# WORKSHOP REPORT

NATIONAL CAPAPCITY BUILDING WORKSHOP AND CONSULTATION ON HUMAN RIGHTS BASED ENVIRONMENTAL PUBLIC ADMINISTRATION – FOCUSING ON THE MINING SECTOR

18-19 MAY 2016 – NAIVASHA, KENYA

# SUMMARY

"In recent years, the relationship between human rights and environmental protection has become clearer. A healthy environment is necessary for the enjoyment of a vast range of human rights. In turn, the exercise of human rights, including rights of access to information, participation, and remedy, is critical for the protection of the environment. UNDP and Swedish EPA efforts to strengthen good governance in the mining sector, including through capacity-building workshops like this one, are of vital importance for the protection of the environment and human rights."

- *John Knox, UN Special Rapporteur on Human Rights and the Environment*

The Swedish EPA and UNDP organized a national capacity building workshop and consultation on human rights-based environmental public administration of the mining sector in Naivasha, Kenya from 18-19 May, 2016. The workshop was designed in close cooperation with the Kenyan National Environment Management Authority (NEMA). It brought together over twenty senior staff and experts from the Kenyan government and civil society including: the Ministry of Mining, Ministry of Environment, Natural Resources and Regional Development Authorities, Kwale County Government, Department of Occupational Health and Safety Services, National Commission on Human Rights, the Institute for Human Rights and Business (NGO), Huria (NGO), and Chamber of Mines. An expert from the UNDP Mozambique Office also attended, where a similar workshop is under preparation. A list of participants is included in Annex 1.

The Sida-funded Environmental Governance Programme (EGP) workshop was designed to:

- Share country experiences and increase understanding of how to integrate Human Rights-based Approaches (HRBA) into environmental governance of the mining sector;
- Identify gaps and priority areas for future learning and technical support; and
- Strengthen the relationship between SEPA/UNDP, NEMA and stakeholders in the mining sector as a base for further EGP cooperation, learning and knowledge exchange.

The workshop sessions included topics on: Human Rights in Public Administration; Inclusive Participation in Mining; Ecosystem Services and Biodiversity; Design and Financial Guarantee for Closing of Mining Operations; Environmental Conservation in Kenya; Impacts of the Kenyan Mining Sector on the Environment; and Environmental Data. These themes were selected in advance through consultations between SEPA/UNDP, NEMA and participating organisations (see Annex 2 for Agenda). Learning outcomes and interactive learning activities were prepared for each session (see Annex 3).

The workshop succeeded in providing a platform for exchanging country experiences and standards that strengthen public administration of mining through human-rights based approaches (HRBA) grounded in Principle 10 and linked rule of law and gender equality principles. HRBA are key to advancing sustainable development and increasing policy implementation effectiveness in line with broader national development goals. Procedural rights, including accessibility, right to be heard, participation, transparency, right to appeal, and accountability, are already enshrined in the Kenya constitution, legal frameworks and public administration, even if the phrase "Human Rights" is not always used.

Participants identified bottlenecks and additional learning needs and technical support required to address implementation gaps and further operationalize HRBA across the mining cycle. These include:

- Formulation of specific guidelines and success criteria to measure and ensure more meaningful community participation, transparency, and accountability, including communication strategies;
- Integration of an ecosystem services framework into environmental and social impact assessments;
- Development of more specific remediation standards, and guidelines for negotiating deposit bonds;
- Stronger capacities of both public and civil society groups to implement the above areas.

Participants also highlighted the value of covening oganisations from different backgrounds, and agreed on the need to continue strengthening longer-term working relationships between the government and civil society participants, as well as between national partners, SEPA and UNDP.

Immediately following the workshop, the government held a coordination meeting for all Kenya participants to discuss programme activities in more detail from an HRBA perspective, including plans for a Strategic Environmental and Social Assessment of the mining sector. Recommendations from the workshop and the coordination meeting will be used to inform EGP work in Kenya and other countries. This incldues preparation of guidelines, technical support and web-based learning through the UNDP-World Bank on-line forum: GOXI.org, and a UNITAR-UNDP-UNEP e-course on Environment and Human Rigths.

**ABOUT THE SEPA-UNDP ENVIRONMENTAL GOVERNANCE PROGRAMME (EGP)**

The Sida-funded EGP responds to the challenges many developing countries face in implementing environmental policies and integrating environmental and social concerns into broader sustainable development policy making. The programme strengthens the environmental, gender, human rights and rule of law dimensions of public administration work in large-scale mining sectors. Working in collaboration with ministries of environment, mining, planning and finance, as well as other public and private stakeholders, the programme provides targeted support to four countries: Colombia, Kenya, Mongolia, and Mozambique. The programme also works at the global and regional level to strengthen south-south knowledge sharing and innovative policy approaches. It draws on the combined governance, social, environmental and extractive sector expertise of the Swedish Environmental Protection Agency, SEPA, the United Nations Development Programme, UNDP, and partners. The EGP prioritizes collaboration with public, private and civil society organizations, and welcomes new partners.

# 1. SESSIONS CONTENT AND REFLECTIONS

A summary of each session follows, including objectives, key messages, discussions and reflections. The outcomes of group exercises are presented in Annex 4.

## 1.1 THE ROLE OF THE STATE AND HUMAN RIGHTS IN ENVIRONMENTAL PUBLIC ADMINISTRATION, ESPECIALLY FOCUSING ON THE MINING SECTOR

The session focused on addressing the unsustainable use of resources and environmental pollution and strengthening the underlying human rights principles and rule of law. The presentation aimed at unbundling what human rights are, the categories of human rights, the role of human rights. The HRBA principles and standards were also presented to the participants.

