



MINISTRY OF PETROLEUM AND MINING

STATE DEPARTMENT FOR MINING

DRAFT

**COMMUNITY DEVELOPMENT AGREEMENT
GUIDELINES**

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1. INTRODUCTION

1.1 Background

- 1.1.1 Kenya has a variety of known mineral resources that include soda ash, fluorspar, titanium, rare earth elements, gold, coal, gemstones, manganese, iron ore, gypsum, carbon dioxide, diatomite, chromite, silica sand, limestone and dimension stone among others. There is also potential for discovery of other minerals as exploration is intensified.
- 1.1.2 These resources support the mining industry, which is an important contributor to Kenya's economy. A significant number of people benefit directly or indirectly from the mining industry and related activities.
- 1.1.3 Article 69 of the Constitution provides for equitable sharing of benefits accruing from natural resources. In addition, the Mining Act No. 12 of 2016, section 6 states that minerals are the property of the Republic and are vested in the National Government in trust for the people of Kenya. This therefore accords community rights to the accrued benefits. In practice mining is undertaken by the private sector and the State operating under a mining license.
- 1.1.4 Prior to the Mining Act No. 12 of 2016, the license holders shared part of their proceeds with the community through Corporate Social Responsibility (CSR) that drawn by the mineral rights holder without the participation of the benefiting community as envisaged in article 10 of the constitution. This led to communities disowning the projects.
- 1.1.5 There was therefore inequity in sharing of mineral benefits between the licence holders and the community, which resulted into conflicts.
- 1.1.6 In view of the above, section 109 of the mining Act provides for the drafting of community development agreement (CDA) regulations. According to the CDA regulations of 2017, CDA aims to:

- i. Provide mechanism for benefit sharing between the holder and the community;
 - ii. Ensure mining significantly contribute to improved economic, social and cultural wellbeing of the community, and
 - iii. Ensure accountability and transparency in mining related community development in the CDA.
- 1.1.7 The CDA regulations provide a governance structure through the CDA committees and a requirement for holders to allocate a minimum of 1% of annual gross revenue sales to support community priority programmes, thus replacing CSR. The holder may continue with CSR activities during exploration and prospecting but will be required to transition to CDA as soon as mining operations commences.
- 1.1.8 Under the CDA arrangement, the holder and communities enter into an agreement in which the holder directly support development priorities identified by the communities.

1.2 Objectives of the guidelines

- 1.2.1 The State Department for Mining developed the Community Development Agreement Regulations, 2017 to promote sharing of benefits between the holder and the communities where the mining takes place. These guidelines provide further details on the implementation of the regulations. The specific objectives of the guidelines are to:
- a) Provide a mechanism of transitioning from mining projects that are currently implementing CSR to CDA projects
 - b) Standardization of mineral holder support to communities
 - c) Outline the responsibilities and obligations of stakeholders to the CDA
 - d) Provide a framework for project/ program identification prioritization, implementation, monitoring and evaluation and reporting
 - e) Provide a mechanism for resolving disputes and conflicts
 - f) Provide for procedures on financial resource management
 - g) Define the nature and extent of community participation in the CDA process
 - h) Define code of conduct of the parties involved

1.3 Scope

1.3.1 These guidelines provide for procedures for formulating the Community Development Agreement, including community consultations, engagement and participation, responsibility and obligations of parties, code of conduct, project and program implementation, financial management and reporting requirements and dispute and conflicts resolution mechanism. The CDA process is expected to be established through a participatory process in line with article 10 of the constitution.

1.4 Stakeholders

1.4.1 The guidelines are for parties involved in development and implementation of the Community Development Agreement, in particular the communities and the Mining rights holders. They shall each submit names in writing of two persons who shall sign the CDA on their behalf. The stakeholders include holders of mining licence, the community, Community Development Agreement Committee and service providers.

