiversity. It does however not seem like this objective is clearly reflected as an environmental goal in WCMA or the regulations under this act, under which the marine areas are protected. The environmental goal prescribed in these legal acts rather appears developed for the terrestrial environment. Neither does it seem like the legal environmental requirements tourists and tourist activity organizers must comply with during marine tourist activities originally have been developed to achieve conservation of marine biodiversity. Environmental requirements directing tourists and tourist activity organizers behaviours during marine tourist activities, developed with the objective of conserving marine biodiversity, rather seem to be found in other sources than WCMA and the regulations under this act, such as codes of conduct applied by KWS.

8.2 Enforcement of Legal Environmental Requirements

KWS is the government authority with the main responsibility of ensuring that tourists and tourist activity organizers to comply with legal environmental requirements during marine tourist activities in Mombasa MNPR and Kisite Mpunguti MNPR. KWS does however not in practice appear to strictly enforce the legal environmental requirements as identified in this essay. KWS in Mombasa MNPR and Kisite Mpunguti MNPR seem to concentrate on enforcing the environmental requirements mentioned by respondents in the respective area.

According to WCMA, KWS seems responsible of supervising tourist activity organizers' and tourists' compliance with legal environmental requirements in WCMA and the regulations under this act during marine tourist activities. In practice, KWS performs such supervision through daily patrols within Mombasa MNPR and Kisite Mpunguti MNPR. KWS officers generally seem to prioritize supervising tourists' and tourist activity organizers' compliance with the legal environmental requirement of paying an entry fee. KWS officers however also to some extent supervise their compliance with other legal environmental requirements.

According to WCMA, tourists or tourist activity organizers, who violate legal environmental requirements in WCMA or regulations under this act during marine tourist activities, could in most cases be prosecuted. KWS officers however have a margin of discretion when deciding how to handle such cases. In practice it seems unusual that prosecution is used by KWS as a mechanism to ensure compliance with legal environmental requirements during marine tourist activities. It appears like this mechanism is primarily used in relation to tourist activity organizers who violate the requirement of paying an entry fee.

It seems like KWS might have possibility to suspend a tourist or tourist activity organizer from a marine national park and reserve according to WCMR, which could in that case be used to enforce legal environmental requirements. In practice, suspension is used by KWS in Mombasa MNPR and Kisite Mpunguti MNPR to ensure that tourist activity organizers comply with some of the environmental requirements that KWS demands them to comply with during marine tourist activities.

According to WCMA, it also seems like KWS should give education and create public awareness on conservation issues. In practice, such incentives have a central role in ensuring that tourists and tourist activity organizers comply with legal environmental requirements during marine tourist activities in Mombasa MNPR and Kisite Mpunguti MNPR. If a tourist

or tourist activity organizer violates legal environmental requirements he would normally be educated and a tourist activity organizer could also be given a warning.

Collaboration between KWS and tourist activity organizers also has a central role in ensuring that tourists and tourist activity organizers comply with legal environmental requirements during marine tourist activities in Mombasa MNPR and Kisite Mpuguti MNPR. Tourist activity organizers have a central role in informing tourists and other tourist activity organizers of environmental requirements and in supervising tourists' and other tourist activity organizers' compliance with these. In Mombasa MNPR, KWS also encourages tourist activity organizers to regulate their own behaviours through environmental requirements in own norms.

It seems like supervision of tourists' and tourist activity organizers' compliance with legal environmental requirements in EMCA and regulations under this act during marine tourist activities should be performed in collaboration between NEMA and KWS, according to EMCA. The Kenyan public could also be seen as having a role in performing supervision under EMCA. In practice, it is primarily KWS of the government agencies which supervises marine tourist activities undertaken within Kisite Mpunguti MNPR and Mombasa MNPR. According to EMCA, environmental inspectors at NEMA have possibility to prosecute a tourist or tourist activity organizer suspected of having violated a legal environmental requirement in EMCA or a regulation under this act. In practice, it however appears unlikely that tourists or tourist activity organizers would be prosecuted by environmental inspectors. NEMA might also have possibility to issue improvement notices or restoration orders under EMCA in order to ensure compliance with legal environmental requirements during marine tourist activities. Furthermore, EMCA recognizes the importance of awareness rising and education on environmental issues and, in practice, it mainly seems to be such incentives which are undertaken by NEMA to ensure that tourists and tourist activity organizers comply with legal environmental requirements during marine tourist activities.