Overall aim: To set the framework of human rights and rule of law in environmental public administration with a focus on mining.

**Key messages:**

- The state and the public administration is the infrastructure for rule of law and human rights.
- Human rights set limits to the exercise of power.
- Governance of natural resources management needs to move beyond the confines of traditional environmental policy.
- Policy design for environmental sustainability is embedded in a political context with multiple actors and interests.
- In many cases, measures that strengthen important human rights principles such as the rule of law, transparency and public participation may be equally or more important than specific environmental policies or projects for improving environmental management and sustainable development.

Discussions and reflections: Some of the following forward looking needs were identified by the participants during plenary discussion to continue to work with in a national context:

- Need to include the aspects of companies' rights or other people's rights in the extractive industries**.**
- Need to improve on the Environmental Governance Process in the Country so as to have standard operating procedures in the sector.
- Need for a process of drafting a business action plan on human rights, national business assessment and regional hearings to enhance the public participation aspect of the people.
- Need to bridge the space between Government Agencies, NGOs and Private Companies involved in the mining sector so as to foster collaboration in the mining sector.

## 1.2 INCLUSIVE PARTICIPATION IN THE MINING PROCESS

This session focused on the concept of communication and participation and how social dialogue´ from a rights based perspective can contribute when implementing inclusive solutions to complex or so called

´wicked´ problems. Different stages in the mining process (from planning to post-closure) and the Kenyan Licensing Process were used as a framework.

Overall aim: To gain a broader and shared understanding of possibilities stakeholder engagement can offer and what it takes to succeed.

Key messages:

- Participation (inclusive not selective) is a core human right principle that offers development opportunities.
- Without communication there can be no participation.

**Discussions and reflections:**

The fact that the mining sector impacts all of the 17 SDGs were e.g. highlighted and that enhanced partnership and dialogue will be critical for mining to realize the full potential for scaling up its positive and minimizing its negative impacts.

To fulfill obligations in e.g. constitutions and/or legislations and other frameworks it is fundamental to go beyond compliance and define stakeholders broadly and strategically to avoid missing out key strategic opportunities.

Participation is a core human right principle. Participation is embedded in political realities and struggles, situated in particular processes, localities and actors and invitational and not imposed. How we ´think participation´ is important.

There can be no participation without communication. Strategic communication planning includes assessments and stakeholder analysis. The value added of stakeholder engagement and risks perceived of not involving stakeholders was the focus of a group working session (see Annex 4).

Some of key issues discussed regarding the Kenyan process/key events in relation to the different phases in the mining cycle were:

- Planning: First, a concessional license application is needed, which requires consent from local communities and landowners, so that there is potential for access to land. Engagement is done through establishment structures or directly through private landowners.
- Exploration: Another round of engagement with local communities and/or land owner on one-to-one basis. Also need to involve CSOs to raise awareness and market the potential of the operation early. Also need to engage with local authorities, e.g. county commissioners.
- Pre-feasibility and feasibility: First an economic feasibility assessment to be shared and discussed with company and shareholders. If the economic feasibility is good, viable, then the next step is the E(S) IA.
- Construction: All stakeholders come on board, more than during initial stages. In this phase there is a need for detailed stakeholder mapping.
- Operations: Well established structures and capacity to licence and oversee operations among government institutions are needed. Also important to be able to provide security for local communities and to secure funding.

- Expansion: In the expansion phase there is a need for a new EIA before project approvals. To ensure that community rights are observed and to continue to raise awareness and ensure continued support.
- Closure: Environmental experts needs to be engaged.
- Post-closure: Capacity to ensure restoration of site.

Key questions remaining:

- Awareness of rights and access to information: e.g. who is responsible for informing local communities and workers of the environmental/health risks, at what stage, and how? There is a need to do some of this engagement even during the planning stage.
- What types of community engagement are used during EIA? Is there a standard ToR?
- How is the final EIA communicated/discussed with local communities/potential workers?
- How is the company mitigation plan shared and discussed, with whom?
- Participation within local communities: e.g. who decides on behalf of local communities to endorse a project?
- How is information on grievance mechanisms shared, and when, by whom? E.g. the National Environmental Tribunal
- How effective are grievance mechanisms, how can they be strengthened?
- How and when do different parts of government discuss, e.g. Mining and Agriculture?
- What parts of existing mandates and legislation can be strengthened?
- How to engage media?
- Financing issues: e.g. staffing of NEMA compliance, enforcement and field operations division; county-level Directorate for Worker Health and Safety, etc.
- How funds EIA experts; if companies, then is there an independent review process? Otherwise, there is potential for conflict of interest. Yes, there is an independent Technical Advisory Committee.

The entire mining cycle needs to be described as we have started to do with the group exercise, to show roles and responsibilities for ensuring engagement from an HR perspective. This can be a short document to help identify areas of possible reform/strengthening with NEMA and other partners; and it can also be used as a communication tool of citizens/local communities, including with a simple illustrative diagram of key steps and entry points for engagement across the cycle.

## 1.3 ENVIRONMENTAL CONSERVATION IN KENYA

The aim of this session was to give an overview and key highlights in the mining sector in Kenya in terms of permitting and the challenges being faced while monitoring. Participants gained a common understanding of how environmental conservation is perceived in the country. Participants shared challenges and their views on internationally accepted standards of health, safety, human rights and environmental protection.

