



REPUBLIC OF KENYA

REGULATORY IMPACT ASSESSMENT FOR

THE DRAFT MINING (ROYALTY COLLECTION AND MANAGEMENT) REGULATIONS, 2023

SEPTEMBER, 2023

This Regulatory Impact Assessment (RIA) has been prepared by the State Department for Mining pursuant to Sections 6 and 7 of the Statutory Instruments Act (No. 23 of 2013).

ABBREVIATIONS

RIA - Regulatory Impact Assessment

RIS- Regulatory Impact Statement

SIA - Statutory Instruments Act

AMV - Africa Mining Vision

SDG - Sustainable Development Goals

UNEP - United Nations Environment Programme

BETA - Bottom-up Economic Transformation Agenda

1. INTRODUCTION

1.1 Regulatory-making Authority and the Legal Mandate

The Mining Act under Section 12 empowers the Cabinet Secretary responsible for Mining with the general administration of the Act. The mandatory requirement upon the Cabinet Secretary is to respect and uphold the principles and values enshrined in Article 201(c) and (d); and Article 69 (1) (a) and (h) of the Constitution. The Regulatory Making Authority in the instant case is the Ministry of Mining, Blue Economy and Maritime Affairs and specifically the State Department for Mining. The Mining Act mandates the Cabinet Secretary to make regulations to prescribe the procedure for consideration of the applications made under the Act; and negotiation, grant, revocation, suspension, or renewal of mineral rights hence the development of the draft Royalty Collection and Management Regulations.

1.2 Requirements of the Statutory Instruments Act

The Statutory Instruments Act, No. 23 of 2013 (SIA) is the legal framework governing the conduct of Regulatory Impact Statement (RIS) in Kenya. Sections 6 and 7 require that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, before making the statutory instrument, prepare a regulatory impact statement about the instrument.

The Act further sets out certain key elements that must be contained in the Regulatory Impact Assessment (RIA) namely:

- (a) a statement of the objectives of the proposed legislation and the reasons;
- (b) a statement explaining the effect of the proposed legislation;

(c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and

(e) the reasons why the other means are not appropriate.

Section 5 of SIA requires that a regulation-making authority to conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content.

1.3 What is a Regulatory Impact Statement?

Regulatory Impact Statement is a systematic policy tool used to examine and measure the likely benefits, costs, and effects of new or existing regulations. A RIS is an analytical report to assist decision makers in arriving at an informed policy decision. As an aid to decision making RIS includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIS should contain the following elements:

- (a) title of the proposal;
- (b) the objective and intended effect of the regulatory policy;
- (c) an evaluation of the policy issue;
- (d) consideration of alternative options;
- (e) assessment of all their impacts distribution;

- (f) results of public consultation;
- (g) compliance strategies, and
- (h) processes for monitoring and evaluation.

RIA is usually conducted before a new government regulation is introduced to provide a detailed and systematic appraisal of the potential impact of a new regulation to assess whether the regulation is likely to achieve the desired objectives. RIS promotes evidence-based policymaking as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, the RIA should confirm whether a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. RIS therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation; and enhancing governmental accountability.

2.0 PURPOSE AND OBJECTS OF THE PROPOSED REGULATIONS

The Mining (Royalty Collection and Management) Regulations, 2023, serve various purposes to regulate the collection and management of royalties in the mining sector. These regulations aim to strike a balance between facilitating the mining industry's operations and ensuring that the government receives fair compensation for the extraction of its mineral resources while promoting transparency and accountability in the sector:

- a) **Royalty Collection:** These regulations establish a framework for the collection of royalties from entities involved in mining and dealing with minerals. The primary objective is to ensure that the government receives compensation for the depletion of its non-renewable mineral resources.
- b) **Determining Royalty Base:** The regulations provide guidelines for determining the royalty base, which is the value to which the royalty rate is applied. This ensures that the royalties are based on the full market value of minerals, including enhancements made to increase their saleability.
- c) **Setting Royalty Rates:** The regulations specify the royalty rates for various minerals, including precious metals, rare earth elements, metallic ores, industrial minerals, and gemstones. This helps in standardizing royalty rates for different mineral categories.
- d) **Reconciliation and Accountability:** The regulations establish a reconciliation system to ensure the accurate reporting and payment of royalties. It includes reconciliation points for dealers, mining permit or license holders, and transferors of mineral rights, thereby promoting transparency and accountability.

