



Orange-Senqu River Basin

Orange-Senqu River Commission Secretariat
Governments of Botswana, Lesotho, Namibia and South Africa

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Transboundary Environmental Assessment Guidelines for ORASECOM

Discussion Materials for the Regional Consultation

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1. Context

The Ministers responsible for water of the Orange-Senqu Basin States have recognised the need for developing procedures for environmental assessment (EA) in the context of the management and development of water and related resources of the Orange-Senqu River Basin. The UNDP-GEF Project supporting the Orange-Senqu River Commission (ORASECOM) has committed to facilitating this process of establishing guidelines for EA in a transboundary context for the Basin.

The purpose of the transboundary EA Guidelines for ORASECOM (Tb-EA Guidelines) is to:

- Highlight the issues of concern in the Orange-Senqu Basin, especially how transboundary impacts on the river and associated habitats could foreclose future livelihood and development options.
- Provide guidance on how transboundary impacts should be assessed, using Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) tools.
- Advise on how best to develop or strengthen legal and administrative instruments, in the context of notification under the ORASECOM Agreement.

The Tb-EA Guidelines are primarily intended for people who have to make decisions on environmental issues through the impact assessment process, namely: national, provincial/state and local authorities who comment on impact assessment reports and make decisions about the environment and development. These authorities include, but are not limited to: local authorities, departments or ministries of environment, planning and land use, mines, energy, water, fisheries, agriculture, forestry, housing, roads, tourism, heritage and health. It is expected that they will also be referred to by practitioners who are undertaking SEA or EIAs for initiatives likely to have transboundary impacts. Whilst these guidelines are written through the ‘lens’ of ORASECOM and thus geared towards river basin and water-related issues and concerns, they could equally be useful for “non-ORASECOM” considerations. However, given that the guidelines have been developed by ORASECOM, the details on institutional arrangements are linked to the ORASECOM agreement and structures.

The ORASECOM Council decided that the work on the Tb-EA Guidelines will be under the overall guidance of the Legal Task Team, a sub-committee under the Council. An *ad-hoc* Working Group, the Tb-EA Working Group will provide the basin States’ inputs to the drafting the Guidelines. The Working Group shall include two members per Basin State, a senior environmental lawyer, preferably from the respective Environment Ministry/Department as well as one senior water/planning sector professional from the respective Water Department.

This paper provides inputs to the regional consultation which will hopefully help shape the Guidelines.

2. Transboundary EA

All four basin States have developed national environmental legislation and recognise the need for undertaking EAs both at strategic and project levels. Their respective legislation broadly follows a similar process of studies, consultation, analysis, report compilation, submission and approval. Likewise, the need for assessing transboundary impacts is recognized in the legislation of all basin States. However, the detailed procedures for the assessment of transboundary impacts and the consultation of stakeholders in the potentially affected states require further elaboration.

The most significant legal instrument in this regard is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (so-called Espoo Convention) and the 2003 Protocol on Strategic Environmental Assessment to this Convention (co-called Kiev Protocol), which establish a regime for EIAs in a transboundary context and for assessing cumulative impacts respectively. Other instruments include the Revised SADC Protocol on Shared Watercourses and the UN-Convention on the Non-navigational Uses of International Watercourses.

However, various studies (e.g. the IAIA CBBIA study¹ completed in 2006), have found that, with some exceptions, there are at present a number of weaknesses in the way that sustainable development tools, notably Impact Assessment, are applied in the region, resulting in poor quality studies and processes. These include:

- Lack of sufficient environmental information, either due to lack of data, or lack of effort to find existing data;
- Environmental input is often focused on the affected site and at species-level, rather than addressing broader, landscape-scale effects on ecosystems and processes;
- There is little consideration of indirect, cumulative and transboundary effects;
- The economic value of ecosystem goods and services is seldom appreciated or considered;
- The linkages between the environment, ecosystem services and human wellbeing, including the dependence on resources by vulnerable communities, are seldom clearly articulated. Consequently, the effects of development on these linkages – and ultimately communities – are not appreciated or considered; and,
- There is inappropriate reliance on environmental management plans and programmes for effective mitigation; the so-called ‘proper management will fix all ills’ approach.

