



MINISTRY OF MINING

COMMUNITY DEVELOPMENT AGREEMENT REGULATIONS, 2016

MEMORANDUM

Introduction

Community Development Agreements (CDAs) are increasingly being used by mining companies as a means to better define their relationships and obligations with impacted communities. CDAs can play a valuable role in managing the expectations of a broad range of stakeholders including, for example, the mining company, the impacted communities, local and national government, and non-governmental organizations. Legal requirements for CDAs are increasingly becoming common and many governments have enacted **(Burkina Faso, Guinea, Sierra Leone, Papua New Guinea, Mongolia, Australia etc)** or now are considering legislation **(Senegal, Kenya)** that would define when such an agreement is required and what subject matter such an agreement can address.

This regulation provides a framework for regulating the way mining companies engage with communities likely to be impacted by their operations. The key defining features of these regulations are:

1. The outcome (the agreement) is arrived at through fair negotiation;
2. Communities, or community representatives, are directly involved in the negotiations;
3. The outcome is formalised in a written document, which is in effect a legal commitment binding on both parties; and
4. The agreement includes provisions that address broader development objectives, rather than being focused narrowly on financial compensation.

Table of Contents/Arrangement of Regulations

1. Citation
2. Interpretation
3. Objectives of Community Development Agreement
4. Application of Community Development Agreement
5. Identification of an Affected Mine Community
6. Multiple Affected Mine Communities and Multiple Community Development Agreement
7. Appointment of Representatives
8. Drafting of Community Development Agreement
9. Negotiation of Community Development of Agreement
10. Community Development Agreement Consultation
11. Content of Community Development Agreement
12. Valuation of Contribution in Kind
13. Content that shall not be included in a Community Development Agreement
14. Duration of a Community Development Agreement
15. Review of Community Development Agreement
16. Community Development Agreement and Transparency
17. Reporting Requirements
18. Transfer of Community Development Rights and Obligations
19. Compliance by Holders of Transitional Mineral Rights
20. Pre-existing Community Development Agreements
21. Approvals and Records
22. Effectiveness of Community Development Agreement
Schedules

IN EXERCISE of the powers conferred by section 223 and pursuant to section 109(i) of the Mining Act, 2016, the Cabinet Secretary for Mining makes the following Regulations:-

1. Citation

These Regulations may be cited as the Community Development Agreement Regulations, 2016.

2. Interpretation

In these Regulations, unless the context otherwise requires:-

“affected mine community” means-

- (a) a group of people living around a mining operation; or
- (b) a group of people who may be displaced from land intended for exploration and mining operations;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to mining.

“Community Development Agreement” means a legal agreement or commitment entered into by a holder and the affected mine community or communities and approved pursuant to these regulations.

“community development programme” is the programme of work agreed under a Community Development Agreement.

“consultation” means a process involving a physical gathering of the impacted or affected communities and other interested parties at the village level and conducted in a location that is reasonably accessible to all members of the communities and other parties and of a certain format and duration to produce, through discussion, dialogue, discourse and other respectful communications, meaningful understanding between the parties from which useful action may be taken. For the purposes of these regulations, consultations are deemed insufficient if held with a few people or opinion leaders of the affected or impacted communities.

“County Government” means the County Government provided for under Article 176 of the Constitution of Kenya.

“holder” means the holder of a mining licence under the Mining Act or a mining lease and a special mining lease granted under the Mining Act (Cap. 306), 1940 which is still valid and subsisting after coming into force of these regulations.

“mine development” means construction and other infrastructural development work carried out on a mining licence area prior to production.

“Mining Act” means the Mining Act, 2016.

“mining licence” means a mining licence granted under the Mining Act.

“**party**” means the holder or affected mine community as well as their duly authorised representatives.

“**mining operations**” has the meaning assigned to it in the Mining Act and any regulations made thereunder.

3. Objectives of the Community Development Agreement Regulations

Although minerals belong to the people of Kenya, this objectives of these regulations are:

(1) to provide a legal basis on which mining operations and mining-related activities are conducted in a manner that, for the life of the mine:

(a) benefits of the mining operations or activities are shared between the holder and affected community;

(b) mining operations are consistent with the continuing economic, social and cultural viability of the community; and

(c) mining operations significantly contribute to the improved economic, cultural social welfare of the community and its members;

(2) to ensure accountability and transparency in mining related community development; and

(3) to define when Community Development Agreements are required and to provide a framework for such agreements.