- e) **Reduction or Suspension of Royalty Rates:** The regulations provide a mechanism for holders of mineral rights to apply for a reduction or suspension of royalty rates, under specific conditions. This helps mitigate adverse impacts on mining operations and encourages compliance.
- f) **Export Control:** The regulations specify that royalties for export minerals are based on the value of minerals at the port of exit, promoting control over mineral exports and ensuring that royalties are paid on minerals leaving the country.

2.1 Realization of Kenya's Mineral Potential

The mining sector in Kenya holds a pivotal role in the nation's economic development, poised to make substantial contributions to socio-economic progress. The mineral resources within the country are held in trust by the national government on behalf of the people of Kenya. The aim of exploiting these mineral resources is to ensure that the benefits are reaped by the citizens of Kenya.

The Mining Act, of 2016 plays a central role in providing a comprehensive regulatory framework for the management and development of mineral resources in the country. To ensure that the benefits derived from mineral exploitation are shared with the people of Kenya, the Cabinet Secretary responsible for the mining function is mandated to establish regulations governing the collection of mineral royalties. These royalties serve as a crucial source of revenue, not only to compensate for the extraction of mineral resources but also to contribute to the socio-economic advancement of the nation.

The development of these regulations aims to give effect to the implementation of the Mining Act and to provide a transparent and structured framework for the collection of mineral royalties. By doing so, the Ministry aims to

make a substantial and sustainable contribution to the responsible utilization of mineral resources, benefiting both the current and future generations.

2.2 Scope

The scope of the proposed Regulations is to:

- a) Provide the principles pertaining to royalty payment
- b) Provide basis for charging mineral royalties on the exploited resource
- c) promote sustainable development of mineral resource in the country
- d) Provide basis for determination of Royalty base
- e) Provide the basis for reconciliation of royalty payments

2.3 General Objective

The general objective of the proposed Regulations is to give full effect to the Mining Act No. 12 of 2016 by providing a framework to ensure sustainable management and development of Kenya's Mineral wealth.

2.4 Specific Objectives

The objectives of the regulations is to balance the interests of the government, the mining industry, and the public while maintaining transparency and accountability in royalty collection and management.

- a) **Compensation:** Ensure that royalties provide monetary compensation to the government for the depletion of Kenya's non-renewable mineral resources.

- b) **Accuracy:** Establish clear guidelines for accurate determination of royalty amounts based on the full market value of minerals.
- c) **Standardization:** Set standardized royalty rates for different mineral categories to ensure consistency in royalty payments.
- d) **Transparency:** Implement a reconciliation system to promote transparency and accountability in reporting and paying royalties.
- e) **Flexibility:** Allow for the reduction or suspension of royalty rates under specific conditions to address temporary adverse impacts on mining operations.
- f) **Export Control:** Control royalties for exported minerals based on their value at the port of exit, ensuring that royalties are paid on minerals leaving the country.

3. BACKGROUND AND CONTEXT OF THE PROPOSED REGULATIONS

3.1 Background of Kenya's Mining Industry

The mining sector dates back to the colonial period where the sector was for a long time operated within a legal framework enacted way back in 1940. The Mining Act no.12 of 2016 revoked the law (1940) consequently opening the sector to more players, in particular recognizing artisanal mining as a game changer for economic growth at the grass root. Mineral royalty collection has been operating without a clear legal framework and for this reason, the current proposed Royalty collection Regulation seeks to provide a clear framework within which this is done.

3.2 International and Regional Context of the Mining Sector

3.2.1 Africa Mining Vision (AMV)

Africa Mining Vision aims to create “a transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”. The Vision was adopted by Heads of State at the February 2009 AU summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development. It is Africa's response to tackling the paradox of great mineral wealth existing side by side with pervasive poverty. It recognizes 6 intervention areas namely: 1) fiscal regime and revenue management; 2) geological and mineral information systems; 3) building human and institutional capacity; 4) artisanal and small-scale mining; 5) mineral sector governance; 6) linkages, investment and diversification.

3.2.2 Sustainable Development Goal (SDG)

The United Nations Member States in 2015 adopted 17 Sustainable Development Goals (SDGs) that are to guide poverty eradication, improve health and education, reduce inequality, and spur economic growth – strategies all while tackling climate change and working to preserve oceans and forests. Out of the 17 sustainable development goals, number 7, 8,

9, and 13 have been identified as those relating to the mining sector. Affordable and clean energy, decent work and economic growth, industrial innovation, and infrastructure climate Action. All these speak to the optimal and sustainable mining sector.

