

LEGAL NOTICE No.

THE MINING ACT
(No.2 of 2016)

REGULATION XIV: MINERAL ROYALTY 2016

MINING (ROYALTY) REGULATIONS – Sections 100, 183(3) and (4), 185(3),
186, 187, 188(2))

ARRANGEMENT OF REGULATIONS

PART I-PRELIMINARY

1. Citation
2. Interpretation
3. Application of Regulations

PART 11- ROYALTY ADMINISTRATION

4. The royalty base
5. The royalty rate
6. When royalty is due and for what period
7. Reduction or suspension of royalty rate
8. Samples
9. Arm's length substitution
10. Assurance of royalty by reconciliation – general
11. Assurance of royalty by reconciliation – dealers
12. Assurance of royalty by reconciliation – exporters
13. Assurance of royalty by reconciliation – transferors of mineral rights
14. Schedules

15. THE MINING ACT

16. (No.2 of 2016)

IN EXERCISE of the powers conferred by sections 100, 183(2), 183(3), 183(4), 188(2), 223(1), 223(2)(a), 223(2)(b) and of the Mining Act, 2016, the Cabinet Secretary makes the following Regulations:

MINING (ROYALTY) REGULATIONS, 2016

MINERAL ROYALTIES, 2016

Citation 1. These regulations may be cited as the Mining (Royalty) Regulations, 2016.

Interpretation 2. In these Regulations, unless the context otherwise requires__

“Act” means the Mining Act, 2016.

“**Acquired**” means acquisition by sale, barter, import, holding on deposit as a pledge or security, receipt as a gift, or receipt under any other supply or disposition, whether for consideration or otherwise.

“**Area of a mineral right**” means licence area, mining area, permit area, prospecting area, reconnaissance area, or retention area under the Mining Act, 2016 according to the mineral right in the particular case.

“**Arm’s length amount**” means the amount which would apply in a transaction if all parties to the transaction were dealing at arm’s length and where the amount is not reduced or increased as a result of any collateral arrangements or relationships, including a past or future course of transactions.

“**Assurance of royalty by reconciliation**” means the system of reconciliation payments at reconciliation points. Royalty that cannot be shown to have been paid as required, as at a reconciliation point for mineral products, is a shortfall which must be made up by a reconciliation payment on account of the unpaid royalty. Such reconciliation payments are recoverable from those who were liable to pay the unpaid royalty, or liable to pay an earlier unpaid reconciliation payment, for those mineral products when the reconciliation payment was made.

“**Cost plus value**” of a mineral product is worked out by adding up the proper costs of producing it, and so including in the value of the mineral product all the costs of producing it as a mineral product but no more. Cost plus value is worked out without double counting, so no amount is claimed both in working out netback value and in working out cost plus value, or in working

out the values of different mineral products.

“Dealing right” means a mineral dealer’s licence, a diamond dealer’s licence, or a mineral dealer’s permit.

-**“Disposal”** means sale, barter, export, deposit as a pledge or security, donation as a gift, or other supply or disposition, whether with or without consideration (and includes loss by theft or misappropriation), and **‘disposed of’** has the corresponding meaning.

“Full market value” of mineral products is the reference price for a product where there is a reference price for the product; where a reference price for the product is not available, full market value is worked out by ‘netback’ and ‘cost plus’ calculation; and where it cannot be worked out in this way by the Director of Mines is such amount as the Director of Mines determines.

“Mineral” has the meaning given by the Mining Act, 2016, and includes minerals in tailings, but excludes petroleum, hydrocarbon gases, and groundwater.

“Mineral product” has the meaning given by the Mining Act, 2016, and includes the product of mining operations, the product of extraction of a metal or a precious mineral from a mineral in mining operations, and the product of beneficiation of a mineral in mining operations, but excludes waste and tailings.

“Netback value” of a mineral product is worked out by netback from the value of the end-products from that mineral product, reduced by the costs of producing those end-products. So netback value is worked out by deducting from the reference price of all the end-products commercially capable of being produced from the mineral product, the cost of producing those end-products. Netback value is worked out without double counting, so no amount is claimed both in working out netback value and in working out cost plus value, or in working out the values of different mineral products.

“Reconciliation” means the process of recovering unpaid royalty on minerals and mineral products at reconciliation points.