It is not surprising, therefore, that authorities often find it difficult to make informed decisions when the information being supplied to them is inadequate. However, there are many cases where the

¹ This study (IAIA, 2005) covered some (but not all) of the ORASECOM countries.

impact assessment report is adequate, but decision making does not seem to support sustainable development. There are several possible reasons:

- The development imperative in the Orange-Senqu countries requires short-term socio-economic benefits to be realized;
- There is a general lack of clear guidance or criteria on which to base decisions. This often results in inconsistencies in decision making e.g. the lack of clarity about sustainability principles (such as the Precautionary Principle) and how to apply them;
- Inadequate consultation and cooperation between authorities, either within a country or between countries;
- Inadequate experience within the government departments to properly guide and review environmental studies;
- Cumulative and transboundary effects are seldom addressed at project-level EIA and therefore developments are approved on a piecemeal basis, without the bigger picture being considered, and
- Records of decision or letters of authorization are often vague and the associated conditions of approval are consequently virtually impossible to implement or audit, and are vulnerable to legal challenge.

An additional issue of concern is that the implementation of conditions of authorization is seldom, if ever, followed up by authorities.

3. Cumulative Impacts

An important component of an EA process, and often closely linked to the aspect of assessing transboundary impacts, is the consideration of cumulative impacts. It is increasingly recognized that environmental impacts may not only result from direct impacts from an individual project, but from the combination of effects from existing developments and individually minor effects from multiple developments over time. The assessment of cumulative impacts recognizes that each additional project represents a high marginal cost to the environment, and that it cannot be considered in isolation. Cumulative effects analysis is an important component in EA, particularly when decision makers need to assess the full or “true” impact to society of a proposed project or development (Chonguica and Brett, 2003). Given the importance of cumulative effects, it is useful to distinguish between environmental assessments for specific projects and EA for evaluating cumulative regional effects of development. This bears relevance for the assessment of individual projects planned in the Orange-Senqu basin as well as the planning and management of the basin’s resources as a whole.

Where a particular geographic area (e.g. a river basin) is experiencing rapid development and/or additive impacts (e.g. habitat alteration), a focused strategic environmental assessment should be commissioned for that area, with a view to providing a robust framework within which to evaluate the cumulative impacts of future development. However, the conducting of an SEA does not rule out subsequent project-level EIAs. For example, a country may conduct an SEA for the irrigation sector, which might set development parameters (e.g. water efficiency, use of agrochemicals, etc.) and define the areas where projects could be located. Within this strategic framework, individual irrigation schemes might still need an EIA, so that the project takes cognisance of site-specific circumstances. When impact assessment is tiered in this way, a big, consolidated and integrated effort goes into the SEA while the subsequent EIAs (which could be many in number) require less effort, cost and time. This is an efficient way to implement impact assessment in the Orange-Senqu countries.

Therefore, the issue of cumulative and transboundary impacts is best addressed at a landscape, regional or sectoral scale through SEA, with project level EIAs providing greater focus and detail.

4. Notification

The principle international water law instruments governing the Orange-Senqu River basin are the Agreement on the Establishment of the Orange-Senqu River Commission (ORASECOM Agreement) and the Revised SADC Protocol on Shared Watercourses. The duty to notify of planned measures is a core obligation contained in all three instruments. The duty to notify requires that states must notify other states if they are planning to carry out activities that may cause “significant adverse effects” upon other watercourse states (Art 12 UN Convention; Art 4(1) (b) Revised Protocol; Art 7.5 ORASECOM Agreement).

Neither the ORASECOM Agreement, the Revised SADC Protocol nor the UN Convention though provides any guidance regarding the procedural and substantive content of the notification.

5. Transboundary Consultation

Timeous and appropriate consultation and collaboration is essential for ensuring that transboundary impacts are properly considered in EA, and that Interested and Affected Parties (I&APs) in the relevant basin countries (i.e. both the authorities and the affected public), are afforded adequate opportunity to be involved in the process. The country where the project is to be located, and from whence the environmental impacts will originate (country of origin) is responsible for initiating and facilitating the consultation. Consultation should start early and continue throughout the process (Figure 1). The key steps for consultation in a project-level EIA are discussed in more detail below:

