

SPECIAL ISSUE

1791

Kenya Gazette Supplement No. 116

28th July, 2017

(Legislative Supplement No. 58)

LEGAL NOTICE NO. 148

THE MINING ACT

(No. 12 of 2016)

THE MINING (COMMUNITY DEVELOPMENT AGREEMENT)
REGULATIONS, 2017

ARRANGEMENT OF REGULATIONS

- 1—Citation.
- 2—Interpretation.
- 3—Purpose.
- 4—Application of the Regulations.
- 5—Identification of a community.
- 6—Multiple communities and multiple community agreements.
- 7—Community Development Agreement Committee.
- 8—Drafting of Community Development Agreement.
- 9—Content that shall not be included in the agreement.
- 10—Consultations.
- 11—Negotiation of agreement.
- 12—Minimum expenditure commitments.
- 13—Valuation of contribution in kind.
- 14—Duration of agreement.
- 15—Review of agreement.
- 16—Reporting requirements.
- 17—Transparency.
- 18—Transfer of rights and obligations.
- 19—Compliance by holders of pre-existing mineral rights.
- 20—Pre-existing agreements.
- 21—Effectiveness of Community Development Agreement.

SCHEDULES

THE MINING ACT

(No. 12 of 2016)

THE MINING (COMMUNITY DEVELOPMENT AGREEMENT)
REGULATIONS, 2017

IN EXERCISE of the powers conferred by section 109 (i) of the Mining Act, 2016, the Cabinet Secretary for Mining makes the following Regulations:—

1. These Regulations may be cited as the Mining (Community Development Agreement) Regulations, 2017. Citation.
2. In these Regulations, unless the context otherwise requires— Interpretation.
 - “Act” means the Mining Act, 2016; No. 12 of 2016
 - “Agreement” means the Community Development Agreement that is signed pursuant to the Act and these Regulations;
 - “Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to mining;
 - “Committee” means the Community Development Agreement Committee established under these Regulations;
 - “community” has the meaning assigned to it in the Act;
 - “County Government” means the County Government provided for under Article 176 of the Constitution of Kenya;
 - “holder” means the holder of a mining licence granted under the Act or the holder of a mining lease or a special mining lease which was granted prior to the coming into force of the Act;
 - “mine development” means construction and other infrastructural development work carried out on a mining licence area prior to production;
 - “party” means the holder or community which is a party to a Community Development Agreement; and
 - “mining operations” has the meaning assigned to it in the Act.
3. The purpose of these Regulations is to ensure that— Purpose.
 - (a) benefits of mining are shared between the holder and the community;
 - (b) mining is consistent with the continuing economic, social and cultural viability of the community;
 - (c) mining significantly contributes to the improved economic, social and cultural wellbeing of the community; and
 - (d) there is accountability and transparency in mining related community development.
4. These Regulations apply to a holder of a— Application of
the Regulations.

- (a) mining licence; or
- (b) lease or a special mining lease which is valid after coming into force of these Regulations.

5. (1) As part of the environmental social impact assessment carried out in accordance with the Environmental Management and Coordination Act, the holder shall identify one or more communities with which it proposes to enter into an Agreement.

Identification of a community.

(2) The holder shall, within thirty days of the grant of a mining licence, notify the community in writing of its intention to enter into an agreement and send a copy to the Cabinet Secretary.

(3) A community that has not been identified by the holder may give notice to the holder that it should be identified as a party to the Agreement.

(4) Where a community gives notice to a holder that it should be identified as a party to the Agreement and the holder is not in agreement, that community may submit a petition to the Cabinet Secretary.

(5) The Cabinet Secretary in consultation with the County Government and the National Environmental Management Authority shall notify the holder within ninety days from the receipt of the petition, whether the community should be identified as a party to the Agreement.

(6) A party that is aggrieved by the decision of the Cabinet Secretary may appeal to the Environment and Land Court within thirty days from the date of notification.

6. (1) Where a holder is required to enter into an agreement with more than one community, it shall enter into one Agreement that includes multiple communities.

Multiple communities and multiple community agreements.

(2) Notwithstanding sub regulation (1), where several communities are located in more than one county, the holder may have a separate Agreement with a community that is located in a different county.

(3) A community may enter into multiple Agreements where it is impacted by more than one mining operation under different holders or may enter into one Agreement that includes multiple holders operating in the community.

7. (1) There shall be established a Committee comprising of —
- (a) the Governor or a representative appointed by the Governor;
 - (b) the National Government representative in charge of administration at the County;
 - (c) the County Assembly representative of the electoral area within which the community is located;
 - (d) one representative of women elected by the community;

Community Development Agreement Committee.