“Reconciliation point” has the following meanings:

- (a) **“dealing right reconciliation point”** means the end of each calendar month during which the holder of the dealing right has acquired any mineral or mineral product, and is incumbent on that holder;

(b) “**export permit reconciliation point**” means the end of each calendar month during which a person exports any mineral or mineral product, and is incumbent on that person; and

(c) “**mineral right transfer reconciliation point**” means the end of the calendar month in which the holder of a mineral right transfers that right (including by assignment, mortgage, or trade of the right, and including such dealing with part only of the right), and is incumbent on that transferor.

“**Reconciliation report**” means a reconciliation analysis between minerals and mineral products and royalty paid, showing:

(a) what reported minerals and their mineral products have had royalty paid; and

(b) what minerals and their mineral products royalty is unpaid,

calculated at the time of the date of the report or, if earlier, the date the report was due.

“**Reference price**” means the price of a mineral, or of a mineral product:

(a) that obtains in a market with a significant number of sellers, a significant number of buyers, and an openly quoted price;

(b) that, if it is adjusted, is adjusted according to objective criteria (such as grade or quality);

(c) that is applicable to the time or the period in relation to which it is to be used; and

(d) that is arrived at on arm’s length terms.

“**Royalty base**” means the total value to which the royalty rate for a mineral is applied in order to determine the amount of royalty due.

“**Royalty rate**” means the percentage rate or unit based rate applied to the royalty base to determine the amount of royalty due.

Application.

3. These Regulations shall apply to holders of mineral rights, dealers’ licences or permits under the Act and the former Act.

Obligation to pay royalty

4. The obligation to pay royalty is guided by the following;

(1) The purpose of mineral royalties is to provide monetary compensation to the people of Kenya, as owner of the minerals until they are won, for the loss of Kenya’s non-renewable asset.

(2) Mineral royalties shall compensate to share in the full value of the asset in its most valuable processed and value-added form, and therefore shall take account of all enhancements or further processing regardless of whether or when or where that processing and value adding take place.

(3) Mineral royalties shall be applied at a basic rate to share in the full gross value from the minerals won, and therefore shall make no deductions or offsets from or in working out the value to which each rate of royalty applies (except for any specific deductions or offsets provided in these regulations or in the Mining Act, 2016).

(4) To ensure the recovery of all royalties due, these regulations include safeguards at appropriate and convenient points including periodic reconciliation from dealers, periodic reconciliation for export of any minerals or mineral products, and reconciliation on transfer of mineral rights. These safeguards do not apply additional royalties but make up shortfalls if royalty due is unpaid or cannot be shown to have been paid.

Royalty base

5. (1) The royalty base is the value to which the royalty rate is applied, in order to determine the amount of royalty payable.

(2) The royalty base is worked out for each quantity of mineral that is won by virtue of a mineral right, within a royalty period, and that is:

(a) moved away from the area of the mineral right during that royalty period if it was not previously included in working out a royalty base; or

(b) not previously moved which is the subject of mineral dealings during that royalty period and was not previously included in working out a royalty base.

(3) The value of the royalty base for a mineral is the full market value of all mineral products capable of being produced from the mineral, through the use of the most efficient methods, to produce the highest value mix of mineral products. Mineral products are metals and minerals where these can be produced from the mineral, or in other cases the most highly processed or beneficiated mineral products that can be derived from the mineral.

(4) The royalty base is the aggregate over the royalty period of the full market value of the mineral products for each sales order.

(5) The full market value is the reference price of such products, without offset or deduction, whether on account of location of the products, insurance, transport or otherwise.

(7) If there is no reference price for a mineral product then its full

market value is determined by:

- (a) deducting from the reference price of end-products commercially capable of being produced from the mineral product, the cost of producing those end-products ('netback value'); and
- (b) including in the value of the mineral product all the costs of producing it as a mineral product ('cost plus value'), with any cost requiring allocation to be so allocated that no amount is claimed both in working out netback value and in working out cost plus value, or in working out the values of different mineral products, and
- (c) averaging the netback value and the cost plus value if they differ.