The presentations were done in three parts as follows:

- Environmental Impact in Kenya with emphasis on the Mining Sector
- Impact of Mining on the Environment
- An Overview of Environmental Data collection in Kenya

Discussions and reflections:

Partial gaps that needed further attention were discussed and included:

- Sector specific remediation standards
- Specific guidance and standards rates for deposit bond payable
- Deposit Bond Assessment Report
- Information system required for deposit bond management
- Environmental impacts on: flora and fauna, biodiversity, land, water, human health
- How widely known are these potential negative impacts?
- Importance of Environmental data: but what are areas for strengthening?

## 1.4 ECOSYSTEM SERVICES AND BIODIVERSITY

This session focused on how mining affects ecosystem services and biodiversity. Questions were raised and discussed on how assessment of ecosystem services can be used to assess trade-offs between different stakeholders over time and how it can be used as a decision base for the public administration.

Overall aim: A shared understanding that the ecosystem services framework can help to analyse wealth.

Key message:

- Mining affects ecosystem services and biodiversity immediately and locally, but also across time and space. This affects the distribution of wealth across different stakeholder groups and needs to be addressed both for human rights and for environmental and economic targets at different administrative levels (local, regional, national).

Discussions and reflections: An ecosystem services approach is important to mining for ensuring that the full economic and social impacts are understood for more informed decision-making across the mining cycle – not just as step before licensing - e.g. regarding licensing decisions, planning for risk mitigation, and use of revenues, including for local communities, but also for the economy more broadly. An ecosystem services approach e.g.:

- Strengthens cost-benefit analysis, including decisions not to approve a project.
- Helps better identify direct and indirect impacts over time and space. It would be useful in other sectors, too.

The current EIA systems does not consider fully the economic potential impact, so this may lead to less effective decisions-making and planning, including decisions to start construction, expand, close, and use of revenues.

Reasons for applying an ecosystem services approach in the mining sector include:

- The mining industry’s dependency on key resource inputs such as water depends on the integrity of ecosystems.
- Mining impact on lowering the water table and hence affecting surrounding communities and agriculture.

- More environmentally-friendly projects are more economically viable as investors continue to examine the sustainability of mines.
- Opportunities to invest in alternative land-use options, and partnerships with neighboring communities could offer future business opportunities.
- Noncompliance is potentially costly, poses risks such as the directors of offending companies being held legally accountable, expensive operational delays or stoppages, licenses being revoked or loss of investment.

Remaining questions:

- How to introduce an ecosystem services approach? How to fund, how to integrate into current legal and operational mechanisms governing the mining sector?
- How to strengthen, SEAs, feasibility studies, EIA ToR and expertise to cover these expanded issues?

## 1.5 DESIGN FOR CLOSURE

This session focused on the importance of early planning for the status the area affected by the prospecting or mining activity shall have after the activities have closed. Closing measures need to be planned already at the design of the mine, design for closure, as well as the cost estimate for the closure that is the base for the financial security. Closure planning needs to include the different right holders. The session drew on participants' knowledge of the existing and coming Kenyan regulation of the mining process and financial security. The session began with a short presentation of the Swedish permitting process for mining activities. For each part of the session there was then a short presentation of Swedish regulations and experiences followed by questions to be discussed in groups, including identifying how Kenyan regulation is handling the issues. The questions and a summary of the discussions are given in Annex 4.

Overall aim: A shared understanding of the importance of early planning of sufficient closure needs for the specific prospecting/mining activities and the corresponding estimated costs.

Key message/messages:

- The design of the prospecting/mining need to include all closing measures and its costs for reaching the agreed status of the area after closure. Emergency plans are necessary when major accidents may occur in a waste facility.

The session was in four parts – all with group exercises:
1. Design for closure
2. The dimension of mining waste
3. Financial security
4. The necessity to prevent and limit consequences of major accidents in waste facilities (not presented or discussed due to lack of time).

Discussions and reflections:

Design for closure

- There is much existing legislation: e.g. Mining Act, EIA regulations, Government Mining Bill, Deposit Bond draft, etc.
- Need to make an assessment of baseline established in terms of integrity of ecosystem;
- This links well to new environmental deposit bond. This still needs to be operationalized.
- The assessment should be done by a technical institution with the proper mandate.
- There is also a need for stakeholder engagement, including local communities.
- EIA process provides for stakeholder engagement.
- The EIA also requires a closure plan.

The dimension of mining waste

A short presentation was made on mining waste, the amounts in different types of mining, important characteristics, and how the handling of mining waste is covered by an EU directive and specifically through the waste management plans. This was followed by a discussion on the types of mining activities that produce waste in Kenya and in what amounts and on how Kenyan regulation is covering the handling of mining waste issues.

| Waste | Amount |
|---|---|
| Titanium mining | 96% |
| Gold mining | 98% |
| Fluorspar (chloride): waste rock and tailings | 93% |
| Gemstone | 99% |
| Quarry: crushing | less than 5% |
| Building stones | less than 5% |

Financial security

A short presentation was made on the Swedish regulations on financial security and on the EU-directive covering this. Some examples were also given on the consequences and costs for remediation when waste facilities have not been closed properly. This was followed by discussion on different aspects of the Kenyan existing and coming regulation on the issue of financial security.