If TILA or the regulations under this act would result in legal environmental requirements in relation to marine tourist activities, it seems like these would be enforced by MT, primarily through supervision and prosecution.

According to the above reasoning, it seems like legal possibilities exist to enforce tourists and tourist activity organizers to comply with the legal environmental requirements that have been identified in this essay. It does however not always seem to follow from the legislations exactly how legal environmental requirements are enforced in practice.

8.3 Environmental Requirements of Kenya Wildlife Service

KWS in Mombasa MNPR and Kisite Mpunguti MNPR appears to demand tourists and tourist activity organizers to comply with the environmental requirements which are mentioned by respondents in the respective area during marine tourist activities. These environmental requirements are found in sources with varying degrees of formality. Some of the environmental requirements are applied by KWS in Mombasa MNPR as well as Kisite Mpunguti MNPR, meanwhile other environmental requirements differ between the areas.

Most environmental requirements which KWS demands tourists and tourist activity organizers to comply in Mombasa MNPR and Kisite Mpuguti MNPR correlate to legal environmental requirements. When enforcing these environmental requirements, compliance therefore simultaneously is ensured with legal environmental requirements. Compliance however only appears to be ensured with part of the legal environmental requirements when only enforcing the environmental requirements mentioned by the respondents.

The environmental requirements applied by KWS fulfil the fundamental features of norms described by Baier & Svensson. It however seems difficult to categorize these requirements as legal rules or more informal norms by using the attributes of legal rules described by Baier &

Svensson and Hydén. It rather seems like the environmental requirements applied by KWS comprise a greyscale of legal rules to more informal norms. The environmental requirements in practice appear relate to and interact with legal environmental requirements in various manners.

8.4 Environmental Requirements of Tourist Activity Organizers

In Mombasa MNPR, tourist activity organizers have own collective norms with environmental requirements which they must comply with during marine tourist activities. These norms fulfil the fundamental features of norms described by Baier & Svensson. Two different norm systems have been identified in this essay: MBOAs' norms (can be seen as consisting of two norm systems) and Explore the Ocean Together's norms. These norm systems have different attributes, such as their origin and creation, which differentiate them.

Environmental requirements in MBOAs' norms are primarily enforced by tourist activity organizers, for example through supervision, education, warnings and suspension. Collaboration however also exists between KWS and the MBOAs. Through this collaboration, environmental requirements in MBOAs' norms can be enforced by KWS applying WCMR, sec. 3(2). This in practice appears to results in that environmental requirements in MBOAs' norms could, with the illustration of Hydén in mind, be viewed as somewhat reinforced through a legal rule.

Environmental requirements in Explore the Ocean Together's norms primarily seem to be enforced by KWS and Trainer, for example through education and workshops. Since environmental requirements in Explore the Ocean Together's norms seem to resemble environmental requirements applied by KWS and the MBOAs, the requirements might however also be enforced by these bodies.

Environmental requirements in tourist activity organizers' norms seem to correlate to legal environmental requirements. By enforcing these environmental requirements, tourist activity organizers are thus simultaneously enforced to comply with part of legal environmental requirements.

In Kisite Mpunguti MNPR, it does not seem like tourist activity organizers have own collective norms with environmental requirements that they must comply with during marine tourist activities.

8.5 Suggestion for Further Research

I have encountered several issues during this study that I believe would be interesting to further examine. What I find most fascinating is the prominent role of more informal norms, such as codes of conduct, in the regulation of tourist activities in Kenya. Such norms appear to be developed by various stakeholders, for example tourism associations and government agencies. What I, as a law student, find would be interesting to further examine is how Kenyan government agencies use such more informal norms most appropriately in order to achieve environmental goals.

During the minor field study, I noticed benefits as well as disadvantages of that government agencies implement both legal rules and more informal norms. In comparison with legal rules, the more informal norms appeared more flexible and could easier be adapted to local environmental conditions. These norms also seemed to have a higher legitimacy among local stakeholders. A problem however seemed to be that local interests sometimes seemed to be prioritized over environmental protection. I also noticed that the use of such more informal norms by government agencies could lead to a weakened rule of law. Furthermore, different codes of conduct appeared to have been developed by different government agencies, which might in practice result in an impaired normative effect.

