



MINISTRY OF MINING

NATIONAL MINING CORPORATION REGULATIONS, 2016

MEMORANDUM

Introduction

State-owned companies have featured prominently in the development of petroleum and mining sectors especially in the developing world. These national oil or mining companies are now a typical feature on the petroleum landscape and are becoming increasingly visible in the mining sector (Chile, Namibia, South Africa, Tanzania, DRC and Morocco). They are thought to play an important role in ensuring national control over natural resource development.

If managed well, state-owned corporations can serve as a catalyst in transforming the mining industry and can contribute significantly to broad-based socio-economic development. The National Copper Corporation (CODELCO) of Chile is a state-owned mining company and currently ranks as the largest copper producing company in the world. Another example of a well-managed state mining company was CVRD of Brazil. It was established by the federal government of Brazil until 1997 when it evolved into a publicly-listed multinational company called Vale S.A. Vale is today the third largest mining company in the world after BHP and Rio Tinto.

In Africa, some countries also run state-owned mining companies. These include Tanzania (STAMICO), Democratic Republic of Congo (Gecamines), Morocco (OCP Group which is the biggest producer of phosphate rock in the world), South Africa (AEMFC) and Namibia (Epangelo). The creation of the National Mining Corporation under the new mining legal framework will add Kenya to the list of Africa countries where the state will directly take part in mineral resource development.

This regulation is essentially to provide a framework for the operationalization of the NMC in accordance with sections 22(1), 25(2) and 27 of the Mining Act, 2016.

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IN EXERCISE of the powers conferred by sections 25(2) and 27 of the Mining Act, 2016, the Cabinet Secretary makes the following regulations.

NATIONAL MINING CORPORATION REGULATIONS, 2015

1. Citation

These regulations may be cited as the National Mining Corporation Regulations, 2016 and shall come into force on the date of its publication in the Gazette.

2. Interpretation

In this regulation, unless the context otherwise requires-

“**Board of Directors**” means the governing body of the National Mining Corporation.

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for mining.

“**Corporation**” means the National Mining Corporation established pursuant to section 22(1) of the Act.

“**financial year**” means the period of twelve (12) months ending on the thirtieth (30th) day of June in each year or as may be prescribed by legislation from time to time.

“**Mining Act**” means the Mining Act, 2016.

3. Establishment of the National Mining Corporation

(1) There is established, pursuant to section 22(1) of the Mining Act, the National Mining Corporation which shall be the investment arm of the national government in respect of minerals.

(2). The Corporation shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of:

- (a) suing and being sued;
- (b) taking, purchasing and disposing of movable and immovable property;
- (c) borrowing money with the approval of the National Treasury in accordance with relevant law;
- (d) entering into contracts; and
- (e) doing such other things as may be necessary for the proper discharge of its mandate under the Act and these regulations.

4. Headquarters of the Corporation

(1) The headquarters of the Corporation shall be in Nairobi.

(2) The Corporation may establish an office in any County if deemed necessary by the Board for the proper and effective performance of its mandate.

5. Functions of the Corporation

(1) The Corporation shall:-

- (a) engage in mineral prospecting and mining and any other related activities;
- (b) invest on behalf of the national government;
- (c) acquire by agreement or hold interests in any undertaking, enterprise or project associated with the exploration, prospecting or mining of minerals;
- (d) acquire shares or interest in any firm, company or other body of persons, whether corporate or unincorporated, which is engaged in prospecting, mining, refining, grading, producing, cutting, processing, buying, selling or marketing of minerals;
- (e) carry on its business, operations and activities whether as principal agent, contractor or otherwise, and either alone or in conjunction with any other persons, firms or bodies corporate; and
- (f) perform any other functions that may be assigned to it by the Cabinet Secretary or under any other law.

(2) The Corporation shall act at arm's length from the Ministry of Mining, and shall not assume a privileged position in the performance of its functions that are contrary to the principles of free enterprise and open market competition.

(3) The Mining Act and any regulations or guidelines made thereunder shall apply to the National Mineral Corporation on the same basis as any other applicant or holder of a mineral right.