The necessity to prevent and limit consequences of major accidents in waste facilities

There was unfortunately no time to cover this part in the session. However, some of the aspects covered by an EU-directive was presented.

# 2. AREAS FOR FUTURE COOPERATION

Priority areas identified by the participants for future learning and/or ideas for next steps:

- Environmental issues – with a specific focus on impacts from the Kenya's mining sector
- Licensing
- County Administration Capacity Building
- Best practices on stakeholder engagement/bench marking
- Sector specific remediation standards
- Sector specific guidelines deposit bonds
- Capacity development of regulators
- Mainstream HRBA and analysis of ecosystem services framework in SESA

Areas for strengthened collaboration between state and non-state actors:

- Site visits (best practices)
- Mining
- Environmental issues
- HRBA
- Rule of Law
- Benefit sharing
- Ecosystem services in mining
- Deposit bonds

Sharing of learning outcomes:

- Report on websites (all participants respective organisations)
- Circulation of material
- Regional events
- Utilize E-Systems already in place

Topics for webinars:

- Design for closure
- Public participation
- HR-ESS
- Deposit bonds
- Biodiversity and mining

# ANNEX 1. PARTICIPANTS LIST

| | Name | Organisation | Position | G |
|---|---|---|---|---|
| 1 | David Ong'are | National Environment Management Authority (NEMA) | Director - Compliance and Enforcement | M |
| 2 | Zephaniah O. Ouma | National Environment Management Authority (NEMA) | Deputy Director - Enforcement | M |
| 3 | Edward Wabwoto | National Environment Management Authority (NEMA) | Legal Officer | M |
| 4 | Oceanic Sakwa | National Environment Management Authority (NEMA) | Senior Compliance & Enforcement Officer | F |
| 5 | Maureen Njeri | National Environment Management Authority (NEMA) | Compliance and Enforcement Officer | F |
| 6 | Reagan Awino | National Environment Management Authority (NEMA) | Compliance and Enforcement Officer | M |
| 7 | Victoria Muzame | National Environment Management Authority (NEMA) | Secretary | F |
| 8 | Doreen Achieng Alwala | National Environment Management Authority (NEMA) | Intern | F |
| 9 | Elizabeth Mutua | National Environment Management Authority (NEMA) | Intern | F |
| 10 | Abel Chumba | Ministry of Mining | Deputy Director - Mines | M |
| 11 | Wilson Ng'ang'a | Ministry of Mining | Economist | M |
| 12 | J. A. M. Waweru | Dept. of Occupational Health and Safety Services (DOSHS) | - | M |
| 13 | Stella Wangechi | Kenya National Commission for Human Rights (KNCHR) | Human Rights Officer | F |
| 14 | Bernard Mogesa | Kenya National Commission for Human Rights (KNCHR) | Principal Human Rights Officer | M |
| 15 | David Rono | Ministry of Environment & Natural Resources | Deputy Director - Policy | M |
| 16 | Rose Kimotho | Institute for Human Rights and Business (IHRB) | Programme Manager - Nairobi Process | F |
| 17 | Moses Njeru | Kenya Chamber of Mines (KCM) | Chief Executive Officer | M |

| | Name | Organisation | Position | G |
|---|---|---|---|---|
| 18 | Yusuf Lule Mwatsefu | Human Rights Agenda (HURIA) | Executive Director | M |
| 19 | Arnold Kipchumba | Council of Governors | Technical Assistant - Water, Forestry & Mining | M |
| 20 | Ali Mafimbo | Kwale County Government | CEC - Lands, Physical Planning & Natural Resources | M |
| 21 | Pakia Mohammed | Kwale County Government | Chief Officer - Lands, Mining & Natural Resources | M |
| 22 | Ann-Marie Fallman | Swedish Environment Protection Agency (SEPA) | Senior Adviser | F |
| 23 | Mats Kullberg | Swedish Environment Protection Agency (SEPA) | Communication Advisor | M |
| 24 | Per Stromberg | Swedish Environment Protection Agency (SEPA) | Senior Adviser | M |
| 25 | Sanne Due | Swedish Environment Protection Agency (SEPA) | Policy Advisor - Sustainable Development | F |
| 26 | Tim Scott | UNDP - HQs NY | Policy Advisor - Environment and Natural Capital | M |
| 27 | Patrick Maingi | UNDP - Kenya | Programme Officer - Inclusive Economic Growth | M |
| 28 | David Githaiga | UNDP - Kenya | Team Leader - Energy, Environment & Climate Change | M |
| 29 | Marit Kitaw | UNDP - Mozambique | Technical Advisor / Extractive Industries | F |

**In total:** 19 Male; 10 Female

# ANNEX 2. AGENDA

## Capacity building workshop and consultation on human rights based environmental public administration - focusing on the mining sector

**Tuesday 17 May**

Arrival at Naivasha for check in and meet and greet-dinner

**Wednesday 18 May**

Facilitators: Patrick Maingi, UNDP Kenya and Sanna Due, SEPA/UNDP

**8.00 – 8.30** **Official opening of the workshop**

Mr. David Ongare, Director Compliance and Enforcement, Nema

**Introduction and Welcome**
Mr. Zephaniah Ouma, Deputy Director Compliance, Nema and Sanna Due, Policy advisor, SEPA/UNDP HQ

**Presentation of the Environmental Governance Program**
Mr. Tim Scott, Policy Advisor, UNDP HQ

**8.30 – 10.30** **The Role of the State and Human Rights in Environmental Public Administration - focus on the mining sector**

Dr. Bernard Mogesa, Head of Research and Compliance, Kenya National Commission on Human Rights

Rose Kimotho, Programme manager for East Africa, Institute for Human Rights and Business (Nairobi process)

Policy design for environmental sustainability is embedded in a political context with multiple actors and interests. In many cases, measures that strengthen important human rights principles such as the rule of law, transparency and public participation may be equally or more important than specific environmental policies or projects in order to improve environmental management and sustainable development. Therefore, as we address the unsustainable use of resources and environmental pollution, we must also strengthen the underlying human rights principles and rule of law.