Some of the pros and cons of more informal norms that I noticed during the study seem to have been described by scholars in for examples sociology of law, environmental law and environmental management.³⁷⁵ Given the central role such more informal norms appear to have in regulating environmental impact from tourist activities in Kenya, it would be interesting to further investigate how to optimize the benefits of such norms, while avoiding their disadvantages. Questions that could be interesting for further research are for example:

- What is suitable to regulate through informal norms and what is more adequate to regulate through legal rules?
- How are informal norms and legal rules most suitably linked, coordinated and separated?
- At which governance level and with the involvement of which stakeholders should such informal norms be developed?
- How are informal norms most suitably enforced?

³⁷⁵ See for example Hydén, 2002, p. 30-35, and especially his book Hydén, *Normvetenskap*. See also for example Christiernsson, p. 54-58 and 60-63.

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Respondents

National Environment Management Authority

Officer X, NEMA, Nairobi, 2011-12-19 (Approximately 45 min)

Officer Y, Senior Environmental Education Information & Public Participation Officer, Coast Province, NEMA, Mombasa, 2011-12-08 (Approximately 50 min)

Officer Z, Principal Officer, Coastal, Marine and Wetlands, NEMA, Nairobi, 2011-12-19 and 2012-01-06 (Informal conversation for approximately 10 min, interview via e-mail)

Ministry of Tourism

Officer T, Regional Tourism Officer, Mombasa Provincial Tourism Field Office, MT, Mombasa, 2011-10-16 (Approximately 45 min)

Kenya Wildlife Service

Officer A(M), KWS, Mombasa MNPR, 2011-11-16 (Approximately 30 min)

Officer B(M), Sergeant, KWS, Mombasa MNPR, 2011-11-15, 2011-11-18 and 2011-12-08 (Approximately 45 min)

Officer C(M), Ranger, KWS, Mombasa MNPR, 2011-11-15 (Approximately 30 min)

Officer D(M), Coxswain, Mombasa MNPR, 2011-11-15 and 2011-11-16 (Approximately 60 min)

Officer E(M), Senior Warden, KWS, Mombasa MNPR, 2011-12-15 (Approximately 90 min)

Officer F(K), Ranger, KWS, Kisite Mpunguti MNPR, 2011-11-29 and 2011-12-01 (Approximately 30 min)

Officer G(K), Ranger, KWS, Kisite Mpunguti MNPR, 2011-11-29 (Approximately 30 min)

Officer H(K), Corporal, KWS, Kisite Mpunguti MNPR, 2011-11-29 (Approximately 50 min)

Officer I(K), Warden, KWS, Kisite Mpunguti MNPR, 2011-11-29 and 2011-12-01 (Approximately 45 min)

Tourist Activity Organizers

Organizer A(M), Mombasa MNPR, 2011-11-15 (Approximately 10 min)

MBOA(A), Mombasa MNPR, 2011-11-18. Group interview with two respondents (Approximately 60 min)

MBOA(B), Mombasa MNPR, 2011-11-17, 2012-12-11 and 2012-12-13. Group interview with three respondents (Approximately 40 min)

Organizer B(K), Kisite Mpunguti MNPR, 2011-11-29 (Approximately 15 min)

Organizer C(K), Kisite Mpunguti MNPR, 2011-11-29 (Approximately 15 min)

Organizer D(K), Kisite Mpunguti MNPR, 2011-11-29 (Approximately 15 min)

Organizer E(K), Kisite Mpunguti MNPR, 2011-11-29 (Approximately 10 min)

Other Respondents

Global Vision International (GVI), Shimoni, 2011-11-30. Group interview with two respondents (Approximately 60 min)

North Coast Beach Operators Forum (NCBOF), Mombasa MNPR, 2011-12-12. Group interview with two respondents (Approximately 40 min)

Trainer, Mombasa MNPR, 2011-12-05 (Approximately 60 min)

