

NJ/Min. of Mining/Laws and Regulations/19/1

30th June 2019

The Cabinet Secretary

Ministry of Petroleum and Mining
State Department of Mining
P.O. Box 30009-00100
NAIROBI

By E-mail

psmining@petroleumandmining.go.ke

Dear Sir,

**RE: SUBMISSION OF COMMENTS ON THE DRAFT FRAMEWORKS AND INSTRUMENTS
IN THE MINING SECTOR**

Following an advertisement in a local newspaper dated 6th June 2019 inviting the public to participate in validation workshops for the validation of draft frameworks in the mining sector, the following comments to the below listed frameworks are submitted for your consideration:

- a) Draft Strategic Plan 2018-2022, for Mining Sector
- b) Draft Gender Strategy and Action Plan for the Mining Sector
- c) Draft Kenya National Mining Institute Bill
- d) Draft Community Development Agreement Guidelines
- e) Draft Model Community Agreement
- f) Draft Mining (Local Equity) Regulations 2019

Thank you for your attention.

Sincerely,



Mark Odaga

mark@naturaljustice.org

General Comments

Comment 1: The period for undertaking public participation on the draft frameworks in the mining sector should be extended

Issue: The time provided in the call for public participation was very short. The notice of public participation was only provided on Thursday the 6th of June 2019, with the public participation meetings listed to commence on the Monday the 10th of June.

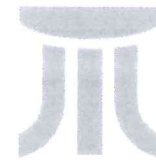
Further, the draft frameworks and venues for meetings were only shared publicly, through the Ministry's website, early on Monday the 10th of June 2019. These time-lines have completely failed to give members of the public any time to organize and familiarize themselves with the content within the frameworks.

Recommendation: In line with Article 10 of the Constitution, which provides public participation as a value and principle of good governance, the Cabinet Secretary must provide additional opportunities for the public to provide oral and written comments to the draft frameworks.

Comment 2: Public participation workshops should be held in other additional counties

Key counties, such as Kilifi and Elgeyo Marakwet, are conspicuously absent from the list of counties where public participation workshops are to be held, yet mining operations with significant environmental, social and economic effects in these regions are taking place.

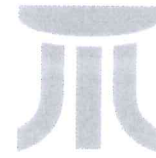
Recommendation: We recommend that additional counties be added to the list and time set to hold public participation workshops to allow other relevant communities to participate in the process.



Draft Strategic Plan 2018-2022 for the Mining Sector

No.	Issue	Recommendation
1.	The strategic plan places “accelerated development” front and center with little mention of sustainability and the need for environmental protection and consideration for the general welfare of communities who far too often bear the brunt of the impacts of mining activities.	There is a need to specifically acknowledge and plan for the environment and communities from the inception of this strategic plan.
2.	Objective 8: Speaks about the maximization of benefits from minerals but does specify whose benefit it is i.e. investors, government or communities.	The plan should be clear that the objective is to see the “equitable maximization and sharing of benefits from minerals.
3.	Global, Regional and National Development Challenges: Plan fails to mention the lack of effective community participation in planning and implementation of decisions in the mining sector as a national challenge.	The State Department of Mining need to specify in its plan how it intends to enhance community participation in the mining sector.
4.	Role of the State Department for Mining and National Development: The Plan does not address important issues of environmental degradation and preservation of biodiversity.	1. The State Department for Mining needs to acknowledge its role in ensuring there are standards in place to ensure sustainable exploitation of mineral resources with equally robust measures to preserve our biodiversity and the environment. 2. There is need for specific objectives aimed at: <input checked="" type="checkbox"/> Formulation of minimum environmental standards for exploitation of mineral resources;

		☒ Capacity building of artisanal miners on sound practices for sustainable mining.
5.	<p>Situational analysis:</p> <p>The situational analysis recognizes that there is a skills gap in the industry and proposes to enhance local technical capacities. No mention is made, however of the challenges of ensuring sustainable artisanal mining practices.</p>	Capacity building needs to extend beyond addressing skills gaps to equally improving understanding of local community stakeholders around best practice to address adverse climate change impacts and environmental degradation.
6.	<p>SWOT Analysis:</p> <p>Unrealistic community expectations are listed as a threat.</p>	Measures to effectively engage communities from the planning stages and to keep avenues for raising concerns open should be put in place as a measure for transparency and accountability to address this concern.
Mining (Local Equity Participation) Regulations, 2019		
	<p>Regulation 4:</p> <p>1. The Regulations apply to “a holder of a mining licence granted under the Act.”</p> <p>However, It is unclear from the drafting whether the provision applies to existing holders of mining licences whose capital investments are above the limits set out under Section</p>	There is a need to clarify so that if the intention is to make the provision apply to companies with licences already, there is need to redraft the provision to state that it shall apply to “existing and prospective holders of mining licences granted under the Act.”
	<p>Regulation 5(3) and (4)</p> <p>2. Provides that the holder of a mining licence may apply to the CS to extend the period that the holder is required to list on the stock exchange but does not specify the ground or grounds on which an application for extension of time may be made.</p>	<p>We propose that the provisions be amended to:</p> <p>(a) Set limits regarding the duration for which an extension may be granted;</p> <p>(b) Include provisions allowing for public comment or engagement in the process of considering any applications for extensions; or</p> <p>(c) Set out reasons for which an extension may be given; and</p>



(d) Prescribe the time within which a licence holder will be required to make an application.