6. Board of the Corporation

(1) The Corporation shall be managed by a Board of Directors consisting of:

- (a) a Chairperson appointed by the President who shall be a non-executive Director;
- (b) the Principal Secretary for Mining or his or her representative;
- (c) the Principal Secretary for the National Treasury or his or her representative;
- (d) the Principal Secretary for Trade or his or her representative; and

(e) three (3) other persons, not being employees of the Corporation, appointed by the Cabinet Secretary.

(2) The President or Cabinet Secretary as the case may be, in appointing a member to the Board of Directors, shall have regard to the person's integrity, knowledge and expertise in matters relevant to the functions of the Corporation.

(3) Appointments made to the Board in accordance with the Mining Act and these regulations shall reflect gender balance as well as the regional and ethnic diversity of the people of Kenya.

(4) An appointment under regulation 6(1)(a) and (e) shall be by name and by notice in the Kenya Gazette.

(5) A representative member referred to under sub-regulation (1)(b), (c) and (d) shall, when attending a meeting, be deemed for all purposes to be a member of the Board.

7. Qualifications of Members of the Board

(1) A person is qualified to be a member of the Board of Directors if that person:

(a) is a citizen of Kenya;

(b) holds a degree from a university recognised in Kenya in any of the following fields;

(i) mineral economics;

(ii) engineering;

(iii) law;

(iv) finance; and

(v) earth sciences or geosciences.

(c) has relevant experience of not less than ten (10) years in the case of the Chairperson and seven (7) years in the case of any person to be appointed under regulation 6(1)(e);

(d) meets the requirements of leadership and integrity as set out in Chapter Six of the Constitution;

(e) is not of unsound mind or has not been adjudged or otherwise declared bankrupt and has not been discharged;

(f) has not been convicted of an offence involving fraud, dishonesty or sentenced to a term of imprisonment;

(g) has not been found by the report of a Commission of Inquiry to be incompetent to hold public office or is a person in respect of whom a Commission of Inquiry has found that, while being a public officer, that person acquired assets unlawfully or defrauded the State, misused or abused that office, or wilfully acted in a manner prejudicial to the interests of the State, and the findings have not been set aside on appeal or judicial review by a court of competent jurisdiction or otherwise disqualified by any other law in force in Kenya.

(2) The qualifications required under sub-regulation (1) shall apply to an appointment under regulation 6(1)(a) and (e) only.

8. Functions of the Board

(1) The Board shall-

(a) ensure the proper and effective performance of the functions of the Corporation;

(b) approve and ratify the policies of the Corporation;

(c) oversee the management, control and administration of the assets of the Corporation in a manner and for purposes that promote the object and purpose of the Corporation;

(d) receive any gifts, grants, donations or endowments made to the Corporation;

(e) determine the provisions to be made for capital and recurrent expenditure, and for the reserves of the Corporation;

(f) open bank accounts for the funds of the Corporation in accordance with the Public Finance Management Act, 2012;

(2) Subject to the Act and these regulations, the Board may, by resolution either generally or in any particular case, delegate to any committee of the Board or to any member, officer, employee or agent of the Corporation, the exercise of any of the powers, or the performance of any of the functions or duties of the Board under the Act.

(3) Any power, the performance of any of the functions or duties of the Board delegated, shall not relieve the Board of the ultimate responsibility for the performance of the delegated function.

9. Tenure of Office of Members of the Board

(1) A member of the Board of Directors shall hold office for a term not exceeding three (3) years.

(2) A member is eligible for re-appointment but may be re-appointed for one (1) term only.

(3) A person ceases to be a member if he or she:

(a) violates the Constitution or any other written law of Kenya;

(b) at any time resigns from office by notice in writing addressed to the Cabinet Secretary;

(c) is absent from three (3) consecutive meetings of the Board without sufficient cause or permission;

(d) is convicted of an offence and sentenced to imprisonment for a term exceeding six (6) months;

(e) is adjudged bankrupt;

(f) is incompetent; or

(g) is incapacitated from performing the duties as a member by prolonged physical or mental illness.

(4) The President in the case of the Chairperson, or the Cabinet Secretary in the case of a member appointed under regulation 6(1)(e), may by notice addressed to a member revoke the appointment of that member for inability to perform the functions of office, gross misconduct, abuse of office or a violation of any written law in Kenya

(5) Where there is a vacancy under sub-regulation (3) or regulation 10(2), or by reason of the death of a member, the Chairperson shall notify the Cabinet Secretary of the vacancy and the Cabinet Secretary or the President as the case may be, shall take action to fill that vacancy.