4. Application of Community Development Agreement

A Community Development Agreement shall be a legal requirement of the holder of a mining:

(1) licence granted under the Mining Act; and

(2) lease and a special mining lease granted under the Mining Act (Cap. 306) as repealed which is still valid and subsisting after coming into force of these regulations.

5. Identification of an Affected Mine Community

(1) A holder, as part of the Environmental Social Impact Assessment and with the approval of the National Environmental and Management Authority, shall assess potential community impacts of its proposed operations and identify one or more communities with which it proposes preparation of a Community Development Agreement.

(2) The holder shall notify, in writing, the affected mine community or communities with copy of such notice to the Cabinet Secretary within seven (7) days of the grant of a mining licence.

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

(4) Where a community gives notice to a holder that it should be identified as a party to a Community Development Agreement and the holder is not in agreement, that community may give notice 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 thirty (30) days from the date of such notice, specifying whether the community should be made a party to a Community Development Agreement.

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

6. Multiple Affected Mine Communities and Multiple Community Development Agreements

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

(3) Where there are several affected mine communities located in more than one county, the holder may have a separate Community Development Agreement with an affected mine community that is located in a different county.

(4) An affected mine community may enter into multiple Community Development Agreements where it is impacted by more than one mining operation under different holders or may enter into one Community Development Agreement that includes multiple holders operating in the community.

7. Appointment of Representatives

(1) The holder shall appoint its representatives for the implementation of the Community Development Agreement to which it is a party and shall notify, in writing, the affected mine community, with a copy of such notice sent to the Cabinet Secretary.

(2) The affected mine community shall elect a Community Development Agreement committee comprising:

(a) The Governor or a representative appointed by the Governor;

(b) The National and County Government representatives in charge of administration;

(c) one or all representatives from the County Assembly from the electoral area within which the affected mine community is located;

(d) one elected representative of women;

(e) two recognized community leaders or elders;

(f) two elected representatives of the youth at least one of whom is a woman;

(g) one representative elected by Non-Governmental Organisations working in the County;

(h) two elected representatives of marginalised groups, persons with disabilities, ethnic and other minorities;

(i) the Members of Parliament of the constituency of the affected mine community and

(j) 3 representatives of the holder.

(3) The Committee members shall elect their own chairperson from among the members;

(4) All the persons elected or appointed under sub-regulations (1) and (2) shall be publicly acknowledged as representatives of the holder and the affected community.

(5) The term of office for members under sub regulations (1)(d)(e)(f) and (h) shall be for a period of three years and may be renewed for one further final term not exceeding three years.

(6) The Committee shall:

(a) monitor and evaluate the 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 dispute that may arise between parties to a Community Development Agreement in respect of any matter in connection with or under the Community Development Agreement;

(e) settle any other issue, matter, grievance or complaint that is not related to the Community Development Agreement that may be made by raised by the holder or the community.

7(1) The Committee shall meet at such times and places as the Chairman may decide and shall meet whenever it becomes necessary to resolve a dispute or complaint relating to the Community Development Agreement or any other matter.

(2) The Committee shall decide on the quorum and its own procedures for every meeting.

8. Drafting of Community Development Agreement

(1) A draft of a Community Development Agreement shall be prepared in accordance with these regulations by the holder.

(2) The agreement shall be prepared in English and, where helpful, charts and schedules shall be included to clearly reflect time-based actions and other information.

(3) The drafting of the Agreement shall take into account the unique circumstances of the mining operations and the affected mine community and the issues to be addressed in the agreement and community development programme plan.

(4) The issues to be addressed in the Agreement may include but not limited to the following:

- (a) role of County Government;
- (b) educational scholarship, apprenticeship, technical training and employment opportunities for the people of the affected mine community;
- (c) employment for members from the affected mine communities;
- (d) financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
- (e) assistance with the creation, development and support to small-scale and micro enterprises;
- (f) special programmes that benefit women;
- (g) special programmes that benefit youth;
- (h) agricultural product marketing;
- (i) protection of natural resources;
- (j) support for cultural heritage and sports;
- (k) treatment of cultural and sacred sites;
- (l) treatment of ecological systems, including restoration and enhancement, for traditional activities such as hunting and gathering;
- (m) how cultural values will be respected;
- (n) funding and control mechanisms to ensure funds are utilised as intended and are transparent and auditable
- (o) other topic areas as may be agreed between the parties; and
- (p) special programmes that will benefit persons with disabilities.