(8) Where the full information to enable the Director of Mines to determine the royalty base for the holder of a mineral right for a royalty period according to sub-regulation (6) is not available, the Director of Mines shall determine the royalty base to be used according to the information at his or her disposal.

where the mineral is consumed in Kenya, Director of Mines may use simplified mine gate sale price method to work out royalty base

Royalty base for export minerals

6. The royalty base for minerals for export shall be the value of the mineral at the port of exit, that is the Freight on Board value based on the full market value.

Royalty base for minerals consumed in Kenya

7. Where the Director of Mines is satisfied that a mineral won by virtue of a particular mineral right is to be used or consumed only within Kenya, the Director may allow the royalty base for the mineral to be worked out in this simplified way:

- (a) using the sale price at the point of sale, if the mineral is sold at the mine gate, that is, when the mineral is moved away from the area of the mineral right;
- (b) using the sale price at which the mineral is delivered, if it is sold at delivery after being moved away from the area of the mineral right, less the cost of transportation and insurance from that area to where the mineral is delivered.
- (c) for high volume low value construction minerals Unit based rate shall apply and no deductions or offsets are allowed.

The royalty rate

8. (1) The royalty rate for a mineral is a percentage or unit based rate applied to the royalty base for that mineral or mineral product in order to determine the amount of royalty due. If a mineral or mineral product would otherwise be subject to more than one rate, the higher of those rates applies.

(2) The royalty rates shall be the percentages or unit based rates

as prescribed by the Cabinet Secretary for mineral classes won by virtue of a mineral right.

Payment of royalty and of additional royalty

9. (1) Royalty is due in respect of each period of three months ending 31 March, 30 June, 30 September or 31 December in which a mineral or mineral product won from a mineral right by the holder or any other person and not previously subject to royalty is:

(a) first moved away from the area of the mineral right; or is

(b) first the subject of mineral dealings without having been so moved.

(2) (a) Royalty is due and shall be paid by the fifth (5th) business day following the last day of the royalty period, and is payable by every holder of the mineral right in the royalty period, and from every subsequent holder of the mineral right after that time but before the royalty is paid in full.

(b) Where the royalty liability is passed to a holder of a dealing right, the royalty payable shall be due before grant of a permit to export and must be paid in full.

(3) For every royalty period in which royalty is due and unpaid, additional royalty of two per cent (2%) per month of the unpaid royalty shall be due from those liable for the unpaid royalty.

(4) Where royalty has been already paid for the same minerals in respect of another royalty period, the royalty paid for those minerals shall be credited against the liability for royalty (but not any liability for additional royalty) for those minerals.

(5) Royalty credited as paid for minerals in a royalty period is limited to the amount of royalty as is established to the satisfaction of the Director of Mines to have been actually paid for those minerals by any person.

(6) Where royalty is due for minerals for a royalty period both from one person and from any other person, and one or another person pays any part of the royalty, credit shall be given for that payment in working out the royalty due for the minerals from any other person for that period; and this shall be without prejudice to any right of contribution any of these persons may have against another.

Royalty to be calculated and paid in USD for export minerals

(7) Royalty (including additional royalty) shall be calculated and paid in United States Dollars (USD) where a mineral won from a mineral right, or a mineral product from that mineral, or an end-product from that mineral, is exported from Kenya or, in the opinion of the Director of Mines, is likely to be exported from

Kenya and whose value exceeds two thousand United States Dollars.

Reduction or suspension of royalty rate

10. (1) The holder of a mineral right may apply to the Cabinet Secretary for reduction or suspension of the rate of royalty applicable to minerals the subject of that right.

(2) No reduction or suspension shall apply in retrospect to minerals won before the application is made.

(3) An application for a reduction or suspension may only be made if all reports and statements in relation to mining operations carried on by or on the authority of the applicant have been made as required under the Mining Act, 2016.

(4) The holder of a mineral right may apply for a general reduction or suspension in the rate of royalty, applicable to all minerals of a kind subject of that right wherever those minerals are found in Kenya.

(5) In the case of a general reduction or suspension, the applicant must provide evidence that proves that the royalty rate which is sought to be reduced or suspended represents an excessive rate of royalty for minerals of that kind.

(6) An applicant for a general reduction or suspension of a royalty rate must provide evidence that proves the proposed lower or zero rate to be reasonable for any minerals of that kind and, where appropriate, for similar minerals besides those specified in the application.

(7) A general reduction or suspension must be for a period no longer than can be justified on reasonable grounds.