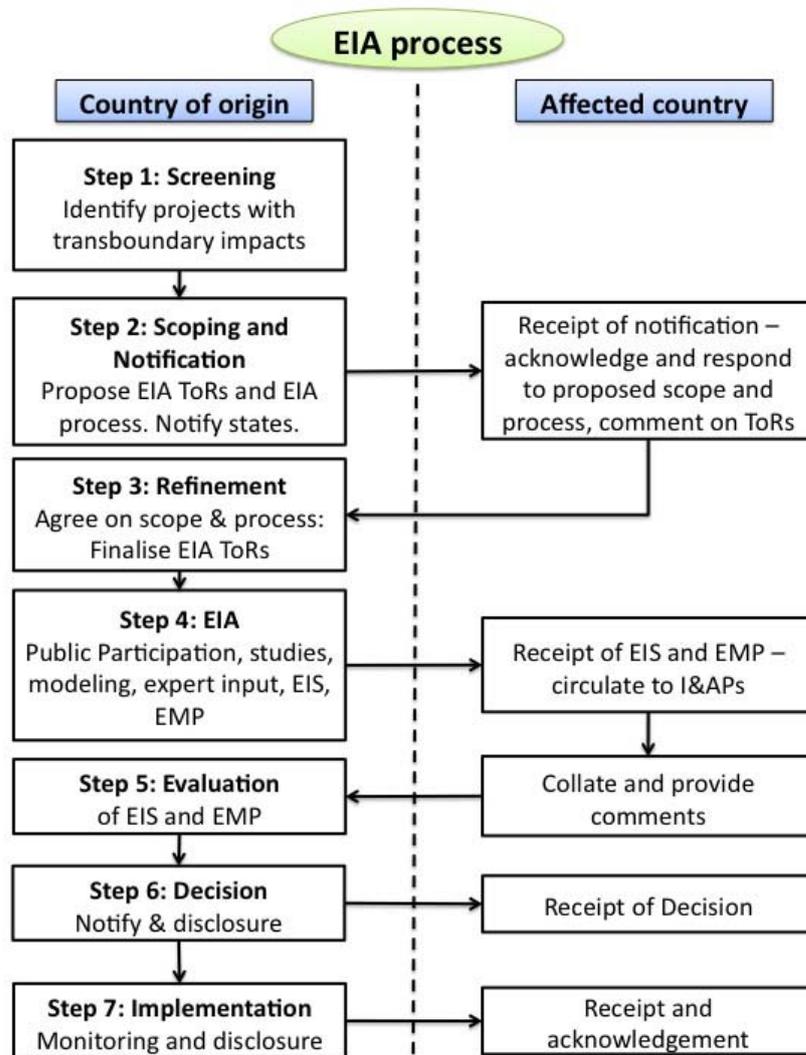


Figure 1: Steps to be followed when an EIA with transboundary impacts is being conducted (Modified from Espoo Convention).

Consultation for a Strategic Environmental Assessment is somewhat different. Since SEAs are usually conducted for policies, plans and projects (or emerging legislation), they are generally initiated by governments rather than a developer, as would be the case for EIAs. In the case of SEAs, the appropriate mechanism would simply be for the country of origin to inform the other countries of their intention to do an SEA, and to invite them to indicate how they wish to participate. The other countries would respond and indicate their preferred level of involvement. As with the EIA process, the notification and communications for an SEA would need to be copied to the ORASECOM Secretariat for their interest and possible action.

Step 1 – Screening

The Espoo Convention provides (in its Appendix 1) guidance on the types of projects that would typically require an EIA. Similarly, most of the Orange-Senqu countries also have their own lists. One of the tasks in the process of developing Tb-EIA Guidelines for ORASECOM will be to consolidate the respective lists so that a ‘combined’ list is generated that all the Parties agree to. Assuming agreement is reached, an Orange-Senqu list will come into being.

Step 2 – Scoping and Notification

Notification should occur during the ‘scoping’ stage of the EIA process, and be in the form of a Notification Letter. The letter should be succinct and non-technical, and include the following:

- Contact details of the proponent and the Competent Authority
- Name of the project and its location (provide map)
- The type and nature of the proposed activity (e.g. main activity and any/all peripheral activities)
- Scope of activity (e.g., size, production capacity, etc.)
- Description of the activity (e.g., technology used, inputs, products, waste);
- Description of the purpose of the activity;
- Rationale for proposed activity and why it is better than available/other alternatives (e.g., socio-economic);
- Time-frame for proposed activity (e.g., start and duration of construction and operation, as well as decommissioning);
- Expected environmental impacts (e.g. types, locations, magnitudes), highlighting transboundary environmental impacts (e.g. types, locations, magnitudes);
- Proposed mitigation measures:
- Scope of assessment (e.g. consideration of cumulative impacts, alternatives, sustainable development, associated activities, etc.);
- Summary and timing of proposed consultation (country of origin and affected country/ies), including a summary of complaint process/grievance procedure;
- Draft Terms of Reference for the EIA;
- Contact details of the consultants engaged to conduct the EIA.