This session aims to set the framework of human rights and rule of law in environmental public administration with a focus on mining.

**10.30 – 11.00** **Break with tea/coffee**

**11.00 -12.30** **Inclusive Participation in the Mining Process**

Facilitator and presenter: Mats Kullberg, SEPA

A session focusing on the concept of communication and participation and how social dialogue from a rights based perspective can contribute when implementing inclusive solutions to complex problems. The session involves a lot of interaction and the participants' sector knowledge and experience will be at the forefront. Different stages in the mining process (from planning to post-closure) and the Kenyan Licensing Process will be used as a framework.

The aim with this session is to gain a broader and shared understanding of possibilities stakeholder engagement can offer and what it takes to succeed.

**12.30 – 13.30** **LUNCH**

**13.30 – 15.00** **Inclusive Participation in the Mining Process (cont.)**

**15.00 – 15.30** **Break with tea/coffee**

**15.30 – 16.30** **Environmental Conservation in Kenya**

Mr. Zephaniah Ouma, Deputy Director Compliance, Nema
Oceanic N. Sakwa, Nema

This session aims to give a common understanding among the participants of the environmental problems and concerns in Kenya related to the mining industry. What is included and perceived by "environmental conservation" among the participants and what is their view on applicable internationally accepted standards of health, safety, human rights and environmental protection

**16.30 – 18.30** **Ecosystem Services and Biodiversity**

Facilitator and presenter: Dr. Per Strömberg, SEPA

Mining affects ecosystem services and biodiversity immediately and locally, but also across time and space. This affects the distribution of wealth across different stakeholder groups and needs to be addressed both for human rights and for environmental and economic targets at different administrative levels (local, regional, national). In this session we will describe how the environment is an important element of wealth, and define the role of tools to guide the policy analysis of mining (e.g. the ecosystem services framework). Moreover we will analyse how ecosystem services and environmental quantification (biophysical or monetary) can be used to assess trade-offs between different stakeholders over time.

The aim of this session is a shared understanding that the ecosystem services framework can help to analyse wealth.

| | |
|---|---|
| **18.30 – 19.00** | **Closing of the first day**<br><br>What have we learned from today and what do we need to take into tomorrow's sessions?<br><br>Presentation of some of the captured conclusions. |
| **19.30** | **DINNER** |

**Thursday 19 May**

| | |
|---|---|
| **8.00 – 8.10** | **Opening of Day Two** |
| **8.10- 12.15** | **Design for Closure and Financial Guarantee for Closing of the Operation including mining waste issues**<br><br>Presenter and facilitator: Dr. Ann-Marie Fällman<br><br>This session will focus on the importance of early planning for the status the area affected by the prospecting or mining activity shall have after the activities have closed. The closing measures need to be planned already at the design of the mine, design for closure, as well as the cost estimate that is the base for the financial security. The closure planning needs to include the different right holders. The session will involve the participants' knowledge of the existing and coming Kenyan regulation of the mining process and financial security.<br><br>The overall aim is a shared understanding of the importance of early planning of sufficient closure needs for the specific prospecting/mining activities and the corresponding estimated costs. |
| **10.00 – 10.30** | **Break with tea/coffee** |
| **11.00 – 12.15** | **Design for Closure and Financial Guarantee for Closing of the Operation - including mining waste issues - cont.** |
| **12.15 – 13.15** | **LUNCH** |
| **13.15 – 14.00** | **Closing and evaluation**<br>Facilitators: Patrick Maingi and Sanna Due<br><br>In this session we will recapture what we have learned during these two days and discuss the way forward. |
| **14.00 – 14.15** | **Closing remarks**<br><br>Mr. Tim Scott, Policy Advisor, UNDP HQ and Dr. Bernard Mogesa, Head of Research and Compliance, Kenya National Commission on Human Rights |

# ANNEX 3. LEARNING OUTCOMES

For each session the following leaning outcomes was formulated:

**The Role of the State and Human Rights in Environmental Public Administration - focus on the mining sector**

- Identify human rights standards and principles in Kenyan law binding for the environmental public administration of the mining sector in Kenya;
- Explain the purpose of human rights and their role in a democratic setting;

**Inclusive Participation in the Mining Process**

- Recognize the links between participation (as a core HR-principle) and communication;
- Recognize different communication tools at hand to develop engagement strategies;
- Identify stakeholders involved in different stages of the mining cycle and their roles, needs, motivation levels, opportunities and risks

**Environmental Conservation in Kenya**

- The participants will be able to identify the major environmental problems and concerns in Kenya related to the mining industry

**Ecosystem Services and Biodiversity**

- Define the role of tools to guide the policy analysis of mining (e.g. the ecosystem services framework);
- Analyse how ecosystem services and environmental quantification (biophysical or monetary) can be used to assess trade-offs between different stakeholders over time;

**Design for Closure and Financial Guarantee for Closing of the Operation - including mining waste issues**

- Recognize how closing objectives, costs for closing measures and the involvement of right holders in these questions are covered in the existing/coming regulation;
- Identify the possibilities in the existing/coming regulations of obtaining satisfactory status in the area affected after closure of the activity;
- Recognize the impact of mining waste on closing measures;
- Recognize the risk of major accidents in waste facilities, how it is covered in existing/coming regulation;
- Identify needs of emergency planning for major accidents.

