



## MEMORANDUM ON THE DRAFT MINING REGULATIONS

### INTRODUCTION

The Ministry of Mining, in the process of operationalising the newly enacted Mining Act 2016 has invited stakeholders to provide input to the Mining Regulations. This memorandum has been prepared with input from four Civil Society Coalitions ; Haki Madini Kenya (HMK), Kenya Civil Society Platform on Oil and Gas (KCSPOG), Kenya Oil and Gas Working Group (KOGWG) and the Natural Resource Alliance of Kenya (KENRA).<sup>1</sup>

The coalitions focus on different aspects of the extractive sector including policy advocacy. The memorandum provides recommendations on six of the fourteen proposed Mining Regulations, namely; **Community Development Agreement (CDA), Mining (Employment and training), Mining (Use of Goods and services), Licencing and the Mine Support Services Regulation.**

The coalitions acknowledge progressive provisions in the Mining Act that are clearly articulated in the proposed regulations. Of particular interest are the transparency provisions from the online mining cadastere, the seeking of consent from the communities and various aspects of beneficiation . Other general observations relate to:

- 1. The role of County Governments:** Whereas mining is a National Government function, the County Governments have consitutional mandates on certain areas that relate to mining actions, eg waste disposal, water management, environmental conservation, training at polytechnics, public participation etc. These seem to have been overlooked especially the linkage to polytechnics in the technology transfer

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<sup>1</sup> [www.kenra.or.ke/](http://www.kenra.or.ke/), <http://kcspog.org/>, [hakimadinikenya.org](http://hakimadinikenya.org)

and training obligations for mineral right holders among others. The memorandum highlights such specific areas and proposes specific modifications.

- 2. Transitional clauses:** In some of the regulations, the transitional clauses are non-existent, which implies immediate compliance to the regulations. For instance, the provisions related to the **artisanal miners** do not seem to have a transitional clause which is critical in view of their dependence on artisanal mining for their livelihood. The requirement for immediate compliance may breed resistance and unnecessary tension. Additionally, some transitional periods may be unrealistic. For instance, when companies are required to develop and submit employment and training plans within 30 days, or where existing mineral right holders submit CDA's within 30 days. Such may be unrealistic and could compromise the quality of these important processes. Additionally, there is concern over government's preparedness and capacity for the transition. Will the relevant institutions be in place within the proposed transition clauses at the national and county levels? The memorandum proposes specific adjustments to some of the provisions.
- 3. Quality of some of the regulations:** It is noted with concern that the mining (Local goods and services) and Mining (Employment and training) is not as comprehensive as would be expected, yet these are critical regulations in ensuring that Kenyans benefit from the mining sector. With the coming of the Local Content Bill, which seem to have progressive provisions, it is recommended that the two regulations are consolidated into one and the proposed bill (and other information) referenced to strengthen this regulation. The memorandum highlights some modifications for consideration.
- 4. Gender and Minority groups** –The regulations in the various provisions need to adhere to the spirit of the constitution and clearly speak out on matters regarding gender and minority especially Women and Persons with disabilities.
- 5. The powers of the CS:** Whereas the CS has a critical role in the mining sector, it is deemed impractical for him/her to engage at the community level e.g. solving minor disputes in the communities, within very tight timeframes as provided for in the regulations. It may be prudent to expressly provide for delegated authority at the

county level for such. The memorandum highlights such provisions and makes recommendations.

The specific recommendations on the five regulations are presented in the table below:

<b>1. COMMUNITY DEVELOPMENT AGREEMENT (CDA)</b>			
<b>No</b>			
1.	<p><b>Section 2: Interpretation</b>  <i>Affected mine community</i>            (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</p>		
	<table border="1" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><b><u>Recommendation</u></b>  <b>Add a third category</b>            (c) a group of people who may receive the negative effects of mining operations.</p> </td> <td style="width: 50%; vertical-align: top;"> <p><b><u>Rational:</u></b> There is possibility that certain groups of communities may not be living around a mining operation or displaced but are negatively affected by mining operations. As such, they should be considered as an affected community.</p> </td> </tr> </table>	<p><b><u>Recommendation</u></b>  <b>Add a third category</b>            (c) a group of people who may receive the negative effects of mining operations.</p>	<p><b><u>Rational:</u></b> There is possibility that certain groups of communities may not be living around a mining operation or displaced but are negatively affected by mining operations. As such, they should be considered as an affected community.</p>
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2.	<p><b>Section 2: Intepretation</b>  <i>Consultation means " a process involving a physical gathering of interested parties conducted in a location that is reasonably accessible to the 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."</i></p>		
	<table border="1" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><b><u>Recommendation</u></b>  <b>Add another definition;</b>  <b>"Community consultation"</b> means a comprehensive, structured discussion with the <b>affected community at the village level</b> and shall be deemed insufficient if only consulted with a few selected persons or opinion leaders.</p> </td> <td style="width: 50%; vertical-align: top;"> <p><b><u>Rationale</u></b>            In many mining operations, there is tendency to consult with the political class or the national/county government <b>only</b>, leaving out the communities that would be affected, which breeds discontent and possible conflict. Whereas consultation with the leadership is very critical, it should be preceded/succeeded by community discussions at the village level.</p> </td> </tr> </table>	<p><b><u>Recommendation</u></b>  <b>Add another definition;</b>  <b>"Community consultation"</b> means a comprehensive, structured discussion with the <b>affected community at the village level</b> and shall be deemed insufficient if only consulted with a few selected persons or opinion leaders.</p>	<p><b><u>Rationale</u></b>            In many mining operations, there is tendency to consult with the political class or the national/county government <b>only</b>, leaving out the communities that would be affected, which breeds discontent and possible conflict. Whereas consultation with the leadership is very critical, it should be preceded/succeeded by community discussions at the village level.</p>
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3.	<p><b><u>Section 5: Identification of an affected Mine Community</u></b>  <i>5 (5) The Cabinet Secretary in consultation with the County Governmen.....and the decision of the Cabinet Secretary shall be final.</i></p>		
	<table border="1" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><b><u>Recommendation</u></b>  <b>Remove the clause " the decision of the cabinet secretary shall be final"</b>    <b>Add a clause 5(6)</b>            The interested party can contest the decision of the Cabinet secretary through the court.</p> </td> <td style="width: 50%; vertical-align: top;"> <p><b><u>Rationale</u></b>            The finality of the CS decision as presented seems to deny a complainant the right to appeal if not satisfied              There should be an appeal mechanism on the decision of the Cs through a court process.</p> </td> </tr> </table>	<p><b><u>Recommendation</u></b>  <b>Remove the clause " the decision of the cabinet secretary shall be final"</b>    <b>Add a clause 5(6)</b>            The interested party can contest the decision of the Cabinet secretary through the court.</p>	<p><b><u>Rationale</u></b>            The finality of the CS decision as presented seems to deny a complainant the right to appeal if not satisfied              There should be an appeal mechanism on the decision of the Cs through a court process.</p>
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4.	<p><b>Section 7: Appointment of Representatives</b>  <i>The affected mine community shall <b>establish</b> a Community Development Agreement Committee</i></p>		