For each EIA with transboundary impacts, the country of origin should designate a contact person, either within the competent authority or the project developer. This person should stay in routine contact with the competent authority of affected countries regarding the availability of EIA and other documents, the proposed consultation process, and other relevant issues. In particular, it is helpful at this stage to identify the culturally appropriate ways of communication with I&APs in the affected countries.

If the project is an “ORASECOM issue”, then all the notifications must be done using existing ORASECOM structures and procedures. The notification must be from the ORASECOM designated person in the country of origin to the ORASECOM designated persons in the affected countries. In all cases, a copy of the correspondence must be sent to the ORASECOM Secretariat for their information and possible action. If deemed necessary, the issue may be placed on the agenda of an ORASECOM Council Meeting.

Step 3 – Refinement

The affected country(ies) should acknowledge receipt of the notification letter within (7 days), and after a maximum period of (30 days) provide a detailed response/initial opinion on the expected environmental impacts, proposed mitigation measures, the Terms of Reference for the SEA or EIA – including the scope of assessment and the modalities for consultation with I&APs in their country. If extra time is needed, the affected countries should request this in writing and a revised time-frame agreed by all Parties. An ‘extra mile’ the affected country should go is providing whatever information it has to the country of origin about the potentially affected environment in their country. Going the ‘extra mile’ demonstrates constructive engagement, which is what one would expect from partners who are committed to jointly managing a shared watercourse.

With technical and process input from the affected country, the country of origin should then refine the TOR for the EIA.

Step 4 – EA²

The Tb-EA Guidelines will provide considerable detail as to what constitutes SEA and EIA best practice in the context of transboundary impact avoidance and mitigation in the Orange-Senqu Basin. The following general principles should be applied:

- Using the ecosystem approach: The ecosystem approach recognizes that people and biodiversity are part of the broader ecosystems on which they depend, and that they should thus be assessed in an integrated way.

² The generic term used here is EA, or Environmental Assessment. When EAs are done at a strategic level, they are called SEAs, and when done for individual projects, they are EIAs

- Considering alternatives: Good impact assessment should identify and select those alternatives that offer the greatest overall benefits and avoid undesirable impacts for the good of society, not only in the country envisaging the development but also for people in neighbouring countries. Decision making, too, should strive to this end.
- Using a hierarchy to mitigate impacts: The emphasis should be avoiding or preventing impacts, and/or reducing or minimizing them.
- Applying the precautionary principle: If one is not sure what's going to happen as a result of doing something, and the effects could be severe and irreversible, and could compromise our future, one should avoid taking any risks. Action to avert serious, irreversible environmental impacts may be required before scientific certainty of the harm exists, and by the time one has gathered enough evidence to be certain, it may be too late to act. The combination of uncertainty and the risk of irreversible effects or loss of irreplaceable resources summarises the challenge to decision-makers in the Orange-Senqu basin with regard to the sustainable use and development of both national and shared natural systems.
- Ensuring equitable sharing: The needs of future as well as current generations must be considered, and alternatives must be sought that don't irreversibly 'cash in' natural capital to meet short-term needs. Agenda 21 requires that development ensures the fair and equitable sharing of benefits arising from the use of the environment.
Where the negative impacts of development lead to an increase in vulnerability of poor people, and/or where society as a whole is left worse off with regard to ecosystem services as a result of development that benefits a few relatively wealthy parties, the condition of equitable sharing is not met.
Equitable sharing also applies to the fair access to natural resources and avoiding transboundary impacts on shared resources.

In addition to the above points, the following common principles should be applied during impact assessment at either strategic or project levels in the Orange-Senqu Basin:

- Involve all relevant stakeholders;
- Use all available and relevant information, including local, traditional and indigenous knowledge;
- Define time and space boundaries of the study;
- Work from good Terms of Reference.

The affected country can choose to participate in the EA process, or not to. Either way, they should respond formally to the designated contact point in the country of origin so that the necessary arrangements can be made. Most important is that the process ensures adequate opportunities for:

- I&AP participation;
- Information exchange;

- Review of EA findings and recommendations;
- Discussions around compensation (if applicable).