(8) The holder of a mineral right may apply for a particular reduction or suspension in the rate of royalty applicable only to minerals of a kind subject of that right, and won in relation to that mineral right.

(9) A particular reduction or suspension shall operate as a deferral of the royalty due at the original rate, with the deferred amount falling due as soon as the period of such reduction or suspension comes to an end. Such deferral may not begin for royalty payments due earlier than three (3) months after the application is made.

(10) A deferred amount of royalty is due from each holder of the mineral right at the end of the period for which it is deferred, and from each holder when the particular reduction or suspension was given.

(11) The deferred amount shall be without interest in the first (1st) year but thereafter shall bear interest at the rate of two per cent (2%) per month compound on that part of the deferred amount that remains unpaid.

(12) Where particular reduction or suspension is sought, the application must:

- (a) show that deferral of royalty is not against the long term interests of Kenya;
- (b) provide documentary evidence showing that the overall impact of deferral will mitigate a temporary but material adverse impact on the applicant and will not be against Kenya's long term interests;
- (c) provide an assurance that the deferred amount of royalty will be paid at the end of the period of deferral; this must be supported by an irrevocable letter of credit, or other irrevocable instrument, ensuring payment in a form and of a character satisfactory to the Director of Mines; and
- (d) show that any economic advantage of the deferral to the applicant will not unreasonably advantage the applicant compared to other producers of minerals of the same kind operating under any other mineral right in Kenya.

(13) A particular reduction or suspension shall be for not longer than is reasonable and may be for a wider or narrower range of minerals than that applied for and may be, at the Cabinet Secretary's discretion, by way of reduction where suspension was applied for, or by way of suspension where reduction was applied for.

Royalty on samples

11. (1) Samples of minerals won and removed for the purposes of testing (including, but not limited to, assaying and metallurgical testing) are subject to royalty if their total value exceeds a maximum permitted value for samples.

(2) The value of samples is their royalty base.

(3) In determining whether the value of samples exceeds the maximum permitted value, the royalty base of the samples must be aggregated with the royalty base of all samples from the area of the same mineral right, won within the previous year.

(4) For samples:

- (i) which are sold; or
- (ii) for which testing is not carried out; or
- (iii) for which the results of testing are not both known to and owned by the holder of the mineral right from the area

of which the samples were won, and the results provided to the Ministry;
the maximum permitted value is zero and royalty is payable accordingly.

(5) For samples other than those specified in sub-regulation (4), the maximum permitted value is two hundred thousand Kenya shillings (Ksh 200,000). Where this value is exceeded, all the samples are subject to royalty payment.

Arm's length substitution

12. (1) The reference price used to decide the full market value of a mineral product, and thereby to determine the royalty base for that mineral, shall be increased to an arm's length amount where the reference price arises under an arrangement and the amount of the reference price is less than it would have been had all parties been dealing with each other on an arm's length basis in relation to the arrangement and the reference price under it.

(2) Where the reference price arises under an arrangement, any associated costs which decreased the apparent market value of a mineral product shall be adjusted to restore the true market value to that of an arm's length sale.

(3) An arrangement includes any understanding or action, whether contractual or not, unilateral or not, and voluntary or not for all parties, and also includes action by only one party.

(4) Parties to an arrangement include every person who brings about the arrangement or action under it whether directly or indirectly, or who is able to affect the terms of the arrangement whether they do so or not, and whether they could affect those terms directly or indirectly.

(5) For the avoidance of doubt, reference prices and costs arising from financing arrangements are subject to this section.

(6) The Director of Mines may require any party to provide information for the purpose of checking whether reference prices under the terms of an arrangement are other than they would have been had all parties been dealing with each other at arm's length. If a party fails within a reasonable time to provide the required information that would allow the arm's length amount to be determined, no information or evidence relating to this from that party shall be admitted in any review or any appeal proceedings unless the Director of Mines waives objection to the information or evidence being admissible.

Assurance of

13. (1) Reconciliation payments assure recovery for unpaid

**royalty by
reconciliation –
general**

royalty on minerals and mineral products at reconciliation points. These points are the dealing right reconciliation point, the export permit reconciliation point, and the mineral right transfer reconciliation point.