Marine Wildlife Code³⁷⁶

- Check local weather and sea conditions before entering the marine park.
- Some marine life is dangerous; do not touch anything under water.
- Do not damage or remove corals. It is a living organism which takes many years to form and is host to many rare and endangered species.
- Do not remove shells, starfish or any other sea – flora or fauna. Removal is illegal, seriously disrupts the eco-system and some marine life is dangerous. The areas outside the parks and reserves is threatened by excessive shell collection. Empty shells provide homes for hermit crabs and some fish.
- Do not buy shells and other marine animal products as souvenirs as this encourages further plundering of the reefs and beaches.
- Never dispose of litter on the beach or in the sea. It is illegal and environmentally unfriendly. Marine turtles can confuse clear plastic waste with jelly fish and will die if they eat it.
- Hand – feeding of fish is discouraged. It disrupts normal feeding patterns.
- Hook and line fishing is allowed in the Marine Reserves but prohibited in Marine Parks. Spear guns are not permitted for use in either.
- Environmentally friendly activities such as snorkeling and diving are encouraged, under the supervision of the Kenya Wildlife Service wardens, who work closely with tour operators and hoteliers to ensure strict adherence to this code of practice.
- Avoid restaurants that serve undersized crabs and lobsters as this contributes to their rapid demise.
- Support traditional coastal livelihoods and do not give money to children on the beach, as this can encourage them to stay away from school.
- Respect the cultural heritage of Kenya, never take pictures of the local people or their habitat without asking their permission, respect the cultural traditions of Kenya and always dress with decorum.

³⁷⁶ This code of conduct is published at the webpage of KWS, *Park, Wildlife and Marine Code*. A similar code of conduct is found in KWS's brochures for Kisite Mpunguti MNPR and Mombasa MNPR.

Entry Ticket³⁷⁷

Your Ticket

- This ticket is proof of your entitlement to be in the park.
- You must have a valid ticket for each day of entry.
- Please be ready to show your tickets to any Ticket Inspection Unit.
- Please hand in your complete ticket at exit. The gate ranger will detach the Exit Portion and return the visitors Portion for you to keep.
- Not refundable or valid for re-entry.

Kenya Wildlife Service

Kenya Wildlife Service maintains Kenya's wildlife and administers national parks- over 10 million acres of the world's greatest wildlife areas. Our main source of Conservation income is your fee. It is used to maintain roads, protect animals from poachers, help neighboring communities that have wildlife on their land, research into wildlife conservation, and manage our parks.

Dos and Don'ts

- Protect the marine environment. Please do not touch or stand on coral reefs.
- Take all your litter with you, never dispose of it on the beach or in the sea.
- Never buy or remove starfish, shells, or any products that derive from turtles, whales or other endangered species.
- Avoid buying undersized crabs and lobsters.

³⁷⁷ This information is found on the backside of the entry ticket, 2011-12-01.

Responsible Wildlife Watching, Code of Conduct³⁷⁸

- If dolphins are sighted, you should slow down gradually to no wake speed and maintain this speed until clear of the animals.
- Don't chase the dolphins, circle them, or drive your boat directly toward them.
- If you wish to approach the dolphins, do it very slowly, keeping parallel to their course and avoid sudden changes of direction or speed which could confuse or disorient them.
- Do not drive through or between groups of dolphins.
- Move away slowly if you notice signs of disturbance from the dolphins, such as erratic changes in speed and direction or lengthy periods under water. Slapping of the tail and/or head of the surface of the water may be a sign of distress.
- Avoid dolphins with young and DO NOT make loud noises.
- Allow the animals to approach you. If they do approach and 'bowride' maintain steady speed and steady course.
- If already in the water snorkeling, remain calm, do not get over excited, and let them approach you, instead you to them.
- Try not to have more than 2 boats at one time at dolphin sightings and keep a distance of not less than 100 m of the animals.
- Do not spend more than 20 minutes (at a time) with the animals (bear in mind the need of other operators who too want to offer their clients the opportunity).
- Do not dispose of fuel or oil in the SEA/OCEAN and other contaminants. Dispose off in appropriate containers on board the boat or at your destination, not into the SEA.
- Do NOT feed, touch or swim with the dolphins.

³⁷⁸ I got a copy of this code of conduct from Officer I(K), Warden, KWS, Kisite Mpunguti MNPR, 2011-12-01. This code of conduct was developed for Kisite Mpunguti MNPR in 2007 by KWS, United Nations Environment Programme and Convention of Migratory Species. Also tourist activity organizers in Kisite Mpunguti MNPR were involved in developing these.