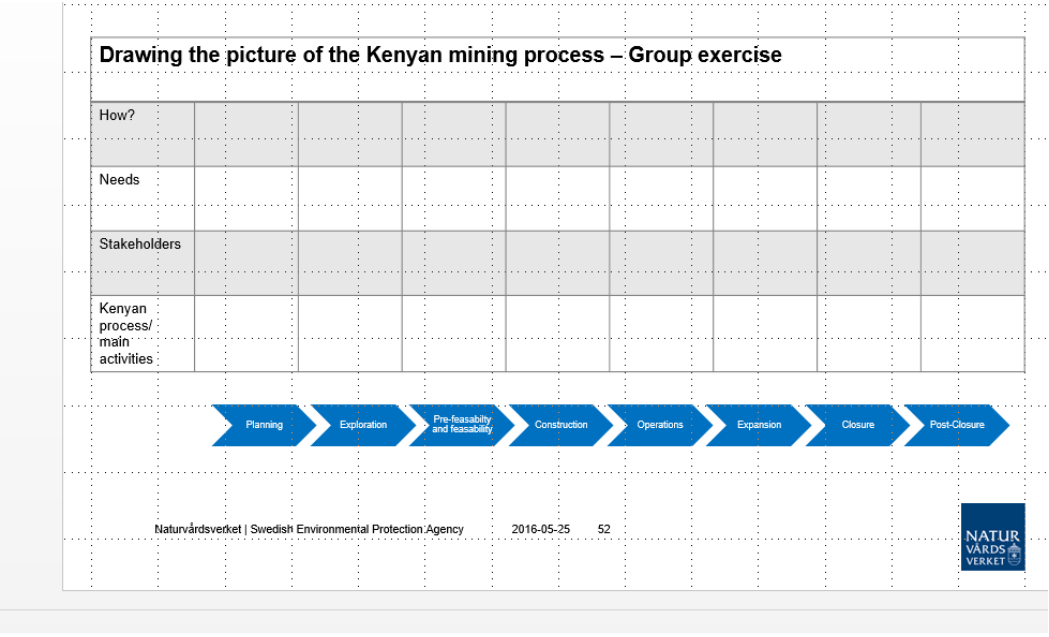
# ANNEX 4. GROUP EXCERCISES

## Inclusive Participation in the Mining Process

Question: Discuss risks involved in not engaging stakeholders in the mining process and possible values added:

| Risk of no participation | Benefits/Values of involvement |
|---|---|
| • Time cost<br>• May set expectations wrong<br>• Compromised security due to conflict<br>• Potential investors scared away<br>• Wrong interpretation of project can lead to wrong results<br>• Financial losses incurred due to stops, delays<br>• Individual perceptions – may not understand issues the same way | • Security, a common goal so everybody will work towards it<br>• Legitimacy of the project<br>• Improved relationships between investors and communities<br>• Improved livelihoods<br>• Increased GDP (taxes etc.)<br>• Promotes accountability, because information is power<br>• Enhance understanding and relations<br>• Conflict resolution |

Question: The participants were asked to identify key events in each phase in relation to the Kenyan mining process, identify key stakeholders, there perceived needs, when to involve them and how.



| Phase | Stakeholders | Needs | How to involve |
|---|---|---|---|
| Planning | Government Lead agencies.<br>-Ministry of Mining<br>-MOIED<br>- NEMA<br>State agencies<br>-National Police Service<br>-Attorney General<br>Investors<br>Community representatives/Land owners<br>Opinion Leaders<br>Development partners &business communities<br>Media<br>Kenya human rights commission/civil society | Capacity development<br>Modern technology & skills<br>Public consultations<br>Established structures<br>Enable legislation and policy<br>To give mining permit<br>For EIA processes/SEA<br>Get land consent<br>Provision of resources<br>To provide security | Training<br>Well-arranged meetings<br>Advertisement/ Announcements<br>Influence public opinions |
| Exploration | Lead government agencies e.g. NEMA, MoM<br>Civil society<br>Investor<br>Land owner<br>Local administrators<br>National treasury | Issuance of licenses<br>Provide exploration reports<br>To give land ownership consents<br>Manage expectations<br>Financial support | Training &capacity development<br>Technical expertise<br>One on one meetings<br>Organized forums<br>To pay courtesy calls |
| Pre-Feasibility &Feasibility | Ministry of mining<br>NEMA<br>Investors<br>Community<br>Consultants<br>Research institutions | Environmental management plan<br>Technical expertise in EIA & Audits<br>Training & capacity development | Participate in EIA process<br>Submit EIA report/feasibility study report<br>Establish ways to acquire land rights<br>Consultation for EIA process |
| Construction | Ministry of public works<br>Ministry of Health<br>Local community<br>Ministry of mining<br>National construction authority<br>DOSH<br>Investor | Licensing operations<br>Building plan approvals<br>Skilled & unskilled labor | Technical capacity<br>Training |
| Operations | Ministry of Mining ,Lands commission,<br>Investors<br>NEMA<br>National treasury<br>National Police service<br>Kenya Human Rights Commission | Oversee operations<br>License operations<br>Funding<br>To provide security | Well established structures<br>Capacity development |