9. Negotiation of Community Development Agreement

(1) Negotiation of the Community Development Agreement shall be conducted by the authorized representatives of the parties, which shall be the same representatives of the parties designated to oversee the implementation agreement.

(2) The parties may employ outside assistance such as legal, technical, or financial experts or otherwise to assist in the negotiations of the community development.

(3) The parties shall develop, in writing, a Community Development Agreement negotiation schedule that will include the date, time and issues for each negotiation meeting.

- (4) Minutes shall be taken of each negotiation meeting.
- (5) If the parties are not able to negotiate agreed-upon Community Development Agreement terms they may by mutual consent seek to resolve their differences through mediation.
- (6) If the parties fail, after reasonable good faith attempts, to negotiate Community Development Agreement terms by the time the holder is ready to commence operations, the holder, affected mine communities or the parties jointly may refer the matter, jointly or individually, by notification to the Cabinet Secretary for resolution.
- (7) A written notification shall be prepared in a form as prescribed under sub-regulation (8) from either or both parties and submitted to the Cabinet Secretary.
- (8) The notification shall include but not be limited to:
- (a) the draft Community Development Agreement;
 - (b) description of negotiations to date;
 - (c) issues holding up the conclusion of the final agreement; and
 - (d) proposals to resolve issues.
- (9) The Cabinet Secretary shall determine the matter within a timeframe that may be agreed with the parties.
- (10) The Cabinet Secretary shall within thirty (30) days from the date on which a Community Development Agreement is approved by the holder and the community, cause a copy of the agreement to be made accessible to the public on the website of the Ministry of Mining.

10. Community Development Agreement Consultations

- (1) The holder and the affected mine community shall establish a schedule of consultations to be published:
- (a) In any manner that is typical for the affected mine community or any other mode of publication mutually agreed upon by the parties.
 - (b) All consultations shall be conducted by parties and their representatives with mutual respect and in good faith including but not limited to:
 - (i) timely performance of consultation and other efforts to put in place the Community Development Agreement;
 - (ii) timely performance of obligations made under the Community Development Agreement;
 - (iii) ongoing monitoring and evaluation of Community Development Agreement obligations and, where required, amending and updating the provisions in the best interests of the parties; and

(iv) assurance that the affected mine community is comprehensively represented and cared for under the Community Development Agreement without isolating any particular individuals or groups.

(2) The holder shall provide the affected mine community with at least five (5) written copies of the draft Community Development Agreement within a timeframe that may be agreed with the Community Development Agreement Committee.

(3) The affected community shall conduct consultation on the draft Community Development Agreement and provide comments back to the holder within a timeframe that may be agreed with the holder.

(4) Where an affected mine community determines that it lacks the capacity to reasonably and effectively negotiate a community development agreement, the holder shall assist to build that capacity including the provision of such funds to the affected mine community to hire its own experts and advisers as are reasonable in the circumstances.

(5) 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 Finance Act, 2015.

11. Content of a Community Development Agreement

The content of a Community Development Agreement shall include but not be limited to the following:

(1) An explanation of the Community Development Agreement goals, objectives, obligations and activities aimed to achieve sustained community development that:

(a) lasts from generation to generation;

(b) is based on the actual needs of the community;

(c) is well planned, monitored and evaluated;

(d) has long term benefits;

(e) prepares the community for closure of the mine;

(f) is in harmony with or complements but does not replace or displace national or county government-led development and services provided or to be provided;

(g) is in accord with and complements County and National Government development plans; and

(h) recognises and incorporates traditional knowledge.

(2) The organisational structure that shall ensure the implementation of the Community Development Agreement which may include but not be limited to a person, persons, board,

committee, foundation, trust, forum, body or other entity with the names and contact information of the appointed representatives of each party.

(3) A community development programme shall include but not be limited to:

- (a) objectives;
- (b) time-based milestones;
- (c) implementation timetable;
- (d) schedule of anticipated expenditures;
- (e) metrics and indicators by which to measure progress;
- (f) periodic reporting including actual expenditures;
- (g) how the plan works in coordination with County Government plans, services, infrastructure and activities provided to or affecting the community;
- (h) how the provision of any service provided by the holder to the community will be terminated or transferred to the community;
- (i) how and when the plan will be periodically updated;
- (j) how the plan and amendments to the plan will be ratified by the affected community; and
- (k) such other content as may be mutually agreed by the affected mine community and the holder.