2. STAKEHOLDER PARTICIPATION

Stakeholder participation is an important tenet in sustainable mining development. The Africa Mining Vision recognizes the need to facilitate increased participation by the government, the private sector (mineral holder) and local communities in the social and development outcomes of mining at local level. Information asymmetry and power differences existing among the three parties limit meaningful participation of the communities.

The Constitution of Kenya mandates public participation in decision making process, it is thus imperative that adequate public participation is conducted, to forestall disharmony among the parties. This may result in communities denying access to land for exploration and mining. In order for mining to be beneficial, deliberate efforts should be made to ensure that the community concerns are included in the mining activities at all stages. This will guarantee greater support and ownership of the mining project by the community.

2.1 Community engagement shall include all stakeholders in the communities are to meet their expectations and specified roles in the CDA. Such engagement will create a platform for better understanding of issues related to the project and expected benefits.

2.2 The holder shall follow the environmental social impact assessment carried out in accordance with the Environmental Management and Coordination Act. The holder shall identify one or more communities, as is necessary with which it proposes to enter into an Agreement.

2.3 Consultations should be adequate and meet desired threshold. In this case, the holder shall ensure inclusion of all members of the identified community/communities and leadership of the area while taking into consideration the size and diversity of community.

The community and leadership to be consulted shall include the following:

- a) Local leaders
- b) National government officers (County Commissioner, relevant government departments)
- c) County government
- d) Members of the community, which should include all gender, youth, Persons With Disabilities (PWD) and the elders within the community
- e) Civil society organizations

2.4 The holder shall use appropriate mode of engaging the communities as follows:

- a) The holder shall notify the community of its intention to enter into an agreement in writing and send a copy to the Cabinet Secretary within thirty days (30) as provided for in the regulations.
- b) The holder shall engage the community through meetings, public barazas, announcements in local radio stations and notices in newspapers.

- c) The holder shall make use of ICT where applicable to engage the community through website posting, mobile telephony and other media channels.
- d) In all engagements, the holder shall endeavor to communicate in Kiswahili and the local language and the CDA should be translated in these languages
- e) The holder shall ensure timely communication to the relevant stakeholders to enable them to prepare and attend forums for engagement
- f) The minutes of the consultations should be made available to the community as a record of the CDA process.

3. ELECTION OF COMMUNITY DEVELOPMENT AGREEMENT COMMITTEES

In order to enforce the requirements for large-scale mining company to have in place community development agreement, the national government shall ensure the establishment for community development agreement committee (CDAC) as provide for under CDA regulation 7. The membership of CDAC shall comprise of:

- a) the Governor or a representative appointed by the Governor;
- b) the National Government representative in charge of administration at the County;
- c) the County Assembly representative of the electoral area within which the community is located;
- d) one representative of women elected by the community
- e) one representative elected from among the village elders of the community;
- f) two representatives of the youth of either gender from the community;
- g) one representative elected by civil society organisations working in the area of extractives in the County;
- h) one representative of marginalized groups, ethnic and other minorities;
- i) one representative of persons with disability from the community;
- j) the Member of Parliament of the constituency of the community and
- k) three representatives of the holder

3.1 Producers for election of CDA committee members

The following procedures shall be used in election of members of the CDA committee:

1. The Cabinet Secretary initiates the process of establishing the CDAC committee by writing to the Governor and draws his/her attention of the mining project under which the CDA is to be established, relevant legal provisions including the

composition of the CDAC committee and its functions. The letter is copied to Council of Governors, County Commissioner, Senator, Member of Parliament, women representative for the respective county (ies), and the Regional Mining Officers. The letter requests a nominee to represent the Governor in the committee. The CS shall request all parties to play their respective roles in actualizing the formation for the committee.