Step 5 – Evaluation³

Depending on the agreement reached between the origin and affected country at the start of the process, there may be an opportunity for the draft EA to be circulated by the project developer or affected country's competent authority, to I&APs so that they can provide comments. This is usually referred to as "public review". Best practice is that the competent authority takes note of public comments during the official evaluation.

The draft EA should be evaluated within 60 days or a request for additional time should be made to the country of origin. In spite of the fact that the evaluation period is usually specified in the country's own legal requirements, the need for additional transboundary consultations in the context of the review may warrant flexibility. The Tb-EA Guidelines will provide templates for reviewing scoping reports, EIA reports and Environmental Management Plans (EMPs) and SEAs.

An important consideration is whether an EA should be evaluated by an external team, since this would help improve objectivity (and reduce bias). External evaluation is generally a good option when a project is likely to have transboundary impacts and/or is controversial. The Tb-EA Guidelines will elaborate on this, drawing from past experiences in the SADC region.

Step 6 – Decision

When the EA has been completed and evaluated, the competent authorities of the country of origin should inform the affected countries that participated in the EA process regarding the final approval of the project and how comments were taken into account. The affected country's competent authority(ies) should ensure that the comments and how they were taken into account and reflected in the final EA are made available to the public who participated in the EA process. The Tb-EA Guidelines will provide a template for how a decision should be recorded.

Step 7 – Implementation

The affected countries should be informed about project implementation and monitoring, and in some cases, they may be involved in monitoring activities.

³ The term "Evaluation" is used here, but in some jurisdictions, the word "Review" is used.

6. Methodology and Workplan

Compiling the Tb-EA Guidelines will require a combination of literature research, personal communications with resource persons familiar with the Orange-Senqu countries, and drawing on experience from numerous previous visits by SAIEA staff to the countries in the course of many years of working and living in the region.

The Guidelines will use and modify the materials contained in a document entitled “Guidelines for Impact Assessment in the Indian Ocean Region”, compiled for UNEP by SAIEA in 2007. The UNEP 2007 guidelines in turn are based on work done by the “Capacity Building for Good Practice in Biodiversity and Impact Assessment” (CBBIA) project in 2006 for the International Association for Impact Assessment (IAIA). The CBBIA guidance materials were compiled by SAIEA and de Villiers Brownlie Associates. Guidelines currently being compiled by SAIEA on the incorporation of gender and HIV/AIDS considerations in EA processes in southern Africa (for UNDP), will also be a useful reference. In addition to the above sources, SAIEA will consult other literature and incorporate as many ideas/results as possible from researchers and authors that are authorities in the field of EIA in a transboundary context.

Once the draft report is compiled, it will be circulated by the ORASECOM Secretariat, to the relevant countries for comment, and to members of the relevant Working Group. It is expected that the knowledge within this group will contribute significantly to the development and refinement of the guideline. The Tb-EA Guidelines will be finalised during the course of 2011, based upon comments received from various stakeholders.

The following sequence of delivery and consultation is proposed:

- Materials for kick-off workshop (including workplan and draft table of contents of Tb-EA Guidelines) provided by the consultant - 20 July 2011.
- Discussion of work plan and contents of Tb-EA Guidelines at the kick-off meeting of the Working Group (WG). At ORASECOM Secretariat, Centurion, South Africa - 16 August 2011.
- Regional consultations, 12 to 16 September 2011.
- Submission of first draft of Tb-EA Guidelines to WG, by email - 10 September 2011.
- Second WG meeting to discuss Tb-EA Guidelines. Venue to be determined, Lesotho - 21 to 23 September 2011.
- WG provides final feedback to the consultant, by email - 30 September 2011.
- Final draft Tb-EA Guidelines submitted by the consultant to WG, by email - 7 October 2011
- Draft Tb-EIA Guidelines considered by ORASECOM at Council Meeting, tentatively at Katse Dam, Lesotho - 27 October 2011.

7. Outline of Tb-EA Guidelines

The Transboundary EIA Guidelines for ORASECOM will be a volume of some 70 to 80 pages, without appendices. It shall be illustrated with photos (about 15) that include a caption that sums up the key issues. So, if the reader just looks at the pictures and reads the captions, they have already got the gist of the message. Also, there will be about a dozen text boxes, which contain a 'pithy' statement to emphasise some of the more important issues.

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