Draft Community Development Guidelines

No.	Issue	Recommendation
1.	Clause 1	<p>The Guidelines should specify that the 1% in annual gross revenue is for <u>each</u> community and not a sum to be shared among a number of affected communities. Clause 1.1.7 should therefore be amended to read:</p> <p>"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 (<i>per affected community</i>) to support community priority programmes, thus replacing CSR."</p>
2.	<p>Clause 2 – Stakeholder Participation: Uses a general term "all genders" while listing groups to be consulted.</p>	<p>Gender sensitive consultation is necessary and therefore Clause 2.3(d) be amended to avoid the general term "all genders" but instead embrace and specifically identify women as a group with its own representation and voice in the formal decision making</p>
3.	<p>Clause 3.1 - Producers for election of CDA committee members: The Regional Mining Officer is required to notify all parties on the agreed date and venue for the CDAC elections using appropriate mechanisms. Not only is the term "appropriate mechanism" vague, but also the period for notification is not specified.</p>	<p>To begin with there is a need to correct the sentence to read "Procedures for election..." and not "Producers for election..."</p> <p>We further recommend that the clause be amended as follows:</p>

The Regional Mining Officer shall, at least twenty one days before the CDAC election, notify all the parties on of the agreed date and venue by:

- Making announcement of the even in a local radio station at least once for two consecutive weeks before the event

- Placing posters in different conspicuous areas in the electoral area which the community is located

- Use of public address system at least twice a week, for two consecutive weeks

- Local Chief Office

Equal representation by community and non-community members in the CDAC

As it is, community members are in the minority and prejudiced in terms of voting power. Our recommendation is that the CDAC must at a minimum be comprised equally of community and non-community members.

Need to keep the CDAC lean

So as to limit expenditure by way of allowances, the total number of CDAC members should be kept to a minimum.

Disconnect with Community Land Act and Community Land Regulations:

To reflect the set up under the Community Land Management Committee, under which all adult members of the community constitute the electorate (i.e. a Community Assembly), the Model Agreement should expressly provide for community election of community members onto

		the Community Development Agreement Committees by a Community Assembly which will ensure that interests of sub-groups like women and persons with disabilities are adequately represented.
4.	Need to clarify that binding decisions for Communities shall be made by the Community through a Community Assembly	<p>There is a need to make it explicitly clear that the CDAC's role is to facilitate and monitor negotiation of the Agreement with no power to decide terms on behalf of either party.</p> <p>A Clause to reflect this in the following terms should therefore be included:</p> <p>"The CDAC's role shall be limited to:</p> <ul style="list-style-type: none"> (a) Facilitating negotiations of the terms of the Agreement; and (b) Facilitating and monitoring implementation of the Agreement" <p>The CDAC's role shall in no way empower it to decide terms of the Agreement on behalf of the Parties. This decision, for the Community, shall always rest with the formal expression of the Community Assembly."</p>
5.	Need to specify direct beneficiaries of funds	The Guidelines (and by extension the Regulations) should make the Community Land Management Committees under the Community Land Act as the beneficiary of funds paid into established Accounts earmarked for particular purposes.
6.	<p>Clause 4 – Code of Ethics and Conduct for CDA members:</p> <p>Clause 4.4(c) only requires the committee members to write an apology for non-attendance. This is not strong enough to hold the CDAC member</p>	<p>We recommend the following amendment:</p> <p>Attend at least 85% of all Committee meetings. or and where attendance is not possible, submit an apology. <u>In any event, a member shall not miss two</u></p>

	accountable on their attendance to the CDAC meetings, as they should.	<u>consecutive CDA committee meetings."</u>
Community Development Agreements		
	Issue	Recommendations
1.	Schedule 1: Largely relies on copy and paste material. It attempts to define locals community mine and further sets out its composition to include two districts: Tano North Council and Asutifi District, which do not exist in Kenya	Change the terminology to Local Community as envisioned in the Mining Act, 2016 as opposed to Local Community Mine
2.	Schedule 2: Provides that the District Electoral Officer should conduct elections for representatives of Bodies – NGOs, Youth and Women	This should be amended to reflect the CDA Guidelines, which provide that an officer from the State Department of Mining headquarters shall preside over the elections of community representatives.
3.	Annexures: The content in the annexures have been copy pasted/ lifted from a community development agreement model in Ghana making them unsuitable for deliberation.	The model agreement, including the schedules and annexures should be amended to reflect and bring them in line with the Community Development Agreement Guidelines and the Community Development Agreement Regulations 2017.

Draft Mining (Local Equity Participation) Regulations

	Issue	Recommendations
4.	Draft Regulation 5: Provides the minimum capital investment for mines to be at least one hundred million united states dollars.	The amount seems too large for it to be the lower threshold for listing and should therefore be revised downward in order to facilitate the objectives of the Regulations which include: <ul style="list-style-type: none"> - To make sure participate in mineral resource development - To make sure that Kenyans acquire a stake in mining companies operating in Kenya

Draft Gender Strategy and Action Plan for the Mining Sector

	Issue	Recommendation
	General Comment: The institutional framework is fragmented and the coordination poses a challenge that it could make for a very slow process that does not, ultimately, allow for real progress.	The Gender office for the State Department which is the focal point should be give clear responsibilities to ensure better coordination and effective implementation.