- (e) one representative elected from among the village elders of the community;
- (f) two representatives of the youth of either gender from the community;
- (g) one representative elected by civil society organisations working in the area of extractives in the County;
- (h) one representative of marginalised groups, ethnic and other minorities;
- (i) one representative of persons with disability from the community;
- (j) the Member of Parliament of the constituency of the community and
- (k) three representatives of the holder.

(2) The Committee members shall elect the Chairperson and Secretary from among the members.

(3) The members under sub regulations (1)(d)(e)(f)(g)(h) and (i) shall serve for a period of three years and the term may be renewed once.

(4) The Committee shall—

- (a) monitor and evaluate compliance with the terms of the Agreement;
- (b) provide a platform for the community to debate whether the use of revenues provided by the holder to fund programmes under the Agreement conform to the development priorities of the community;
- (c) facilitate continuous engagement and serve as the link between the community and the holder;
- (d) settle all disputes that may arise between parties to the Agreement in respect of any matter in connection with or under the Agreement; and
- (e) settle any other issue, matter, grievance or complaint that is not related to the Agreement that may be made by raised by the holder or the community.

(5) Whenever it becomes necessary to resolve a dispute or complaint relating to the Agreement, the Committee shall meet at such times and place as the Chairperson may decide.

(6) The quorum for a meeting shall be two-thirds majority of the members.

(7) The Committee shall determine its own procedures for every meeting.

8. (1) The Agreement shall be prepared by the holder and the representatives of the community in accordance with these Regulations.

Drafting of
Community
Development
Agreement.

- (2) The Agreement shall—
- (a) be prepared in Kiswahili and English and where possible in the local language of the community; and
 - (b) have charts and schedules to reflect activities, timelines and other information.
- (3) The issues to be addressed in the Agreement may include—
- (a) the role of the County Government;
 - (b) educational scholarship, apprenticeship, technical training and employment opportunities for the people of the community;
 - (c) employment for members from the communities;
 - (d) financial or other forms of support for infrastructural development and maintenance including education, health, roads, water and power;
 - (e) assistance with the setting up of and support to small-scale and micro enterprises;
 - (f) special programmes that benefit women, youth and persons with disabilities;
 - (g) agricultural product marketing;
 - (h) protection of the environment and natural resources;
 - (i) support for cultural heritage and sports;
 - (j) protection of ecological systems;
 - (k) funding and control mechanisms to ensure funds are utilised as intended and accounting processes are transparent and audited; dispute resolution; and
 - (l) any other areas as may be agreed between the parties.

(4) Any project that is executed under the Agreement shall complement but shall not replace or displace national or county government development plans, projects and services that have been provided or are to be provided.

9. The Agreement shall not include the following —

- (a) the imposition of any additional rent, fee, or tax for the benefit of the community that is not set out by law;
- (b) the provision of any vehicle to any individual or single family unit of the community other than a specialized purpose vehicle such as an ambulance, fire engine, water truck, or bus for the benefit of the entire community;
- (c) the provision of any monetary amount, service, good, or facility for the sole benefit of any group, an individual, clan or single family unit in the community, political party or other person; and

Content that shall not be included in the Agreement.

(d) any matter that is illegal under any written law.

10. (1) The holder and the community shall agree on the manner in which consultations under these Regulations shall be held. Consultations.

(2) The agreed consultations shall be in accordance with an agreed schedule which shall be published in a manner that is acceptable to the community or any other mode of publication mutually agreed upon by the parties.

(3) All consultations shall be conducted by the holder and the community with mutual respect and in good faith including but not limited to—

- (a) timely performance of consultations and other efforts to conclude the Agreement;
- (b) timely performance of obligations under the Agreement;
- (c) ongoing monitoring and evaluation of obligations under the Agreement and, where required, amending and updating the provisions in the best interests of the parties; and
- (d) assurance that the community is adequately consulted and represented in all deliberations without isolating any particular individuals, groups or persons.

(4) The holder shall provide the community with at least five written copies of the Agreement within a timeframe that may be agreed with the Committee.

(5) The community shall conduct consultations on the draft Agreement and provide comments to the holder within a timeframe that may be agreed with the holder.

(6) For the purposes of these Regulations, consultation –

- (a) means a process of discussion or dialogue involving the community and other interested parties at the village level and conducted in a location that is reasonably accessible to all members of the community and other parties for the purposes of coming to an understanding; and
- (b) may not necessarily require unanimity but shall be insufficient if held only with a few people or elders of the community.

(7) Where a community determines that it lacks the capacity to negotiate an Agreement, the holder shall assist the community to build that capacity including the provision of funds to the community to hire experts or consultants as are reasonable in the circumstances.

(8) Any fee or payment to the experts or consultants that may be recruited by the community to assist the community in the negotiation of the Agreement shall be agreed with the holder and shall be treated as deductions that the holder may be entitled to under the Income Tax Act.

11. (1) Negotiation of the Agreement shall be conducted by the Committee.

Cap 470

Negotiation of agreement.