<p><b><u>Recommendation</u></b></p> <p><b>Replace “establish” with “elect”</b></p> <p>The affected mine community shall <b>elect</b> a Community Development Agreement Committee (CDAC).</p>	<p><b><u>Rationale</u></b></p> <p>Establish can be interpreted to allow an appointive process that does not grant communities to exercise their constitutional right to choose their representatives.</p>	
<p><b><u>Recommendation</u></b></p> <p><b>Add a clause (3)</b> The County Representative of the Director of Mines shall facilitate the election of the CDAC with financial facilitation from the holder.</p>	<p><b><u>Rationale</u></b></p> <p>The election process needs to be facilitated by National Government representative at the county, hence the Director of Mines or his or her representative.</p>	
<p><b><u>Recommendation</u></b></p> <p><b>Add clause (4):</b> The County Representative of the Director of Mines shall circulate notices of meetings and give 30 days for the affected community to be informed of the CDA and its requirements . The process of identifying/electiong the community representatives shall then be initiated as agreed in this meeting.</p>	<p><b><u>Rationale</u></b></p> <p><b>The process of</b> electing the community representatives (committee) is missing and should be clearly laid out in the regulations.</p>	
<p><b><u>Recomendation</u></b></p> <p><b>Add Clause (5):</b> The committee <b>shall be drawn from the village level</b> and shall reflect the geographical and ethnic representation of the affected community.</p>	<p><b><u>Rationale</u></b></p> <p>When representatives are selected from the village level upwards, in a clear and guided process, it gives ownership and credibility to the committee.</p>	
<p>5.</p>	<p><b><u>Recommendation</u></b></p> <p><b>Add clause (6) :</b>The election process should be <b>preceded by a comprehensive mobilization</b> process that <b>clarifies the roles and the desirable ‘qualifications’</b> or traits of the community representatives to the CDAC.The election process should also reference chapter 6 of the constitution</p>	<p><b><u>Rationale</u></b></p> <p>The mobilization process that precedes the election of the representatives highlights the magnitude of the task and provides guidance on what kind of individuals the community should elect as their representatives</p>
<p><b><u>Recommendation</u></b></p> <p><b>Add Clause (7):</b> The basic qualifications for the the community represenatives shall be:</p>	<p><b><u>Rationale</u></b></p> <p>There is a tendency for ‘elite’ capture in such community committees where non resident persons are appointed/elected but are never present with the</p>	

	<p>(a) Be members of the affected communities and <u>permanent residents</u> in the area.</p> <p>(b) Basic numeracy and literacy</p>	<p>community that they puport to represent, hence an unhealthy disconnect.</p> <p>Basic numeracy and literacy skills will ensire that the committee is fairly able to discharge its duties., The committee (as provided by these guidelines) shall seek technical expertise is as and when deemed necessary.</p>
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6.	<p><b>Section 7: Appointment of Representatives</b>  <i>Section ( 2) the affected mine community shall establish a Community Development Commmittee comprising ..... (a) <b>one</b> representative from the County Assembly that represents the electoral affected mine community in the County Assembly; (b) <b>one</b> representative of women; (c) <b>two</b> recognized community leaders or elders; (d) <b>two</b> representatives of the youth at least one of whom is a woman; (e) the Chief in the local community; (f) <b>two</b> representative of marginalized groups, ethnic and other minorities.</i></p>
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**There are two sets of recommendations for this section**

**(A) Where the CDAC plays a monitoring role on the CDA, i.e** *Communities decide their priorities and draw a community development plan which is agreed upon with the holder, complete with work plan and budgets. CDAC role is to monitor its implementation.*

**(B) Where the CDAC has control of financial resources in Community Trusts Funds, i.e** *Communities decide their priorities and draw community development plans, these are agreed upon with the holder who then provides financial resources for implementation by the CDAC*