10. Meetings of the Board

(1) The Board shall meet not less than four (4) times in every financial year and not more than four (4) months shall elapse between the date of one meeting and the date of the next meeting.

(2) A meeting of a Board shall be held on such date and at such time as the Board shall decide or, in the absence of such decision or on any occasion on which the Chairman in consultation with the Chief Executive shall decide that a meeting is necessary, on a date and at a time determined by the Chairman.

(3) The Chairperson shall, at the request in writing of not less than one-third of the membership of the Board, convene an extraordinary meeting within seven (7) days of receipt of the request at a place and time to be determined by the Chairperson.

(4) Unless three-quarters of the total membership of a Board otherwise agrees, at least fourteen (14) days' written notice of every meeting of a Board shall be given to every member of the Board.

(5) The quorum for the conduct of business at a meeting of the Board shall be a simple majority of the total number of members of the Board or the number nearest to but not less than two-thirds, provided that where within half an hour after the time appointed for the meeting a quorum is not present, the meeting shall be adjourned to the same day in the next week, at the same time and place, or at such time as the members may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be deemed to be a quorum.

(6) The Chairman of a Board shall preside at all meetings of the Board but in the absence of the Chairman the members present shall appoint one of their members to preside at the meeting.

(7) Unless a unanimous decision is reached, a decision on any matter before a Board shall be by a majority of votes of the members present and in the case of an equality of votes, the Chairman or the person presiding shall have a casting vote.

(8) The Board may co-opt a person to attend a meeting but that person shall not vote on a matter for a decision at the meeting.

(9) The Board shall regulate its own procedures and the procedures of any committee thereof.

(10) The minutes of all meetings of the Board shall be recorded and kept, and the minutes of each meeting shall be confirmed by the Board and signed by the Chairperson or the member presiding at the meeting.

(11) Any member of the Board present at a meeting of the Board or a committee thereof, shall have the right to require his or her opinion to be recorded in the minutes if the Board or committee, as the case may be, passes a resolution or takes any decision which in the opinion of that member is contrary to his or her advice or to law.

11. Disclosure of Interest

(1) A member of the Board who has a vested interest in a matter for consideration by the Board shall:

- (a) disclose the nature of that interest and the disclosure shall form part of the record of the consideration of the matter, and
- (b) not participate in the deliberations in respect of that matter.

(2) A member ceases to be a member of the Board if that member has a vested interest in a matter before the Board, and

- (a) fails to disclose that interest; or
- (b) participates in the deliberations of the Board in respect of the matter.

12. Establishment of Committees

(1) The Board may establish committees consisting of members of the Board or of members and non-members of the Board to perform a function or deal with such matters as the Board may direct.

(2) A committee of the Board shall be chaired by a member of the Board.

(3) Regulation 10 shall apply to members of a committee of the Board.

13. Allowances

Members of the Board and members of a committee of the Board shall be paid allowances approved by the Cabinet Secretary in consultation with the National Treasury and the Salaries and Remuneration Commission.

14. Directives of the Cabinet Secretary

(1) The Cabinet Secretary may give directions in writing to the Board on matters of policy and the Board shall comply.

(2) Directions given by the Cabinet Secretary shall not adversely affect or interfere with the performance of the functions and the exercise of the powers of the Corporation under the Act or these regulations.

15. Appointment of the Chief Executive Officer

(1) There shall be a Chief Executive Officer of the Corporation who shall be recruited competitively by the Board.

(2) The Cabinet Secretary shall appoint the Chief Executive Officer from a list of three (3) names of persons submitted by the Board following a competitive selection process.

(3) The Chief Executive Officer shall hold office on the terms and conditions as specified in the letter of appointment and in accordance with the State Corporations Act.

(4) A person shall be qualified for appointment as the Chief Executive Officer if that person:

(a) holds a degree in earth sciences, geosciences, engineering, economics, business administration, law or other relevant degree from a university recognized in Kenya;

(b) has at least ten (10) years' relevant professional or management experience in a public or private institution;

(c) meets the leadership and integrity requirements of Chapter Six of the Constitution of Kenya; and

(d) has not been convicted of an offence involving fraud, dishonesty or sentenced to a term of imprisonment.