| Phase | Stakeholders | Needs | How to involve |
|---|---|---|---|
| Expansion | NEMA<br>Community<br>Ministry of Finance<br>Lands commission<br>Civil society | For new EIA processes<br>Project approvals<br>Awareness &support<br>Ensure community rights are observed. | Environmental experts<br>Modern skills<br>Technology |
| Closure | Investor<br>NEMA<br>Both levels of government<br>DOSH<br>Local community<br>Civil society | Environmental experts | Capacity building |
| Post-Closure | NEMA<br>Investor<br>Local / National government<br>Community<br>MDCAS<br>Ministry of Mining<br>Civil society | Ensure restoration of site | Capacity building<br>Training |

## Ecosystem Services and Biodiversity

| QUESTIONS | RESPONSES |
|---|---|
| Why are ecosystem services and biodiversity important when assessing mining?<br><br>How could the ecosystem services approach and biodiversity be integrated into the governmental decision making in the mining process? | Examples of ecosystems and biodiversity include: forests, wetlands, land, rivers etc., and they provide the following services; provisional services (e.g. food, fresh water, timber ), regulatory services (e.g. climate & water regulation)and cultural services (e.g. aesthetic value, research, educational)<br><br>These ecosystems and biodiversity are fragile and can be affected by mining activities.<br><br>The parliament should pass laws that make it mandatory to integrate biodiversity and ecosystem considerations in the exploration licensing process.<br><br>Integration should happen through the tools that assist in decision making, e.g. EIA, SIA, HIA, SEA, EA, EMP, CCM, CIA & RAP.<br><br>Public outreach and promotion of active public participation to build capacity to the locals and create awareness so that the right holders can make informed decisions.<br><br>Cost benefit analysis of ecosystems and biodiversity should be integrated in the environmental Impacts Assessments.<br><br>The government should ensure effective enforcement. |

| QUESTIONS | RESPONSES |
|---|---|
| What are the good and bad experiences of mining in Kenya and Sweden (with respect to ecosystem services and biodiversity)? | BAD EXPERIENCES<br>• Insufficient consultation prior to mining process.<br>• EIA process is linked only to licensing rather than long term planning.<br>• Environmental degradation, habitant loss, fragmentation; Pollution-Air, Aquatic &Terrestrial pollution; Loss of protected species, loss of biodiversity<br>• Health problems<br>• Impacts on livelihoods, displacements and climate change.<br>• Corruption<br>• E.g.: Athi-river Mining; Macalder gold mines in Migori; Magadi Salt mines; Gemstones mining in Taita-Taveta; Sand harvesting; Stone Quarrying in Thika; Copper mine in Sweden<br><br>GOOD EXPERIENCES<br>• Some mines have been rehabilitated, e.g. Haller Parker, a tourist site.<br>• Mining is an economic activities<br>• There are draft laws and policies governing the mining sector.<br>• There is regulatory body (NEMA) which has been overseeing the mining activities.<br>Good examples include:<br>• Recycle waste water-Sweden<br>• Enhanced storage capacity-Sweden<br>• Protection of cultural sites- Kaya forest<br>• Rehabilitation of the mines -Base Titanium |

## Design for Closure and Financial Guarantee for Closing of the Operation - including mining waste issues

### Design for Closure

| QUESTIONS | RESPONSES |
|---|---|
| Group A<br>Based on existing and coming regulation:<br>- Analyse what status that shall be obtained at the area affected by the prospecting or mining activities after closure of the activities.<br>- Describe how and when the right holders are involved.<br>- Identify how knowledge of the present environmental status is gathered and how information on "traditional knowledge" is gathered.<br>Assess what in your opinion would be the right time to plan the closure of the prospecting or mining activity. | There is much existing legislation: e.g. Mining Act, EIA regulations, Government Mining Bill, Deposit Bond draft, etc.<br><br>Need to make an assessment of baseline established in terms of integrity of ecosystem;<br><br>This links well to new environmental deposit bond. This still needs to be operationalized.<br><br>The assessment should be done by a technical institution with the proper mandate.<br><br>There is also a need for stakeholder engagement, including local communities.<br><br>EIA process provides for stakeholder engagement.<br><br>Traditional knowledge is also covered well by the EIA process.<br><br>Must be a formal communication from government technical institution before the decommissioning process is certified.<br><br>All this must be considered during the planning stage. |
| Group B<br>Based on existing and coming regulation<br>- Identify how it is secured that the satisfactory status will be obtained after closure of the operation?<br>- Identify who approves the satisfactory status predicted from the planned closure and from the performed closure?<br><br>Assess when and what difficulties may occur?<br><br>Identify what closing measures and resulting status normally are designed and presented in the project for getting the license?<br><br>Analyse what parts that are missing? | Existing regulation is very thin, e.g. Mining Act.<br><br>The current deposit bond bill is addressing these issues, i.e.:<br><br>Clause 152 focusses on land use: land should be restored to original status, water quality<br><br>Also requires plans for reclamation and closure should be included at time of initial mining license.<br><br>Clause 154: environmental protection deposit bonds. More detailed guidelines are needed to operationalize for mining sector.<br><br>Challenges: plans may be incomplete until more detailed guidelines are provided.<br><br>The EIA also requires a closure plan.<br><br>Environmental Audits also provide a monitoring framework.<br><br>NEMA issues a bond discharge certificate as proof of satisfactory closure in consultation with leads state agencies.<br><br>Reg. 16 outlines community engagement, but more detailed guidelines are needed. |