	<p><b>(A) Committees Monitoring CDA</b></p>
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7.	<p><b><u>Recommendation</u></b>  <b>i) Composition of CDAC should be purely by the affected community representatives as follows:</b></p> <p>(a) <b>one</b> representative of women;</p> <p>(b) <b>two</b> community leaders or elders,</p> <p>(c) <b>two</b> representatives of the youth (Male and female)</p> <p>(d) <b>two</b> representative of marginalised groups, ethnic and other minorities <b>including PWDS;(male and Female)</b></p> <p><b>e) One</b> county representative on mining who shall be an ex officio member</p>	<p><b><u>Rational</u></b>  The County Government representative in charge of mining is critical in providing the linkage to county development agenda/plans and ensuring there is <i>harmony/ complementarity in</i> the Community Development proposals and curbing duplicity.</p>
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	<b>f) one</b> representative from the national government Ministry of Mining who shall be an ex officio member	
8.	<b>Add Clause on Advisory Team</b> An Advisory Team comprising of elected leaders and FBO and CSO representatives shall meet semi-annually with the CDAC for briefing on the CDA and providing advisory support. The CDAC is not bound to implement the recommendations of the advisory team	In view of the power dynamics of such a committee, the elected leaders, County/ National Government staff and FBO/CSO leaders should play an advisory role and minimize the possibilities of influencing decisions hence the recommendation to have this committee composed <b>purely of community representatives.</b>
9.	<b>Add Clause :</b> The CDAC shall serve for term of two years renewable once	<b>Rational</b> It is important to clearly stipulate the term of the CDA committee. A two year term provides an opportunity for communities to remove representatives that do not perform their roles satisfactorily yet avoiding the rigor of establishing the 'recall' mechanism.
10.	<b>Add clause : Community Liaison Office</b> The CDAC shall Establish a community Liaison office to enhance communication with the affected community  The Liaison office shall have officers drawn from the community and they should have negotiation skills, management and financial.	<b>Rational:</b> When such committees are established and without physical presence in the community, the information flow is compromised/limited causing unnecessary anxiety. Emerging issues at that level are also not promptly addressed, which breeds unnecessary tensions and possible conflict. A physical presence in the community can also enhance transparency and accountability.
<b>(B) Community Trust Funds</b>		
11.	<b>Recomendation</b> The Composition of CDAC should be purely from the affected community as proposed in (A) above, <u>with the addition</u> of <b>One representative of the community land board (where applicable)</b>	<b>Rationale</b> A representative of the County Land Boards would provide insight on important land issues.
12.	<b>Add An advisory Team</b> comprising of elected leaders and FBO and CSO representatives that shall meet semi-annually with the CDAC for briefing on the CDA and providing advisory support. The CDAC is not bound to implement the recommendations of the advisory team	<b>Rational:</b> In view of the power dynamics that could play out in the committee to the disadvantage of the community, the Advisory Team should be established to provide an opportunity for the elected leaders, FBO's and CSO's to contribute to the CDA committee processes. Whereas the Advisory Team would seem as additional structure, the cost of excluding these leaders may be as high as the cost of having them dominate such community process and stifle the authentic voice of communities.

	<p><b>Add Clause:</b> The CDAC shall be registered as a Legal entity capable of suing and being sued (proposing registering as a Trust.</p>	<p><b>Rationale:</b> In view of the critical financial obligation of the community Trust Fund, there is need to have it registered as a legal entity capable of suing and being sued.</p>
	<p><b>Add Clause:</b> CDAC shall act as a board, elected by the community, consults the communities and provides overall guidance to the secretariat.</p>	<p><b>Rationale:</b> This will provide overall guidance to the secretariate that shall be established.</p>
	<p><b>Add Clause:</b> The CDAC shall recruit through a competitive process for key professionals to serve in the secretariat.</p>	<p><b>Rationale:</b> This will ensure resident I expertise to support implementation of technical aspects of the CDA.</p>
	<p><b>Add Clause:</b> The secretariat shall have a physical office within the affected community which shall serve as the community liaison office.</p>	<p><b>Rationale:</b> It is very critical for communities to have an accessible avenue for informations sharing. Many mining communities elect representatives but do not get regular feedback on important processes. Such a liason office would relay such information and address emerging issues.</p>
13.	<p><b>Add Clause:</b> The Secretariat shall maintain a functional financial account for the implementing/operations CDA projects.</p> <p><i>(we also propose that the 10% for the community as cited in the mining Act, 183 (5) (c) to be channeled through this account too).</i></p>	<p><b>Rationale:</b> This will ensure that funds are utilized professionally with all necessary organizational controls</p>
14.	<p><b>Section 7. Appointment of Representatives</b> (contd) <i>(5) The Committee shall:</i> <i>(a) monitor and evaluate the compliance with the terms of the agreement;</i> <i>(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; and</i> <i>(c) Facilitate continuous engagement between the community and the holder</i></p>	
	<p><b>Recommendation</b></p> <p><b>Add the three clauses</b></p> <p>(a) Negotiate and sign the CDA with the holder on behalf of the affected community</p>	<p><b>Rationale</b></p> <p>The most critical function of the committee is to negotiate and sign the CDA. This should not be silent or implied</p> <p>It is important that the CDAC establishes its own procedures that enable them to play their roles effectively and professionally.</p>