2. The Principal Secretary responsible for Mining shall coordinate with relevant national Government actors, County governments and the local leaders on the best approach for smooth implementation of the CDA.
3. The Regional Mining Officer in consultation with the County Commissioner and respective Deputy County Commissioner (s), Community and the holder shall set a date for venue of election.
4. The Regional Mining Officer shall notify all the parties on the agreed date and venue using appropriate mechanism including but not limited to Local Chief Office.
5. An Officer of the State Department for Mining headquarter shall preside over the elections of the community representatives:
 - a) Members of each separate interest groups shall elect their representatives to the Committee separately.
 - b) The names of the elected candidate shall be submitted by the presiding officer who shall present the name to the Principal Secretary
 - c) Principal Secretary shall submits the elected committee members to the CS for gazettelement.

3.3 The elections should be concluded within three months upon the receipt of the notification from the mineral right holder, before holder commences mining.

3.4 CDA can form sub-committees as may be deemed necessary for better execution of their functions.

4 CODE OF ETHICS AND CONDUCT FOR CDA MEMBERS

The CDA is a public process that the Government is using to ensure that mining benefits and shared with the communities where mining operations occur.

- 4.1 All members of the Committee are required to conduct themselves at all times in accordance with the Code of Ethics and Conduct in Public Projects as enshrined in these guidelines. The code of conduct aims to promote good practice and give members a summary of their obligations and provide guidance on ethical conduct.
- 4.2 Every member of the Committee shall be able to understand the CDA regulations and guidelines and the rules made there under and be committed to the Implementation of this Agreement
- 4.3 All members have a responsibility to ensure efficient and effective operations of the committee, avoid extravagant and wasteful use of resources and ensure actions are consistent with the role and purpose of the Committee.
- 4.4 Members of committee are required to:
- a) Understand and internalize the roles and responsibilities of the committee within the Community.
 - b) Stay informed on all matters affecting the Committee's business.
 - c) Attend all Committee meetings or where attendance is not possible, submit an apology.
 - d) Participate actively and cooperate with other Committee members, the holder and the Community.
 - e) Prepare for Committee meetings by reading and considering the agenda items, minutes and other relevant documents.
 - f) Ensure decisions are consistent with any statutory and legal requirements.
 - g) Ensure resources, funds and staff are used effectively and economically for committee business.
 - h) Not to abuse Office by finding a way of allocating themselves the Projects
 - i) Not improperly influence other Committee members.
 - j) Where appropriate, declare interest and disqualify themselves from committee discussions and decisions where a conflict of interest occurs
- 4.5 Any member of the Committee who knowingly, directly or indirectly, obstructs or causes the obstruction of the implementation of this Agreement shall be

reprimanded and the Committee shall take any other appropriate action against any such members which shall include recall and replacement and be subject to leadership and integrity Act of 2012.

- 4.6 a) All documentation produced by the Committee forms part of the Community records and shall be kept in the Community's information resource centers.
- b) The Secretary to the Committee shall:
- i. Ensure adequate procedures are followed for documenting decisions and actions of the committee.
 - ii. Maintain confidentiality of committee business where necessary, ensuring confidential records are subject to appropriate storage and access procedures.
 - iii. Respect confidential discussions and not misuse any information obtained through membership of the committee.
 - iv. Openly declare any matters of private interest and record any issues with the potential for conflict or perceived conflict to ensure they are transparent and capable of review.
 - v. Ensure that the Community is fully and promptly informed of all matters that are deliberated by the Committee.

5. ELEMENTS OF THE COMMUNITY DEVELOPMENT AGREEMENT

- 5.1 The structure of the CDA shall comply with the Act and the CDA regulations and shall contain the following elements including;
- a) Name of and geographical location of the Sub-County
 - b) Name of the Community– describe the Mining community including those within the resettlement area, mining and processing area, ship loading facility area and other associated mining areas.