(4) The consultative and monitoring frameworks between the parties including but not limited to the means by which the community will and may participate in the planning, implementation, management, measurement (including indicators) and monitoring of activities carried out under the agreement.

(5) The means by which members of the affected mine community will participate in the community's development agreement related decision-making processes.

(6) The means by which the interests of women, youth, and marginalised groups of the affected mine community will be represented in the Community Development Agreement related decision-making processes and implementation.

(7) Roles and obligations of the holder which may or may not be part of the community development programme plan required under sub regulation 11(3), including but not limited to:

- (a) undertakings, with respect to the social and economic contributions, that the project will make to the sustainability of the affected community;
- (b) assistance in creating self-sustaining, income-generating activities, such as, but not limited to, production of goods and services needed by the mine and the community; and

(c) consultation with the community in the planning of mine closure and post-closure measures that seek to prepare the community for the eventual closure of the mining operations.

(8) Roles and obligations of the affected mine community which may or may not be part the community development programme plan, including but not limited to:

(a) undertakings to ensure community participation throughout the life of the Community Development Agreement aimed at optimizing its implementation; and

(b) establishment of a grievance and information exchange mechanism to monitor impacts of Community Development Agreement implementation on the community and to identify aspects that may require modification.

(9) The means by which any funds made available under the agreement are to be disbursed, for what purposes they may be disbursed, what accounts must be kept and by whom, and reporting and auditing requirements.

(10) Grievance and dispute resolutions provisions including:

(a) the mechanisms through which either party may lodge a grievance with the other;

(b) a written, signed statement which shall be included in the Community Development Agreement confirming that both parties agree that good faith amicable attempts to resolve any dispute regarding the agreement shall in the first instance be resolved by consultation between the holder and the affected mine community representatives; and

(c) the dispute resolution mechanism to be used when consultation between the holder and the affected mine community representatives fails.

(11) The applicable law which shall be the laws of Kenya and the process by which the agreement may be modified.

(12) Definition, reasons, notice provisions, mitigation requirements, and procedure for declaring and resolving force majeure.

(13) Assignment of all Community Development Agreement rights or any right or obligation there under to third parties, duration and termination of the agreement.

(14) The modality for how notifications to respective parties shall be done.

(15) Location where the agreement may be accessed by members of the community.

(16) Signature of the authorized parties; and

(17) A minimum expenditure which shall be at least one per cent (1%) of the gross revenue from the sale of minerals by the holder in the first calendar year and in every calendar year shall be expended under the agreement.

(18) (a) 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.

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

12. Valuation of Contributions in Kind

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

13. Content that shall not be included in a Community Development Agreement

The content of a Community Development Agreement shall not in any way address the following:

(1) the imposition of any additional rent, fee, or tax for the benefit of the affected community that is not set out by law;

(2) the provision of any vehicle to any individual or single family unit of the affected mine community other than a specialized purpose vehicle such as an ambulance, fire engine, water truck, or bus for the benefit of the entire community;

(3) 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, any other person howsoever described; or

(4) any matter that is illegal under any legislation in Kenya.

14. Duration of Community Development Agreement

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

15. Review of the Community Development Agreement

A Community Development Agreement shall be reviewed at least every five (5) years from the date of signing and shall include:

(1) the means by which it shall be reviewed by the parties; and

(2) all the terms and conditions of the approved Community Development Agreement which shall remain in place during any follow on review of the terms and conditions unless otherwise agreed in writing by the Parties.

16. Community Development Agreement and Transparency

(1) The parties shall use best efforts to establish meaningful mechanisms that ensure transparent transactions relevant to Community Development Agreement commitments including but not limited to:

(a) quarterly written publication of status of Community Development Agreement implementation to be available on the Ministry of Mining official website, using any typical mode of information and communication for the affected mine community, or as may be mutually agreed by the parties;

(b) quarterly public meetings by the parties in a place that shall be accessible to the holder and members of the affected mine community.

(2) The parties shall prepare rules of procedures for public meetings with emphasis on monitoring and implementation of the Community Development Agreement, and the parties may determine whether additional issues shall be addressed.