	(e) Develop their own operational /Procedures that will be deposited with the Representative of the Director of Mines at the county level ( <i>and shared with the holder and the advisory team</i> )	
	<p><b>Recommendation</b></p> <p><b>Add clause:</b> (f) The Operating Procedures (above) shall include but not be limited to;</p> <ul style="list-style-type: none"> <li>i) The procedure for electing their representatives,</li> <li>ii) Procedures for meetings, decision making and conflict resolution amongst the committee</li> <li>iii) Establishment of the Community Liaison Office</li> <li>iv) Financial Management</li> <li>v) the development of a comprehensive framework for community consultation/engagement framework.</li> </ul>	<p><b>Rational</b></p> <p>It is important that the CDAC establishes its own procedures that enable them to play their roles effectively and professionally.</p>
	<p><b>Section 8: Drafting of Community Development Agreement</b></p> <p><i>(1) A draft of a Community Development Agreement shall be prepared in accordance with these regulations <b>by the holder</b></i></p>	
	<p><b>Recommendation</b></p> <p><b>Add words in bold to read as follows;</b></p> <p>(1) A draft of a Community Development Agreement shall be prepared in accordance with these regulations by the holder <b>and in consultation with the CDAC Committee.</b></p>	<p><b>Rationale</b></p> <p>The joint drafting enhances ownership of the document.</p>
14.	<p><i>(2) The agreement shall be prepared in <b>English</b> and, .....</i></p>	
	<p><b>Recommendation</b></p> <p><b>Add Swahili</b></p> <p>(2) The agreement shall be prepared in English and <b>Swahili</b>".</p>	<p><b>Rationale</b></p> <p>English and Swahili are the official Kenyan Languages as per the constitution.</p>
15.	<p><b>Section 9: Negotiation of Community Development Agreement</b></p> <p><i>(1) Negotiation of the Community Development Agreement shall be conducted by the authorized representatives of the parties, <b>which may be the same representatives of the parties designated to oversee the agreement or otherwise.</b></i></p>	
	<p><b>Recommendation</b></p> <p><b>Remove the words in bold to read as</b></p> <p>Negotiation of the Community Development Agreement shall be conducted by the authorized representatives of the parties.</p>	<p><b>Rationale</b></p> <p>Negotiation should be with the committee. Any third party engagement in the negotiation process should be advisory. The bolded section introduces ambiguity and possible avenue for abuse.</p>



16.	<p><b>Section 9:</b> (2) <i>The parties may apply outside assistance ..... <b>to assist</b> in the negotiations of the Community Development Agreement</i></p>	
	<p><b>Recommendation</b>  <b>Replace the word 'to assist' with 'advice in'</b>  The parties may ..... to <b>advice in</b> the negotiations of the Community Development. Agreement</p>	<p><b>Rationale</b>  Their role is more advisory</p>
	<p><b>Section 9: (3)</b> <i>The parties shall develop, in writing, a Community Development Agreement negotiation schedule that will include the date, time and issues for each negotiation meeting.</i></p>	
	<p><b>Recommendation:</b>  <b>Add the word 'venue'</b> The parties shall .....that will include the date, <b>Venue</b>, time and issues for each negotiation meeting.</p>	<p><b>Rationale :</b>  Looks like it was an omission, or might there have been reason to omit venue?</p>
17.	<p><b>Section 9(4)</b>  <i>Minutes shall be taken of each negotiation meeting.</i></p>	
	<p><b>Reommendation : Add phrase in bold</b>  Minutes shall be taken of each negotiation meeting <b>and duly signed by the representative of the holder and a representative of the community. These shall be promptly circulated to the relevant persons.</b></p>	
	<p><b>Recommendation:</b>  <b>Add clause on approval by the appointing parties ; (5)</b>  The negotiated CDA must be approved by the appointing parties and signed.</p>	<p><b>Rationale:</b>  This seems to be implied, but its important to expressly indicate this</p>
18.	<p><b>Section 9(9)</b>  <i>The Cabinet Secretary shall determine the matter <b>within fourteen (14) days of</b> such notification</i></p>	
	<p><b>Recommendation</b>  <b>Re word to;</b>  The Cabinet Secretary shall determine the matter <b>within twenty one (21) days of</b> such notification.</p>	<p><b>Rationale</b>  14 day does not seem very practical</p>
19.	<p><b>Section 9(7)</b>  <i>A written notification shall be prepared .....and submitted to the <b>Cabinet Secretary.</b></i></p>	
	<p><b>Recommendation</b>  <b>Replace Cabinet secretary with Director of Mines</b></p>	<p><b>Rationale</b>  Section 155 of the Mining Act doesn't seem to enumerate this as an area of dispute resolution that the CS will attend to. The CS representative at the County (Director of Mines) could be better placed to address such disputes. If the matter is not resolved, may be it can be escalated to the CS</p>
20.		