(5) The Chief Executive Officer shall be appointed for a term of three (3) years and may be re-appointed for one further term of three years.

(6) The Chief Executive Officer may be removed from office in accordance with the terms and conditions set out in the contract or for the violation of any written law in Kenya.

16. Functions of the Chief Executive

(1) The Chief Executive Officer is responsible for:

- (a) the day-to-day administration of the affairs of the Corporation and is answerable to the Board in the performance of his or her functions under the Act and these regulations;
- (b) the implementation of the decisions of the Board;
- (c) any other functions determined by the Board; and
- (d) the organization and control of the staff or employees of the Corporation.

(2) The Chief Executive Officer shall be the-

- (a) Accounting Officer for the Board; and
- (b) Secretary to the Board.

(3) The Chief Executive Officer may delegate a function to an officer of the Corporation but shall not be relieved of the ultimate responsibility for the performance of the delegated function.

(4) The Chief Executive Officer during the period of his or her appointment, shall not be employed in any gainful employment, work, business or hold any other public office.

(5) The terms and conditions of service of the Chief executive officer, and the staff or employees of the Corporation shall be determined by the Board in consultation with the Cabinet Secretary, the Public Service Commission and the Salaries and Remuneration Commission.

17. Vacancy of Office

The office of the Chief Executive Officer shall become vacant if the holder—

- (a) dies; or

- (b) become incapacitated on medical grounds; or
- (c) resigns by a written notice of three months addressed to the Board; or
- (d) upon expiry of his or her term; or
- (e) ceases to hold office under regulation 18 of these regulations.

18. Removal of the Chief Executive Officer

(1) The appointment of the Chief Executive Officer may be terminated only in accordance with this part.

(2) The Board may terminate a person's appointment as the Chief Executive Officer if that person —

- (a) violates the Constitution or any other written legislation;
- (b) is incompetent;
- (c) is of unsound mind;
- (d) is convicted of a criminal offence and sentenced to a term of imprisonment or a fine exceeding one hundred thousand Kenya shillings;
- (e) contravenes the terms and conditions of service; or
- (f) is adjudged bankrupt.

(3) Where the question of the removal of the Chief Executive Officer under sub regulation (2) arises, the Board shall—

- (a) inform the Chief Executive Officer in writing of the reasons for the intended removal; and
- (b) give the Chief Executive Officer the opportunity to be heard in accordance with the principles of fair administrative action provided for under Article 47 of the Constitution.

4. The Board may designate a member of the staff of the Authority to act as the Chief Executive Officer during the illness or absence of the Chief Executive Officer or during a vacancy in the office for a period not exceeding three months within which time the Public Service Commission will have reconstituted the recruitment panel to recruit another Chief Executive Officer.

19. Appointment of other Staff

(1) The Board or the Chief Executive Officer with the approval of the Board, shall appoint the other officers, staff or employees necessary for the proper and effective performance of the functions of the Corporation.

(2) The appointment of the staff or employees of the Corporation shall be on such terms and conditions of service as the Board shall determine taking into account the need for ethnic, regional balance and gender parity.

(3) Other public officers may be transferred or seconded to the Corporation or may otherwise give assistance to it.

(4) The Chief Executive Officer may engage the services of advisers and consultants subject to the approval of the Board.

20. Funds of the Corporation

(1) The funds of the Corporation may include:

(a) moneys as may, from time to time, be appropriated by Parliament for that purpose;

(b) moneys that accrue to the Corporation in the performance of its functions;

(c) grants, donations or gifts to the Corporation for its activities under the Act or these regulations;

(d) any other moneys that are approved by the National Treasury.

(2) the expenses of the Corporation shall be paid from moneys provided for the Corporation under sub-regulation 1.

(3) The Corporation shall cause to be prepared and shall, not later than the end of February in every year, submit to the Cabinet Secretary and to the Treasury for approval, estimates of the Corporation's revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken by the Corporation, or the implementation of which will continue during the financial year to which those estimates relate.

(4) The annual estimate shall make provision for all the estimated expenditure of the Corporation for the next financial year and in a particular but not limited to:

(a) the payment of salaries, allowances and other charges in respect of the staff of the Corporation and the Board; and

(b) any other expenditures that may be necessary for the proper and effective performance of the functions of the Corporation.