(3) The parties shall issue no later than January 15 of each year following the first licence year, a schedule of the dates and location for the public meetings.

17. Reporting Requirements

(1) A holder shall submit to the Cabinet Secretary through the online mining cadastre and a copy to the County Government for every Community Development Agreement to which it is an annual report and attachments substantially as set out in the Schedule [**Community Development Agreement Annual Report**] not later than sixty (60) days after the end of the year indicating in sufficient details its community development expenditures on every item or service provided and total expenditure for January through December of the previous calendar year.

(2) All Community Development Agreement reports 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 of Mining and the County Government.

18. Transfer of Community Development Agreement Rights and Obligations

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

19. Compliance by Holders of Pre-existing Mineral Rights

The holder of a mining lease or special mining lease that currently is in force but which was granted prior to the adoption of these regulations is subject to these regulations and shall be in compliance with them no later than eighteen (18) months from the coming into force of these regulations.

20. Pre-existing Community Development Agreement

Where a holder of a mining lease or special mining lease has entered into a Community Development Agreement or has 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, agreement or howsoever described shall be in compliance with the requirements of these regulations within eighteen (18) months after coming into force of these regulations.

21. Approvals and Records

(1) A Community Development Agreement or revised Community Development Agreement agreed and signed by the authorized representatives of a holder and the affected mine community shall be submitted through the online mining cadastre for approval by the Cabinet Secretary for Mining who shall, if the agreement meets the requirements as set out in the regulations, approve such agreement within fourteen (14) days of it being submitted.

(2) If a Community Development Agreement is not approved, the Cabinet Secretary shall notify both the holder and the affected mine community representatives, and such notices shall contain the specific reasons for rejection and the means or directions by which any corrections or amendments as directed by the Cabinet Secretary may be made.

22. Effectiveness of Community Development Agreement

A Community Development Agreement shall come into force after the agreement has been signed by both parties.

**SCHEDULE
COMMUNITY DEVELOPMENT AGREEMENT REGULATIONS, 2016
FORMS**

**1. FORM CD: Community Development Agreement Annual Report
(Regulation 17 of the Community Development Agreement Regulations, 2016)**

Name of the holder of the mining licence: _____

Year (in which this form is submitted): _____

Period being reported: (tick one box)

January through June; Year _____

July through December; Year _____

	<p>Dated seal here Report received at: _____ On (day/month/yr.): _____ Attestation has been signed: _____ (note: if the attestation signature is absent, the report cannot be accepted) Receiving officer: _____ Receiving officer's signature: _____ Report confirmed complete: _____ On (day/month/yr.): _____ Reviewing officer: _____ Reviewing officer's signature: _____</p>
	<u>Check List</u>
	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;
	Other information as may be requested in writing by the Ministry of Mining
	Special programmes that benefit youth, women and marginalised groups

Instructions:

This form shall be attached to a Community Development Agreement Annual Report being submitted to the Mining Cadastre Office. This form must be completed in full and signed by a Mine Manager of the holder or a duly authorised officer. If the attestation section of this form is not signed, the attached report cannot be accepted (the report does not meet the requirements Community Development Regulations). Use a separate reporting form and report for each Community Development Agreement (combined reports are not permissible).

Details of the holder of the Mining Licence:

1. Name of the Holder: _____
2. Name or description of the affected mine community:

3. Year that the Community Development Agreement with the affected mine community was originally approved: _____
4. Year that the Community Development Agreement was last amended and such amendment was approved: _____
5. Attach a report addressing the following:
 - description 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, 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 including a gender aware beneficiary assessment of Community Development Agreement activities;
 - special programmes that benefit women;
 - special programmes that benefit youth and persons with disabilities;
 - special programmes that benefit marginalised groups;
 - other information as may be requested in writing by the Ministry of Mining;
 - other information that the holder wants to report;
 - work or funds irrevocably committed to fulfil any obligation of the holder specified in a Community Development Agreement (attachment are required: attach a detailed list of expenditures made with regard to that agreement, sum the expenditures for each agreement, and provide the total expenditure)
 - Attestation of truth and accuracy

Any such descriptions and information shall be sufficiently detailed so that the Ministry of Mining can determine whether the Community Development Agreement is succeeding.

(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 a 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: _____