	<p><b>Section 9 (10)</b> <i>The Cabinet Secretary shall within thirty (30) days from the date on which a Community Development Agreement is approved cause a copy of the agreement</i></p>	<p><b>Recommendation</b>  <b>Add the words in bold</b>  (10) The Cabinet Secretary shall within thirty (30) days from the date on which a Community Development Agreement is approved cause a copy of the agreement to be made accessible to the public on the website of the Ministry of Mining <b>as well as other platforms/media accessible to the affected community</b></p>	<p><b>Rationale</b>  The CDA is a critical document to the community and hence the need for it to be made available/accessible at the community level.</p>	
21.	<p><b>Section 10: Community Development Agreement Consultations</b></p> <p><i>(3) The affected community shall conduct consultation on the draft Community Development Agreement and provide comments back to the holder within thirty (30) days of initial receipt.</i></p>		<p><b>Recommendation : Add the words in bold</b></p> <p>The affected community, <b>with facilitation from the holder</b>, shall conduct consultation on the draft Community Development Agreement, <b>in accordance with community consultation framework</b> and provide comments back to the holder within thirty (30) days of initial receipt.</p>	<p><b>Rationale</b></p> <p>When there is certainty of the mineral right holder's commitment (ie facilitation) to support the consultation process on the CDA, it is not unnecessarily delayed. It is also important to reference the consultation framework that is developed by the CDAC as this guides how this process is conducted.</p>
22.	<p><b>Section 10(4)</b> <i>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.</i></p>		<p><b>Recommendation : Add the words in bold</b></p> <p>The affected community, <b>with facilitation from the holder</b>, shall conduct consultation on the draft Community Development Agreement, <b>in accordance with community consultation framework</b> and provide comments back to the holder within thirty (30) days of initial receipt</p>	<p><b>Rationale</b></p> <p>When there is certainty of the mineral right holder's commitment (ie facilitation) to support the consultation process on the CDA, it is not unnecessarily delayed. It is important to reference the consultation framework that is developed by the CDAC as this guides how this process is conducted.</p>
23.	<p><b>Section 11. Content of a Community Development Agreement</b>  <i>(h) recognizes and incorporates traditional knowledge</i></p>		<p><b>Recommendation : Add the words in bold</b>  (h) recognizes and incorporates traditional knowledge <b>and cultural practices that are in line with the constitution.</b></p>	<p><b>Rationale</b></p> <p>Traditions do not exist in isolation or outside cultural practices.</p>
24.	<p><b>Section 11 (7) ( a)</b> <i>undertakings, with respect to the social and economic contributions, that the project will make to the sustainability of the affected community</i></p>			

	<p><b>Recommendation : Add words in bold</b> 7(a) undertakings, with respect to the social and economic contributions, that the project will make <b>to the development</b> and sustainability of the affected community.</p>	<p><b>Rationale</b> Development and sustainability are wholitic lenses to view the contrinutions.</p>
25.	<p><b>Section 11: Content of a community Development Agreement</b></p>	
	<p><b>Recommendation: Add clause</b> 18) Mechanisms to cascade reports to the communities on a regular basis, semiannually at the village level.</p>	<p><b>Rationale</b> These are Important provisions to enhance transparency and accountability.</p>
26.	<p><b>Section 15: Review of the Community Development Agreement</b></p> <p><i>(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.</i></p>	
	<p><b>Recommendation</b> <b>This clause is not clear. Please clarify the text</b></p>	
27.	<p><b>Section 17: Reporting Requirements</b> <i>(19)The holder of a mining lease or special mining lease that currently is in force ..... shall be in compliance with them no later than <b>ninety (90)</b> days from the coming into force of these regulations.</i></p>	
	<p><b>Recommendation : Add the words in bold</b> (19) The holder of a mining lease or special mining lease that currently is in force shall be in compliance with them no later <b>than one hundred and eighty (180)</b> days from the coming into force of these regulations.</p>	<p><b>Rationale</b> 90 days is a very short time and may compromise the quality of the engagement processes. The proposed time period will enable the holder to effectively comply with all the provisions in the regulations</p>
28.	<p><b>Section 21: Approvals and records</b></p>	
	<p><b>Recommendation</b> Delete the word "records" to read only Approvals since it's about authorization of CDA and not records.</p>	<p><b>Rationale</b> This is not a clause on record keeping but of approvals alone.</p>
29.	<p><b>Section 22. Failure to Comply</b> <i>(1) The Cabinet Secretary may suspend a mining license, mining lease or a special mining lease if the holder fails to comply with the requirements of these regulations.</i></p>	
	<p><b>Proposed Recommendation</b> <b>Replace the word 'May' with 'shall'</b> (1)The Cabinet Secretary <b>shall</b> suspend a mining license.....regulations.</p>	<p><b>Rationale</b> This change makes it mandatory for the CS to take action. The word 'May' gives leeway for non-action.</p>
30.	<p><b>Section 25: Dispute Resolution Committee</b></p>	

	(3) (b) <i>four (4) members representing the affected mine community appointed on ad-hoc basis by the affected mine community <b>with at least one (1) member who shall be a woman.</b></i>	
	<b>Recommendation : Add the words in bold</b> Four (4) members representing the affected mine community appointed on ad-hoc basis by the affected mine community. These <b>should adhere to the constitutional provisions on gender representation.</b>	<b>Rationale</b> This will guard against a minimalist approach to women representation which can be referenced to the regulation.
31.	<b>Section 26: Meetings and decisions of the committee</b> <i>(4) The Members of the County Assembly, National Assembly and the Senate who are representatives of the affected mine community shall be invited and may participate in all meetings of the Dispute Resolution Committee but shall not vote on any matter for decision at a meeting.</i>	
	<b>Proposed Recommendation</b> <b>Add FBO and CSO to read as follows</b>  (4)The Members of the County Assembly, National Assembly, Senate, <b>and representative of FBO/CSO</b> , who are representatives of the affected mine community .....at a meeting.	<b>Rationale</b> The FBO's and CSO's may have relevant experience in dispute resolution. FBO's in particular have in many occasions been the voice of reason and reconciliation in conflict situations.