- c) Name, postal and physical address of the Holder and Area in which the mining operation takes place
- d) Particulars of the signatories to the agreement
- e) Certificate of proof by the High Court Registrar in that particular county where mining takes place.
- f) Procedures for election of CDA committee, election of the chairperson, vice chairperson and secretary ensuring that there is gender balance
- g) Functions, responsibility, roles and obligation of parties and the CDA committee.
- h) Description of the meetings to be held by the Committee.
- i) Provisions on local content by the mineral right holder on local employment, training, skills transfer and procurement of local goods and services. This should take into consideration gender aspects.

5.2 The community shall identify and prioritize projects and programmes that they would want to be implemented under the agreement which may include:

- a) Educational scholarship, apprenticeship, technical training and employment opportunities for the people of the community;
- b) Financial or other forms of support for infrastructural development and maintenance including education, health, roads, water and power;
- c) Assistance with the setting up of and support to small-scale and micro enterprises;
- d) Special programmes that benefit women, youth and persons with disabilities;
- e) Agricultural product marketing;
- f) Protection of the environment and natural resources;
- g) Support for cultural heritage and sports;
- h) Protection of ecological systems
- i) Funding and control mechanisms to ensure funds are utilized as intended and accounting processes are transparent and audited; dispute resolution; and
- j) Any other areas as may be agreed between the parties.

5.3 Financial management

Being public funds, CDA financial management shall be subject to the Constitution of Kenya, the Public Finance management 2012 and the Mining Act, 2016, Salaries and Remuneration Commission and the Community Development Agreement regulations.

5.3.1 The financial management should include:

- a) Provision on the allocated amount (a minimum of one percent of the gross mineral sale revenue) for the CDA activities in separate CDA account
- b) Facilitation of the CDA Committee
- c) Provision on disbursement of finances by the holder to the service providers of the Projects being implemented under the CDA.
- d) Provisions on the valuation of contribution in kind made by the holder valuation by competent authority instituted by the Committee
- e) The mineral right holder shall submit to the Cabinet Secretary annual reports on payments made with respect to agreed projects in the CDA

5.3.2 Facilitation of the CDA Committee

- a) The holder shall finance the activities of the committee
- b) Members of the Committee shall not be entitled to a salary but shall be entitled to such allowances as determined by the Salaries and Remuneration Commission.

5.3.3 The CDA expenditure accounts shall be subject to audit by the Auditor-General and Controller of budget.

5.4 The CDA shall contain a clause on review every five years or as need arises.

5.5 CDA shall contain provisions on monitoring, evaluation and reporting:

- a) There shall be a framework for the monitoring and evaluation of the projects in order to ensure that they meet the expected standards (Schedule 1).

b) The holder shall submit an annual report to the Cabinet Secretary and County Government, which shall include the expenditure incurred in executing the projects.

5.6 The agreement shall provide for dispute and conflict resolution mechanism

5.7 Duration of the agreement and provision for continuity on transfer of mineral rights to a new holder.

5.8 The closure of the CDA would be determined by the sale of the final mineral stock.

5.9 Outline on how to handle project assets on decommission.

6. RESPONSIBILITIES AND OBLIGATIONS

Mining is a National Government function as provided for under schedule four of the Constitution, and therefore not devolved. The County governments however have an important role to play in the management and development of mineral resources. Mining operations take place in geographical areas located in counties, and affects a spectrum of stakeholders. CDAs shall therefore recognize the unique and complementary roles of various stakeholders.

6.1 Role of various stakeholders

National Government

- i. Enforce the requirement for large scale mining companies to have in place Community development agreements
- ii. Ensure establishment of Community Development Agreement Committees

National Leaders (Senator, Women rep and member of Parliament)

- i. Facilitate smooth implementation of CDA through sensitization of communities
- ii. Act as champions of the CDA

County Government

- i. Assist communities in identifying expertise and areas for negotiation and drafting of CDA
- ii. Governor or his rep and county rep of the electoral area are members of the Community Agreement Development Committee
- iii. Assists in community mobilization

Community

- i. Communities negotiate Community Development Agreements with Large scale operators in their areas
- ii. Communities identify projects under the CDA

In order for the CDA to be successfully implemented, the stakeholders should have responsibilities and obligations during CDA preparation phase, during implementation phase and closure.