**Mining Waste**

| QUESTIONS | RESPONSES |
|---|---|
| What are the critical characteristics of the produced mining wastes? | Rock, Fluoride, Ferrous, Sulphide<br>Transportation and challenge when waste amount is high<br>Related cost implications of this and handing in general, a source of air, water, land pollution<br>Disturbance of rock structure, geological aspects<br>Titanium: toxic wastes<br>Gold mining: mercury (smelting/processing) |
| Identify how the handling of mining waste is addressed in the application for permit? | This is included in EIA process, but also an Env Management Plan that also provides for handling waste. EIA does not adequately address these issues.<br>During implementation stage, there are a range of regulations covering water, air and solid waste for handling and transport. |
| Analyse to what extent sufficient information on the characteristics and handling of the mining waste included in the applications for permit? | The Environmental Management Plan is a useful monitoring tool. Environmental Audits can have a multi-agency and multi-media inspection.<br>The proposed mining bill can provide a wider framework to help cover the gaps of the EIA and Env Audits. |
| Assess to what extent, from your opinion, the regulation is covering the handling of mining waste? | There are gaps in existing regulations.<br>There is also inadequate technical capacity among collaborative institutions.<br>Regulations also provide for grievance mechanisms, monitoring, and suspension, cancellation. |

**Financial security**

| QUESTIONS | RESPONSES |
|---|---|
| Identify what should be covered by the financial security? | Conditional approval that NEMA asses to monitor. |
| Identify what permit is regulating the measures that the financial security shall cover? | The bond discharge certificate is issued once compliance is achieved. Only after this is the deposit returned. |
| Identify how it is secured that the size of the financial guarantee is corresponding to the costs of these measures? | This is based on the accuracy of the assessment. It is also based on the annual adjustment of the annual bond payment due to inflation, as well as periodic audit of deposit bond payable.<br><br>Provisions also to capture emergencies/unexpected situations. |
| Identify how the size of the bond is calculated? | This is part of the assessment, but additional guidelines needed to provide standards for the calculations. |
| Identify how the bond (and right size) is included in the permit? | Deposit bond assessment profess includes a checklist that analyzes insurance, environmental systems and compliance history. The bond must be paid within 30 days of the approval and before the permit is used. |

| QUESTIONS | RESPONSES |
|---|---|
| Group 1: Analyze at what stages and how different stakeholders can influence this process? | Regulation 10.5 states that the content of the assessment report is a technical exercise involving competent experts the investor, so there is 'no influence' per se during the planning stage.<br><br>Of course this takes place in a broader context of stakeholder engagement during the EIA.<br><br>During later stages, also stakeholder engagement would be involved during operations, emergencies, reclamation and closing procedures. |
| Group 2: Analyse how the measures to be covered by the bond correspond with the closure measures discussed in Part 1 of the session. | |
| Group 3: Assess from your opinion if the deposit bond assessment report produced sufficiently early in the permitting process? | Current provisions are not sufficient, but the proposed deposit bond regulation will be produced early enough during the assessment report under the EIA before the permit is issued |
| Group 4: Identify if the costs of environmental emergency are included in the financial security? If so, analyse how costs for environmental emergency are estimated? | The costs of env emergencies are included in principle but difficult to calculate. NEMA and other agency expertise needs to be strengthened for this.<br><br>The operator needs to take responsibility during emergencies. |

# ANNEX 5. PICTURES

*Zephaniah Ouma, Deputy Director - Compliance and Enforcement at NEMA, welcoming all participants to the workshop.*

*David Ong'are, Director - Compliance and Enforcement at NEMA. "There are many challenges that we face in the mining sector and hopefully this programme would help address the same", he said in the official opening of the workshop. Participants were also told that issues of social inclusion and environmental conservation are pertinent for any project to be implemented successfully.*

*Rose Kimotho from IHRBA sets the framework of human rights and rule of law in environmental public administration. "Governance of natural resources management needs to move beyond the confines of traditional environmental policy", she said in her presentation and also stressed that policy design for environmental sustainability is embedded in a political context with multiple actors and interests.*

*Workshop participants involved in discussions on unsustainable use of resources and environmental pollution and strengthening human rights principles and rule of law.*

*Benard Mogesa from KNCHR is illustrating, with the help from participants and a cord, what might happen if right holders/citizens (on the one side) or duty bearers/government (on the other) pulls too hard. If the government says there are no resources and the citizens say they want their rights the cord may break. The government needs to show its commitment and protect citizen rights.*

*Mats Kullberg from SEPA discussing inclusive participation and the importance of involving stakeholders, addressing needs across the different stages of the mining cycle.*

*Reagan Awino, NEMA, presents an overview of environmental data collection in Kenya.*

*Ann-Marie Fällman from SEPA leads a discussion on design for closure of mining activities.*

*Oceanic Sakwa, NEMA, desribes some of the impacts of mining on the environment.*

*Per Strömberg, SEPA, gives a presentation on how a broader and a shared understanding of how ecosystem services framework can help to analyse natural wealth.*

*Participants identifying stakeholders involved in different stages of the mining cycle.*

*The dimension of mining waste and how mining waste is covered in the Kenyan regulation was one of the topics discussed in group sessions during the workshop.*