## 2. MINING (EMPLOYMENT AND TRAINING ) REGULATIONS

1.	<b>Section 2: Interpretation</b>	
	<b>Recommendation : Add two more definitions Kenyan</b> Has the meaning of any person with a valid Kenya citizenship as prescribed in the constitution  <b>Local Kenyan</b> Has the meaning of a Kenyan who has an ethnic background in and around the mining area.	<b>Rationale</b> In view of the tensions between resident communities in mining areas and Kenyans from other parts of the country seeking opportunities in the mining area, it is important to distinguish the two.  In its implementation, first priority should be accorded county/ies /affected by the mining action
2.	<b>Section 5: Employment and Training Requirement.</b> <i>(1) Except ..... licence shall not be granted by the Cabinet Secretary unless the applicant has submitted to the Cabinet Secretary a plan outlining the proposals for the employment and training <b>of Kenyans.</b></i>	
	<b>Recommendation: Add a clause</b> <i>(2) The training and employment plan should <b>indicate the percentages and job categories</b> of Kenyans in the two categories above</i>	<b>Rationale</b> To enable performance monitoring on employment and training of Kenyans. Left as it is, it is vulnerable to abuse and could generate conflict.
3.	<b>Section 5:</b> <i>(3)(e) Particulars on the employment of marginalized groups..... to be undertaken; and</i>	

	<b>Recommendation : Add the words in bold</b> (e) Particulars on the employment of marginalized groups,.... <b>PWDs</b> and ..... to be undertaken.	<b>Rationale</b> Persons with Disabilities ought to be specially recognized in line with the Kenyan constitution.
4.	<b>Section 6. Submission of Employment and training Plan</b>  <i>(1) Every holder ...., <b>within 30 days</b> of the coming to effect of these regulations , submit to the Cabinet secretary a detailed Employment and Training Plan which correspond to the Work Programme .....</i>	
	<b>Proposed recommendation</b> <b>Replace 30 days with 6 months</b> (1)Every holder ..... <b>within 6 months</b> of the coming to effect of these regulations , submit to the Cabinet secretary a detailed Employment and Training Plan which correspond to the Work Programme .....	<b>Rationale</b> The provision of 30 days is inadequate for an objective Training Needs assessment and development of a Plan, which may require consultations within the holders and with other stakeholders. Objectivity may be sacrificed in the rush to meet the 30 days deadline.
5.	<b>Section 9: Promotion of Research and Development</b> <i>3 (c) "linkages with selected universities or institutions of higher learning in Kenya ....."</i>	
	<b>Add the words in bold</b> 3 (c) Linkages with <b>County Governments</b> and selected universities or institutions of higher learning in Kenya ....."	This linkage with learning institutions should as well consider an interface with County Government in view of their constitutional mandate on the running of local polytechnics, which are handy in training artisans that can be absorbed in various mining operations.
6.	<b>Section 12.Offences and Penalties</b>  <i>(2) An applicant .... who fails to comply with any requirement under these regulations, ..... commits an offence and is liable on summary conviction to a fine <b>of not less than one million Kenya Shillings (Ksh 1,000, 000) or to a term of imprisonment not exceeding three (3) years or both</b></i>	
	<b>Add the words in bold</b>  (2) An applicant .... who fails to comply with any requirement under these regulations, commits an offence and is liable on summary conviction to a fine <b>of not less than ten million Kenya Shillings (Ksh 10,000, 000-15,000,000) or to a term of imprisonment not less than (3) years or both</b>	<b>Rationale</b> Raising the fines will make it more punitive and hopefully deter potential offenders
7.	(2) A Kenyan citizen who acts as a front or connives with a foreigner or company to deceive ..... and is liable on summary conviction to a <b>fine of not less one million Kenya Shillings (Ksh 1,000, 000) or to a term of imprisonment not exceeding three (3) years or both.</b>	
	<b>Add the words in bold</b> (2) A Kenyan citizen who acts as a front or connives with a foreigner or company to deceive ..... and is liable on summary conviction <b>to a fine of between 10,000,000-15,000,000 million or to a term of imprisonment not less than (3) years or both.</b>	<b>Rationale</b> Raising the fines will make it more punitive and hopefully deter potential offenders

8.	<p><b>Section 12: Offences and penalties</b></p> <p><i>(3) A person ..... to deceive the Cabinet Secretary, Director of Mines or any authorized officer of the Ministry as representing a company owned by Kenyans ..... is liable on summary conviction <b>to a fine of not less than one million Kenya Shillings (Ksh 1,000, 000) or to a term of imprisonment not exceeding three (3) years or both.</b></i></p> <p>(3) A person ..... in order to meet the employment and training requirements under these regulations commits an offence and is <b>liable on summary conviction to a fine of between (Ksh 10,000, 000-15,000,000) or to a term of imprisonment not less than 3 years or both.</b></p>	<p><b>Rationale:</b> Raising the fines will make it more punitive and hopefully deter potential offenders</p>
<b>MISSING in the regulations</b>		
<p><b>Recommendation: Add a section on</b> Establishment of local office by a mineral right holder where decisions on procurement, project management and implementation decision making are to take place.</p> <p><b>Recommendation: Add a section on</b> Establishment of local content development and monitoring</p>		<p><b>Rationale:</b> This places an obligation on the holder of a mineral right to facilitate such decisions at the local level.</p> <p><b>Rationale:</b> Important for monitoring compliance instituting concrete and targeted policies to improve local content uptake by locals.</p>