6.1 CDA preparation Phase

Cabinet Secretary

- i. Initiate the CDA process through issuance of letter of intent to the stakeholders
- ii. Liaise with the Salaries and Remuneration Commission on allowances payable to the CDAC
- iii. Receives CDA annual reports for publication in the ministry website
- iv. Handles disputes
- v. Gazettement of CDA committee
- vi. Ensures CDA meets the requirements of the Act, Regulations and the guidelines.

State Department for Mining/PS mining

- i. Coordinate the CDA process from start to closure
- ii. Sensitization and awareness
- iii. Capacity building of CDACs
- iv. Monitoring the progress of CDA
- v. Documentation of lessons learnt during CDA process

6.2 Community Development Agreement Preparation Phase

a) Mineral right holder

- i. Notify the communities in writing of the intended CDA establishment within thirty days of the grant of a mining licence and send a copy to the Cabinet Secretary
- ii. Engage the national and county government officials

- iii. Undertake sensitization of the community by engaging public participation, meetings and workshops
- iv. Mobilize resources to facilitate initial activities related to establishment of the CDA

c. The community

- i. Participate in the sensitization process
- ii. Propose projects to be included in the CDA
- iii. Develop strategies and frameworks for realization of local content

6.3 Community Development Agreement Formation Phase

a) Mineral Right Holder

- i. Prepare a draft CDA incorporating the priorities and in accordance with the CDA regulations and guidelines.
- ii. Carry out community consultations on the draft CDA at respective administrative units
- iii. Appoint three representatives for the CDA committee and forward the names to the Cabinet Secretary
- iv. Submit five copies of the CDA to the community.
- v. Procure consultancy services to support communities during CDA negotiations where necessary

b) The Community

- i. Participate in the consultative meetings and provide input into the draft CDA
- ii. Elect the community representatives to the CDA committee comprising of one representative of women, one representative of village elder, two youths representative of each gender. In addition, one person from marginalized ethnic community, or other minorities and Persons With Disabilities (PWDs) and forward the names to the Cabinet Secretary.
- iii. Identify the community needs to be included in the CDA list of priorities

b) Civil Society Organizations should nominate the representative to the CDA committee and submit the name to the Cabinet Secretary

c) Community Development Agreement Committee

- i. shall develop an agreement negotiations schedule that will include the date, time and issues for each meeting;
- ii. Provide technical input on the priority projects and programs
- iii. Sign the final Community Development Agreement with the Mineral Right Holder and submit a copy to the Cabinet Secretary
- iv. In consultation with the communities, develop an action plan for the implementation of the CDA
- v. Prepare an annual procurement plan to guide in the identification of service providers
- vi. Engage the services of experts to assist in the negotiations of the CDA where Communities have inadequate capacity.
- vii. Resolve disputes that may arise during negotiations of the CDA

d) The National and County governments shall have representation in the CDA committee as follows:

- i. Governor or his/her representative
- ii. County commissioner representative
- iii. Member of County Assembly representative
- iv. Member of Parliament of the constituency (required to nominate a representative)

6.4 Community Development Agreement Implementation Phase

a) Mineral Rights Holder

- i. Set aside at least one percent of the gross mineral sale revenue for the CDA activities in separate CDA account
- ii. Facilitate the procurement of goods and services