3.3 Local Context of the Mining Sector

3.3.1 Bottom-up Economic Transformation Agenda (BETA)

In recognition of the potential contribution of the Mining sector in job creation, the Government under the BETA approach has earmarked the formalization of artisanal mining which provides livelihoods for over 800,000 people. This sub-sector can create more decent jobs with the adoption of safe and sustainable mining techniques with guaranteed markets. On the same note, mineral value addition has also been identified as a game changer in maximizing the full worth of a mineral resource along the whole value chain.

3.3.2 Kenya Vision 2030

The economic pillar, one of the enablers of the vision, is set to be actualised by a wide range of sectors; mining being one of them. Efficient royalty collection will guarantee the country maximum benefit from its mineral wealth.

3.3.4 Strategic Plans

The just-ended Strategic Plan for the State Department for Mining provided a roadmap for implementing the Mineral Resources Sector Plan which is one of the priority sectors under the Economic Pillar of Vision 2030. The Plan provided an important framework for realizing the government's commitment to a transformative and competitive extractive industry as a key driver of the effective implementation of Kenya Vision 2030, and positioned Kenya as a regional focal point and a frontier for foreign direct investment in the Mining Sector.

3.3.5 Mining and Minerals Policy

The Mining and Minerals Policy was developed in 2016. The rationale behind the policy was to provide a framework to give clear guidance for sustainable mineral resources development, to address gaps that existed in the mining sector, form the basis for a review of the outdated Mining Act of 1940, and align the industry's strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. In addition, to strengthen the institutional framework and address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building, and mainstream artisanal and small-scale mining. The policy will promote the use of appropriate technology including Geo-spatial technology and airborne geophysical surveying to enhance information on the country's mineral potential and increase investment in mining. The policy led to the development of the Mining Act, 2016

4.0 RATIONALE AND JUSTIFICATION FOR THE PROPOSED REGULATIONS

4.1 Policy Issue

Mining royalty collection has emerged as a significant concern within Kenya's mining and minerals sector. Mining royalties serve as a critical source of government revenue derived from mineral extraction. However, several pressing policy issues demand focused attention and necessitate the implementation of a comprehensive RIA.

One key concern is the need to optimize revenue collection from mining royalties. An effective royalty collection system is vital to ensure that Kenya receives its rightful share of revenue from the exploitation of its mineral resources. Evaluating existing royalty collection mechanisms and identifying areas for improvement is essential to maximize revenue generation.

Furthermore, there is a growing emphasis on the equitable distribution of royalties. RIA can play a pivotal role in determining whether the current distribution of royalties among different stakeholders, including local communities and the government, is fair and in line with the principles of resource benefit sharing.

The persistent challenges of mining royalty evasion and underreporting necessitate attention. RIA should delve into measures that address these issues, such as enhanced monitoring and enforcement, as well as the development of transparent royalty collection processes.

Promoting transparency and accountability in royalty collection is another crucial aspect. Implementing measures to enhance transparency, such as technology-driven solutions for royalty tracking and reporting, will foster public trust and reduce the risk of corruption in the sector.

Finally, a well-structured royalty collection system should be designed to support sustainable development. This includes directing a portion of collected royalties into community development projects, environmental conservation, and infrastructure development in mining regions.

4.2 Opportunities for Kenya to realize the full potential in the Mining Sector

RIA focused on mining royalty collection highlights several opportunities for Kenya to enhance its revenue collection mechanisms.

Firstly, modernizing royalty collection systems is imperative. The introduction of technology-driven platforms can significantly improve the efficiency, accuracy, and transparency of royalty collection. This can be achieved through the development of digital platforms for tracking, reporting, and payment.

Secondly, strengthening monitoring and enforcement mechanisms is essential to prevent royalty evasion and underreporting. This includes leveraging data analytics to track mining activities and ensure compliance with royalty payment obligations.

Thirdly, exploring innovative revenue-sharing mechanisms that prioritize equitable distribution of royalties among various stakeholders, including local communities, the national government, and county governments, will reduce disparities in mining regions and contribute to local development.

Additionally, public engagement and awareness initiatives are pivotal. Promoting public awareness and engagement in the royalty collection process can lead to greater accountability and transparency. Developing education campaigns and platforms for public participation can facilitate this.