(2) The Committee—

- (a) shall, at all times act in trust on behalf of the community;
- (b) shall develop an agreement negotiation schedule that will include the date, time and issues for each negotiation meeting; and
- (c) may consult experts to assist in the negotiations.

(3) The Secretary of the Committee shall take minutes of each meeting of the Committee.

(4) If negotiations fail, the Committee may petition the Cabinet Secretary for resolution.

(5) The Cabinet Secretary shall, within ninety days of receipt of the petition, determine the matter.

(6) Any party that is aggrieved with the determination of the Cabinet Secretary may apply to the Environment and Land Court within thirty days of the decision of the Cabinet Secretary.

(7) The Cabinet Secretary shall within thirty days from the date the Agreement is approved by the holder and the community, publish the Agreement at the website of the Ministry.

12. (1) The holder shall spend a minimum of at least one per cent of the gross revenue from the sale of minerals in every calendar year to finance the projects under the Agreement.

Minimum expenditure commitments.

(2) Any payment or money that is required to finance any activity or meet any expenditure requirements under the agreement shall be disbursed by the holder and shall be used solely for the activities or projects that have been agreed to by the parties to the Agreement.

(3) The holder shall not make any direct payment to the Committee or any member of the community for any expenditures or expenses required under the Agreement.

13. Where any contribution or payments in kind are made by the holder as part of its obligations under the Agreement, the holder shall state the nature and value of such contributions or payments and provide supporting notes to explain how the value has been determined.

Valuation of contributions in kind.

14. The Agreement shall be in force for the productive life of the mine and may be modified or amended by the parties from time to time.

Duration of agreement.

15. The Agreement shall be reviewed at least every five years from the date of signing.

Review of agreement.

16. (1) A holder shall, not later than sixty days at the end of the year, submit an annual report to the Cabinet Secretary and the County Government in accordance with the check list set out in the Schedule.

Reporting requirements

(2) The annual report shall include the expenditure of all projects carried out under the Agreement.

17. All reports relating to the Agreement and community development annual expenditure reports including all required attachments submitted as required by these Regulations shall also be made available to the public on the website of the Ministry and the County Government.

Transparency.

18. Where a mining licence is transferred to another holder in accordance with the Act, the transferee shall, in writing, to the Cabinet Secretary assume all rights and obligations of the transferor under any agreement relating to the mining licence or transitional mining right.

Transfer of rights and obligations.

19. The holder of a mining lease or special mining lease granted prior to the coming into force of these Regulations shall comply with these Regulations no later than eighteen months from the coming into force of these Regulations.

Compliance by holders of pre-existing mineral rights.

20. Where a holder of a mining lease or special mining lease has entered into or started some community development initiative, scheme or social development programme prior to the coming into force of these Regulations, the holder shall ensure that such a scheme, initiative, programme or agreement shall comply with the requirements of these Regulations within eighteen months after coming into force of these Regulations.

Pre-existing agreements.

21. (1) A Community Development Agreement shall come into force after the Agreement has been signed by both parties.

Effectiveness of Community Development Agreement.

(2) The Cabinet Secretary shall ensure that the Agreement in sub regulation (1) meets the requirements of the Act and these Regulations.

SCHEDULE

FORM CD1

(r16(1))

[Community Development Agreement Annual Report]

Regulation 17 of the Community Development Agreement Regulations, 2017

Name of the holder of the mining licence: _____

Date: _____

Period being reported:

Check list

Name or description of the community
Year that the Community Development Agreement with the community was originally approved
Year that the Community Development Agreement was last amended and such amendment was approved if any.
Description of the goals of the Community Development Agreement
Description of the community development objectives and how they are to be met;

Community Development Agreement activities, milestones and results for the period being reported;
Development programme plan activities, milestones including timelines for performance, expenditures and results for the period being reported;
Description of community related challenges encountered, how these challenges are or may affect the project, and how the challenges are or will be addressed;
Description of environmental and social impacts of Community Development Agreement activities;
Special programmes that benefit youth, women, marginalised groups and persons with disabilities

(Note: when any attestation provided in this form is found to be false, the person whose signature appears below shall be guilty of an offence and subject to penalty.)

I hereby attest that the Community Development Agreement Annual Report attached to this form was prepared under my supervision. The information as provided above and in the attached report is truthful and substantially accurate in all its details.

Date: _____

Name: _____

Position: _____

Signature: _____

Email: _____

Telephone: _____

Address: _____

Attestation

I hereby attest that the Community Development Annual Expenditure Report attached to this form was prepared under my supervision. The information as provided above and in the attached report is truthful and substantially accurate in all its details.

Signature: _____

Date: _____

Name: _____

Position: _____

Email: _____

Telephone: _____

Address: _____

Dated the 19th June, 2017.

DAN KAZUNGU,
Cabinet Secretary, Ministry of Mining.