(4) The annual estimates shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for approval with the concurrence of the National Treasury.

(5) No annual estimates and proposals for funding projects shall be implemented until they have been approved by the Cabinet Secretary with the concurrence of the National Treasury.

(6) The Corporation shall not, without the prior approval in writing of the Cabinet Secretary and the National Treasury, incur any expenditure for which provision has not been made in an annual estimate prepared and approved in accordance with these regulations.

(7) The financial year of the Authority shall be the period of twelve months ending on the 30th June in each year or any other day prescribed by national legislation.

21. Books of Accounts and Audits

(1) The Corporation shall keep or cause to be kept books of accounts and proper records in relation to them in the form approved by the Auditor General or as required under any written law in Kenya.

(2) Without limiting the scope of sub-regulation (1), the Corporation shall ensure that all income and liabilities, expenditure, assets, undertakings, contracts, funds, activities, transactions and any other business of the Corporation are properly recorded and kept.

(3) The Corporation shall ensure that all moneys received are properly brought to account, all payments out of its funds are correctly made and properly authorized, and that adequate control is maintained over its assets and liabilities under these regulations or as required by any other written law in Kenya.

(4) The Corporation shall, within a period of three (3) months after the end of each financial year, prepare annual financial statements in accordance with the provisions of the Public Finance Management Act, 2012 as may be amended from time to time and submit them to the Controller of Budget and the Auditor General or to an auditor appointed under sub-regulation (6) for audit.

(5) The Corporation shall also prepare the financial statements in a form that complies with the relevant accounting standards prescribed and published by the Public Sector Accounting Standards Board from time to time.

(6) The auditor referred to in sub-regulation (4) shall be appointed by the Corporation with the written approval of the Auditor General.

(7) The appointment of an Auditor shall not be terminated by the Corporation without the prior written approval of the Auditor General.

(8) The fee for any auditor not being a public officer shall be determined and paid by the Corporation.

(9) The Auditor General may give general or special directions to an auditor appointed under sub-regulation (6), and the auditor shall comply with such directions.

(10) An auditor appointed under sub-regulation (6) shall report directly to the Auditor General on any matter relating to the directions given under sub-regulation (9).

(11) Nothing in these regulations shall be construed to prohibit the Auditor General from carrying out an inspection of the Corporation's accounts or records whenever it appears to him or her to be desirable and such inspections shall be carried out at least once every six (6) months.

22. Reporting Requirements

(1) Within a period of six (6) months after the end of the financial year, the Auditor General shall report on the examination and audit of the accounts of the Corporation to the Cabinet Secretary and the Board, and in the case of the auditor appointed under sub-regulation 18(6), the auditor shall submit the report to the Auditor General.

(2) The Cabinet Secretary within one (1) month after receiving the report under sub-regulation (1) shall submit the report to the National Assembly.

(3) Notwithstanding anything in these regulations, the Auditor General may submit to the Cabinet Secretary a special report on any matter incidental to his powers and the provisions of the Public Finance Management Act, 2012.

(4) The Corporation shall within three (3) months after end of the financial year, submit an annual report to the Cabinet Secretary covering all the activities and operations of the Corporation for the financial year to which the report relates.

(5) The annual report shall include the report of the Auditor General.

(6) The Cabinet Secretary shall, within one (1) month after the receipt of the annual report, submit the report to the National Assembly together with any statement that the Cabinet Secretary may consider necessary.

(7) The Corporation shall in addition to anything else submit to the Cabinet Secretary any other report which the Cabinet Secretary may from time to time request in writing.

23. The Common Seal of the Corporation

(1) The common seal of the Corporation shall be kept in such custody as the Board may direct and shall not be used except on the order of the Board or the Chief Executive Officer.

(2) The affixing of the common seal of the Corporation shall be authenticated by the signature of the Chairperson and the Chief Executive Officer, and any document not required to be made under seal and all decisions of the Board may be authenticated by the signature of the Chairperson or the Chief Executive Officer provided that the Corporation in the absence of the Chairperson or the Chief Executive nominates one (1) member to authenticate the seal on behalf of the Chairperson or the Chief Executive Officer.