(2) A dealing right reconciliation point arises at the end of each calendar month where the holder of the dealing right has acquired any mineral or mineral product within that month.

(3) An export permit reconciliation point arises at the end of each calendar month during which a person exports any mineral or mineral product.

(4) A mineral right transfer reconciliation point arises at the end of each calendar month in which the holder of a mineral right transfers that right (including by assignment, mortgage, or trade of the right, and including such dealing with part only of the right).

(5) At any reconciliation point, the dealer, exporter, or transferor of a mineral right as appropriate shall submit a reconciliation report within one (1) week after the reconciliation point arises. The report must be made to the Department responsible for collecting royalties.

(6) Where a correct reconciliation report would identify that a royalty is outstanding, a reconciliation payment equal to the amount of unpaid royalty is due from, and must be paid by, the person who is required to make the reconciliation report at the time the reconciliation report is required.

(7) For every royalty period in which the reconciliation payment is due and unpaid or partly unpaid, interest at a rate of two per cent (2%) per month compound on the unpaid amount of the reconciliation payment shall accrue and shall be payable by the person from whom the reconciliation payment was due in respect of the royalty period in which the reconciliation payment is due. The interest shall be paid to the designated account of the Department responsible for collecting royalties.

(8) Where a reconciliation payment has already been made for minerals in respect of another reconciliation point, that reconciliation payment shall be credited against any reconciliation payment otherwise due at the later reconciliation point.

(9) Where a reconciliation payment is to be paid by a person for minerals or mineral products, but the person has passed them to another person who is the holder of a dealer's right before the reconciliation point for the reconciliation report, the reconciliation payment due from the first person is reduced by the amount due

on those minerals or mineral products.

**Assurance of
royalty by
reconciliation -
dealers**

14. (1) When a dealing right reconciliation point arises, the holder of the dealing right must make a reconciliation report in respect of the minerals and mineral products the dealer then holds or has held during the reconciliation period

(2) The report shall set out the amount of minerals and mineral products acquired by the holder during the period, offset against the minerals and mineral products for which royalty has been paid by the time of the report, or which were exported or sold to another holder of a dealing right by the holder during the period, and shall calculate the royalty outstanding in respect of the remaining minerals and their mineral products.

(3) For all minerals and mineral products which were not exported or sold on to another holder of a dealing right and for which no royalty and no reconciliation payment can be shown to have been paid, the holder of the minerals and mineral products must make a reconciliation payment.

(4) The amount of the reconciliation payment shall be equal to the outstanding royalty on those minerals and their mineral products.

(5) A reconciliation payment made by the holder of a dealing right shall be recoverable from any holder of the mineral rights who was liable to pay that part of the unpaid royalty for them when the reconciliation payment was made.

**Assurance of
royalty by
reconciliation –
exporters**

15. (1) When an export reconciliation point arises, the exporter shall submit a reconciliation report detailing the minerals and mineral products exported during the period offset against royalty payments made in respect of the minerals and mineral products by the mineral right holder, and any other previous reconciliation payments made.

(2) For all minerals and mineral products for which royalty cannot be shown to have been paid, and for which no previous reconciliation payment can be shown to have been paid, the exporter of the minerals and mineral products shall make a reconciliation payment.

(3) The amount of the reconciliation payment shall be equal to the outstanding royalty on those minerals and mineral products.

(4) A reconciliation payment made by an exporter shall be recoverable from any holder of a mineral right who was liable to pay that part of the unpaid royalty for them when the reconciliation payment was made, and from any dealer who was liable to pay a reconciliation payment for that part of the minerals or mineral products when the exporter's reconciliation payment was made.

Assurance of

16. (1) When a mineral right transfer reconciliation point arises,

**royalty by
reconciliation –
transferors of
mineral rights**

the transferor of the mineral right shall submit a reconciliation report in respect of the royalty due in relation to that mineral right as if the royalty period had ended at the time of the transfer.

(2) For all minerals for which a royalty or a reconciliation payment cannot be shown to have been made, the transferor shall make a reconciliation payment, and the transfer shall not be registered until the payment is made.

(3) The amount of the reconciliation payment shall be equal to the royalty that would otherwise be payable for the minerals to the date of the transfer, at the end of the royalty period.

Made on this.....day of.....2016

DAN KAZUNGU
Cabinet Secretary, Mining