### 3. MINING (USE OF GOODS AND SERVICES) REGULATIONS

1.	<p><b>Section 2: Interpretation</b></p> <p><i><b>Kenya Content</b> means the quantum of composite value added to or created in the Kenyan economy by a systematic development of capacity and capabilities through the deliberate utilization of Kenyan human and material resources and services rendered in the mining industry value chain.</i></p> <p><b>Recommendation:</b> <b>Review the definition</b></p>	<p><b>Rationale:</b> The definition of local content or “Kenyan Content” seems to capture criteria including maximization of local procurement and local employment only. It omits technology <u>requirements</u> and the issue of the <u>percentage of local transformation or beneficiation.</u></p>
2.	<p><b>Missing definitions on Bid Rigging and Cartelization</b></p> <p><b>Recommendation : Add definition of ;</b></p> <p><b>Bid rigging-</b> An agreement where in response to a call or request for bids or tenders one or two holders agree:- a)not to submit a bid b)withdraw a bid c) Submit a bid arrived at by agreement.</p> <p><b>Cartelization</b>–Any agreement, combination or concerted action by holders or their representatives to fix prices, restrict outputs or divide markets either by products or by areas or</p>	<p><b>Rationale</b> This is an important aspect in local content and has also been captured in petroleum sector regulations.</p>

	allocate markets either by products or by areas in restraint of trade or free competition, including any contractual stipulation which prescribes pricing levels and profit margins.	
3.	<b><u>Missing threshold for local companies</u></b>	
	<b><u>Proposed Recommendation</u></b> <b>Add a definition Local Companies</b> A local Kenyan Company as a company incorporated under the Companies Act (Cap 486, Laws of Kenya) that has: 1. at least 51% of its equity owned by a Kenyan citizen; and 2. Kenyan citizens holding at least 80% of executive and senior management position and 100% of non-managerial and other positions.	<b><u>Rationale</u></b> The regulations do not give a threshold for <u>indigenous companies</u> in terms of how their shareholding should be. This is important as in many cases companies registered locally may not necessarily be controlled by locals and any thresholds met may not reflect a true picture of what is happening.
4.	<b>Section 6: Requirement of a plan by an Applicant for a license</b>	
	<b><u>Recommendation</u></b> <b>Add specific clauses to address:</b> <ol style="list-style-type: none"> <li>a) The local content plan by <u>subcontractors</u> who shall submit their plan under the main contractor.</li> <li>b) Clear details of information to be submitted under a local content plan which should have specifics on employment, training, succession plans, research and development plans, technology transfer, legal services plans, financial and insurance services plans</li> <li>c) A mechanism to review of local content plans that have been submitted, with time frames for review, feedback mechanisms, acceptance and rejection of submitted plans</li> </ol>	<b><u>Rationale</u></b> For easier administration, it would be better to have a local content plan submitted that includes aspects beyond procurement. The details will guide the applicants on the depth of the plan that is required. A comprehensive review mechanism commits the responsible offices to
5.	<b>Section 6: Requirement of a Plan for an applicant for a License</b>	
	<b><u>Proposed Recommendation</u></b> <b>Add a clause / provision</b> requiring licensees, contractors or subcontractors to achieve the minimum local content levels specified in regulations.	<b><u>Rationale</u></b> The regulations have not set any minimum thresholds of what obligations contractors are required to meet. Quantitative requirements may prove useful in monitoring local content.
6.	<b>Section 8: Registration of Business</b> (1) the Director of Mines shall establish and maintain a register of local businesses and service providers	
	<b><u>Proposed Recommendation</u></b> <b>Add a clause on</b> Establishment of prequalification of service providers in the mining sector based on their capacities, capabilities and local content strength.	<b><u>Rationale</u></b> A common qualification system can be useful in ranking and categorization of the service providers as well as tracking and monitoring their performance in the clusters.

#### 4. LICENCING REGULATIONS

1.	<p><b>Para. 8(5)(c):</b> “Application information, requirements, forms and screens required under the Act and these regulations shall be accessible and available to all <b>registered users</b>”.</p>	
	<p><b>Recommendation</b> Delete the words ‘<b>registered users</b>’ There is a concern that this requirement may limit who can access this information</p>	<p><b>Rationale</b> Information should be publically accessible without requiring a fee in order to ensure those impacted by mining activities have access to this info.</p>
2.	<p><b>Para. 8(6)(c):</b> – “For members of the public requiring computer access, the Mining Cadastre Office shall during its regular business hours make computers available for use by the public.”</p>	
	<p><b>Recommendation:</b> There should be a continuous initiative to conduct community outreach and ensure impacted communities know about this option and where the nearest MC Office is located.</p>	<p><b>Rationale</b> It is good that the regulation is taking into account those who do not have access to computers or internet.</p>
3.	<p><b>Para. 10(5)(s):</b> <i>good that the Registrar shall include in the OMC all “environmental and social reports”</i></p>	
	<p><b>Recommendation:</b> Provide the information or a mechanism to view these reports</p>	<p><b>Rationale</b> For enhanced transparency and accountability</p>
4.	<p><b>29) Disclosure of interest: Para. 29:</b> Good that the Mineral Rights Board members must (1) provide a disclosure of interests and (4) that a member who fails to disclosure his/her vested interest will be removed from the Board</p>	
	<p><b>Proposed Recommendation</b> <b>Add a clause</b> That provides for determination of a members vested interest, by whom and how</p>	<p><b>Rationale</b> The provision indicates that the removal from the Board has immediate effect if the person fails to disclose a vested interest, but no guidance is provided to determine whom and how the assessment of whether there was a “vested interest” will be made. Instead, the provision only generally states, “...may reasonably be considered of relevance to that topic and its review”.</p>
5.	<p><b>Para(39) Consent from land owners to conduct mining operations</b> <b>Para. 39(9)(b):</b> “unreasonably withheld or delayed” for either of the below reasons, without any parameters to ensure it is not used to circumvent the consent requirement. -“(b) does not so harm the local environment or people as to warrant additional review” and/or</p>	