- iii. Make prompt disbursement of finances to the service providers upon the recommendation by the committee
- iv. Maintain a clear and up-to-date records of all disbursement made for the CDA projects and programs
- v. Provide annual audited books of accounts to the Cabinet Secretary, the community and to the CDA committee.
- vi. Prepare and submit annual CDA implementation reports in accordance with form CD1 in the regulations and submit to the Cabinet Secretary for hosting in the ministry website.
- vii. Commission a 5 year evaluation of the CDA

b) CDA Committee

- i. Oversee the procurement of goods and services to implement the CDA priority projects in accordance to relevant rules and regulations.
- ii. Sensitize the community on the projects expected to be implemented by the service provider
- iii. monitor and evaluate compliance with the terms of the Agreement;
- iv. Monitor the progress of implementation of the projects
- v. Approve payments for the contractors/service provider as per the contract
- vi. Valuation of in kind contribution

c) Community

- i. Cooperate with the service provider and mobilize social capital
- ii. Provide any relevant information to aid the projects implementation
- iii. Follow up on the projects implementation and raise any concerns to the holder, CDA committee and submit the same to the Cabinet secretary as necessary.

d) Contractors/Service Providers

- i. Implement project in accordance to the agreed specifications and schedules as defined in the contract
- ii. Upon satisfactory completion hand over the projects to the parties.

6.5 Community Development Agreement Closure Phase

a) Mineral Rights Holder

- i. Shall submit to the Cabinet Secretary CDA closure report on the evaluation of the agreement, detailing the projects implemented, their status, social economic impacts, challenges, sustainability and recommendations.
- ii. Shall comply with the Environmental Management Plan under ESIA
- iii. Shall submit to the Cabinet Secretary an inventory of movable and non-movable assets, their location and status.
- iv. Sensitize the community of the CDA closure

b) CDA Committee

- i. Oversee the closure of the agreement
- ii. Oversee smooth transition of CDA projects to the community and to relevant government agencies
- iii. Provide information for the CDA evaluation
- iv. Sensitize the community of the CDA closure

c) State Department for Mining

- i. Ensure that the holder complies with the law
- ii. Ensure smooth transition of CDA projects to the community and to relevant government agencies

d) Community

- i. Participate in the closure process
- ii. Oversee smooth transition of CDA projects

The stakeholders shall ensure that the CDA Projects and Programmes have a sustainability plan to benefit the community beyond the closure of the agreement.

7. DISPUTE AND CONFLICT RESOLUTION MECHANISM

The CDA is a negotiated agreement between the holder and the community to facilitate a smooth and harmonious coexistence during the mining operation. However, disagreements, disputes and conflicts may arise.

A dispute and conflict resolution mechanism provides an opportunity for the parties to create solutions to address differences or conflicts related to mining operations. The objective of this process is to reach a speedy, efficient, effective, sustainable and mutually satisfactory agreement.

7.1 Process in dispute resolution

- a. An aggrieved stakeholder shall lodge their complaints in writing to the CDA Committee.
- b. The CDA committee shall deliberate on the matter with a view to determine the merits and demerits of the complaint and best way forward
- c. The parties shall hold open consultations to resolve matters in order to mitigate disputes that may escalate into conflicts.
- d. The CDAC shall provide the Alternative dispute resolution options in resolving any dispute that may arise.

7.4 If the process fails, the committee may petition the Cabinet Secretary for resolution. The Cabinet Secretary shall within ninety days of receipt of the petition

7.5 The decision of the committee and that of the Cabinet Secretary shall be in writing stating the reasons.

7.6 Any party that give misleading information or alters any document with an intention to mislead the process shall be liable to the penalties set out in the Mining Act and any other written law.

DEFINITIONS

1. Community-GROUP OF PERSONS AFFECTED BY THE MINING OPERATIONS;AFFECTED CORPORATE CITIZEN INVESTOR BEING AND AFFECTED TOGETHER a group of people living around and exploration and mining operations area or a group of people who may be displaced from land intended for exploration or mining operations.
2. Regulations
3. CDA Committee
4. Mineral rights holder
5. Stakeholders
6. Interest groups

Schedule 1 : Community Development Agreement Project Monitoring Sheet

Project Name	Location/ Ward	Project cost (ksh. Mn)	Expected Project Outputs	Start date (mmyy)	End date (mmyy)	Expenditure (ksh. Mn)	Implement ation Status %	Remarks