Kisite Marine Park & Mpunguti Marine Reserve, The Dolphin Watch³⁷⁹

Human Activities

Dont chase the dolphins, circle them, or drive your boat directly towards them. Do not drive through or between groups of dolphins. Always ensure dolphins are not surrounded. Leave an obvious escape route for dolphins. Avoid dolphins with young or when mating. Do not feed, touch or swim with dolphins.

Lack of Food due to Fishing

Modern fishing methods, mid water traws, entangled in long-lines, costal gill nets & purse-seine nets endangering a number of costal species of dolphins & porpoise.

Sea & Noise Pollution

Do not make loud noises. Do not dispose off fuel, oil, plastic, metal or other contaminants in the sea-ocean. Dispose off litter in appropriate containers on board the boat or at your destination, not into the sea. Toilets are to be emptied on land, not into the sea or channel.

³⁷⁹ This text is found on a signboard at KWS's headquarters in Kisite Mpunguti MNPR, 2011-12-01.

Marine Park and Reserve Regulations³⁸⁰

These regulations include existing gazetted regulations based on the Wildlife (Conservation and Management) Act as well as draft, but formally agreed and enforced, regulations (by-laws).

- Draft regulations were made after several seminars on coastal Management held in various MPAs (Mombasa, Malindi, Watamu and Kisite)
- Initial reserve regulations were agreed upon at a meeting held in the presence of the then Minister for Tourism (Hon. Shako), Coast Provincial Commissioner, Fishing communities from Mkwiro, Wasini, Shimoni and Kibuyuni at the Fisheries Department compound in 1977/8.

Reserve Regulations

Prohibit the following within the reserve:

- Spear-fishing or possession of spear-fishing equipment
- Handling, removal or standing on coral formations
- Removal of corals, shells, clams, starfish, etc.
- Usage of poison for fishing purposes
- Usage of beach seine-net fishing
- Use of dynamites as a fishing method

Park Regulations

Prohibit the following within the park:

- Fishing, except under a Government of Kenya research permit
- Collection, handling, removal or destruction of any natural marine organisms – whether living or dead (sea grass, fish, coral, shells, sponges, turtles, starfish, clams etc.)
- Littering, discharge of trash or other pollutants
- Damage by human-driven vessel to natural formations
- Handling, standing or kicking on coral formations
- Nude sun-bathing on the beach and nude swimming in the sea
- Tampering with or damaging markers, mooring buoys & other installations
- Dredging, filling, exaction and building activities
- Transit (way-through) for vessels
- Vessels speeding at more than 10 knots

³⁸⁰ These regulations are found at KWS's headquarters in Kisite Mpunguti MNPR, 2011-12-01.

Code of Conduct for Glass Boats Excursions and Associated Members³⁸¹

Mombasa Marine Park and Reserve

All Glass Boat Associated Members Will Practice SAFETY FIRST

- They will display (and respect) the carrying capacity of each boat clearly for all clients to see
- They will always remain with the clients for the duration of the excursion
- They will moor (park) the boats in a safe manner at designated areas
- They will carry safety equipment to include: first aid kit, fire extinguisher, life vests/rings

All Glass Boat Associated Members Will RESPECT MARINE LIFE

- They will only look at the marine and not touch or remove anything from the reef (living or dead)
- They will not harass any wildlife
- They will not litter and will make an effort to collect any rubbish

All Glass Boat Associated Members Will Conduct Themselves in a PROFESSIONAL MANNER

- They will appear in a presentable manner and uniform
- They will exercise social discipline and not engage in public debate
- They will conduct business in a honest, realistic and clear manner
- They will not interrupt/intrude another member conducting sales (one man, one visitor)
- They will not harass (potential) clients
- They will be punctual
- They will be affiliated to a glass boat association (example MBOA) and attend the meetings

All glass boat associated members agree NOT TO TRANSFER OR LEND OUT any of the educational materials received upon completion of the workshop

³⁸¹ I got a copy of this code of conduct from Officer E(M), Senior Warden, KWS, Mombasa MNPR, 2011-11-07.

Registrerades på kursen första gången: HT-11
Omregistrerats: VT-11
Dispens: 10 veckor för minor field study