	<i>-(c) it is in the national interest to include such land under the mineral right"</i>	
	<p><b>Proposed Recommendation</b>  <b>Add clauses that,</b>  Creates clear parameters to determine when/how these provisions (Para. 39(9)(b) or (c)) would apply.</p>	<p><b>Rationale</b>  This provision is of concern because it allows the Cabinet Secretary to assess whether the required consent has been "unreasonably withheld...." How will these options be monitored to ensure they are not misused?</p>
6.	<p><b>Section (41) Information, Reports and confidentiality</b>  Para. 41(1)(e) – good that included in the information &amp; reports to be submitted in support of for a mining license and permit include "community development reports" in addition to environmental, financial, and health &amp; safety reports  Para. 41(4)(b) – good that environmental reports are deemed "public documents, available for inspection via the OMC by any party who is a registered user or in person at the Mining Cadastre Office."</p>	
	<p><b>Recommendation</b>  <b>Add provisions that</b>  guide and/or model key information to be included in these reports to ensure this provision has real impact and value</p>	<p><b>Rationale</b>  Related to Para. 8(5)(c) there is need to ensure that access fees to do present a hurdle for impacted people and/or communities to obtain access to these documents</p>
7.	<p><b>Section(68) Form of Prospecting License</b>  <b>Para. 68(2)(j):</b> good that this provision states that in order to obtain a prospecting license requisite information includes "environment, gender impact and on any monument, cultural heritage, artifacts or relic in the proposed prospecting area, measures to be taken to mitigate such effects and an estimate of the cost of mitigating such impacts"   <b>Para. 87(2)(o):</b> good that an application for a retention license requires information on the positive and negative impacts that activities will have on gender relations within the community.</p>	
	<p><b>Recommendation</b>  <b>Provide clarity on</b>  Cultural/religious sites that may not be officially recognized, but that are an integral part of a community's culture, identity or religion. How will these sites be defined to ensure that in practice they are protected?</p>	<p><b>Rationale</b>  In order for this to have actual meaning in practice, it will be necessary to create more detailed guidance on what is necessary to meet this criterion.</p>
8.	<p><b>Section (101) Reporting under a mining licence</b>  Para. 101(1)(c)(ix): good that reporting requirements for a mining license include reporting "in detail", on an "ongoing basis" that "local government, traditional authorities and communities" have been informed and consulted about the mining operations that require physical entry on "land within their jurisdiction" as well as the outcome of the consultations including "dates and locations of formal consultations"</p>	
	<p><b>Recommendation</b>  <b>Add clause that</b> ensures/clarifies that this requirement should also include community consultation and/or information sharing with communities whenever mining activities may directly or indirectly impact their land or livelihoods, even if, for example, the mining operations are not technically in their jurisdiction (i.e. they are technically in a neighboring jurisdiction)</p>	
9.	<p><b>Section (137) Reporting under a mining permit</b>  Para. 137(1)(b): good that reporting under a mining permit requires annual information on environmental damage and remediation and that these are made publically available</p>	

	<p><b>Recommendation</b>  <b>Reword to read</b>  “conduct mining operations with due regard to the environment and shall submit an annual report on environmental damage and remediation which shall be made publically available”)</p>	<p><b>Rationale</b>  For clarity</p>
10.	<p><b>147) Renewal of an artisanal mining permit</b> 145(2)(i) – requires an environmental and social impact screening report for an artisanal mining permit –</p> <p><b>Proposed Recommendation</b>  Provide an exemption for Artisanal miners</p>	<p><b>Rationale</b>  While this is good, the question is, does this create a cost prohibitive bar for artisanal miners that will keep them properly registering and consequently keep this portion of the mining sector unregulated?</p>
11.	<p><b>Section (149) Obligations and conduct under artisanal permit</b>  Para. 149(7): good that the holder of an artisanal mining permit must submit an annual report on environmental damage and remediation and make it publically available</p>	
	<p><b>Recommendation:</b>  Exempt or provide minimal guidelines for the Artisanals to comply with</p>	<p><b>Rationale</b>  It will be important to understand if this requirement is cost prohibitive for artisanal miners b/c we don't want reporting requirements to send incentivize elicit artisanal mining</p>
12.	<p><b>Section (159) Form A 9</b>  FORM A-9: Application for a Mining Permit</p>	
	<p><b>Proposed Recommendation</b>  <b>Add a clause</b> that read s, In addition to the environmental impact assessment and ongoing consultation plan, an “approved gender impact assessment” is also required</p>	<p><b>Rationale</b>  It would be good to learn whether more specific criteria and guidance has been developed for the environmental, community consultation, and gender impact studies and reports, i.e. best practices or model report</p>

## 5. MINE SUPPORT SERVICES REGULATIONS

1.	<p><b>Section 3(4) (e) t</b>  Application for a mine support service license 3.4.(e)  a plan for the employment and training of Kenyan citizens and the progressive replacement of expatriate workers if required;</p>	
	<p><b>Proposed Recommendation</b>  Break it down to local communities and local nationals</p>	
2.	<p><b>Section on Processing of an application for a mine support service licence</b>  4.1 The Cabinet Secretary shall approve or reject an application for a mine support service license within thirty (30) days from the date of the submission of a complete application.</p>	
	<p><b>Proposed Recommendation</b>  Add the clause in bold</p> <p>The Cabinet Secretary shall <b>after the advice of MRB</b> approve or reject an application for a mine support service</p>	

	license within thirty (30) days from the date of the submission of a complete application .	
	<b>Section</b> 4.2 Where the application is approved, the Cabinet Secretary shall serve a notice requiring the applicant to accept or reject the grant of the license within fourteen (14) days from the date of notification of the approval	
	<b>Recommendation</b> Propose an inclusion of an appeal mechanism for the applicant	