Lastly, ensuring that Kenya's royalty collection mechanisms align with international best practices, including the Extractive Industries Transparency Initiative (EITI) and the principles of good governance in resource-rich countries, will enhance the country's reputation and credibility in the global mining industry.

CONCLUSION

Conducting a Regulatory Impact Assessment (RIA) on mining royalty collection is a critical step in optimizing revenue generation, ensuring equitable distribution, preventing evasion, promoting transparency, and supporting sustainable development. By identifying areas for improvement and capitalizing on the opportunities highlighted in the RIA, Kenya can enhance its royalty collection mechanisms and further its economic and social development goals. This aligns with the principles of responsible resource management and good governance.

5.0. POLICY AND LEGAL FRAMEWORK FOR THE PROPOSED REGULATIONS

5.1 The Constitution of Kenya, 2010

Part 2 Article 69 (1) (a) of the Constitution provides that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefit. This regulation will provide a framework for the management and utilization of minerals for current and future generations.

5.2. The Mining Act of 2016

The legal framework for governance of the Mining sector in Kenya is primarily under the Mining Act, No 12 of 2016. The Act outlines the rights and obligations of mineral rights holders, establishes the process for granting mineral rights and dealers rights, and defines the regulatory framework for mining operations and all other related activities in the sector

Further, the Mining Act under Section 223(1) gives the Cabinet Secretary the power to make the regulations necessary for the proper administration and implementation of the Act. Several regulations have been developed to aid in the implementation of the Mining Act 2016.

3.3.5 Mining and Minerals Policy

The Mining and Minerals Policy was developed in 2016. The rationale behind the policy was to provide a framework to give clear guidance for sustainable mineral resources development, to address gaps that existed in the mining sector, form the basis for a review of the outdated Mining Act of 1940, and align the industry's strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. In addition, it to strengthen the institutional framework and address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building, and mainstream artisanal and small-scale mining. The policy will promote the use of appropriate technology including Geo-spatial technology and airborne geophysical surveying to enhance information on the country's mineral potential and increase investment in mining. The policy led to the development of the Mining Act, of 2016.

6.0. PUBLIC PARTICIPATION AND CONSULTATIONS

Public Participation refers to the process by which citizens, as individuals, groups, or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representatives.

It is a constitutional requirement that policy and law-making should be done in an open and transparent manner, with appropriate procedures for effective and timely input from professionals and persons affected by the policy instruments.

6.1 Legal Basis for Public Participation and Consultation

Participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever the State or public officer applies the Constitution, enacts any law, or makes or implements a public policy. This requirement is premised on the sovereignty principle, which vests all sovereign power to the people of Kenya. This power entitles the people to unfettered access to the process of making public decisions through their involvement.

Transparency of public finances and performance is ensured through rules, mechanisms, and capacities for sharing information on government programs, budgets, expenditures, and results with citizens.¹⁰ Participation mechanisms enable citizens to participate in setting budget priorities, monitor expenditures and assess service delivery performance. They also include feedback systems, which provide citizens with the opportunity to provide comments and grievances. Accountability mechanisms include both direct and indirect relationships, where service providers are sanctioned if they fail to meet an established standard.

The objects of devolution give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them and recognize the rights of communities to manage their own affairs and to further their development. The values and principles of public service require the involvement of the people in the process of policymaking and include transparency and provision to the public of timely and accurate information.

Regarding the subsidiary legislation-making process, the Statutory Instruments ACT 15 requires that the regulatory-making authority shall undertake public consultations before making statutory instruments (Regulations), particularly, where the proposed Regulations are likely to have a direct or substantial indirect effect on the business or restrict competition.

The Act provides that in determining whether any consultation that was undertaken is appropriate, the regulation-making authority shall have regard to all relevant matters, including the extent to which the consultation: drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

The Statutory Instruments Act further requires that the persons to be consulted should either directly or by advertisement through representative organizations be invited to make submissions by a specified date, which should not be less than fourteen days or be invited to participate in public hearings concerning the proposed instrument.

6.2 The Process of Public Participation and Consultations

Pursuant to section 5 of the Statutory Instruments ACT, the Ministry of Mining Blue Economy and Maritime Affairs identified specific stakeholders whom it engaged in a consultative process. These include the main professional and specialist institutions and individuals who will be directly or indirectly affected by the proposed statutory instrument.

6.2.1 Stakeholders Mapping

The following stakeholders were identified for the purpose of developing and consultations on the proposed Regulations:

- a. National Assembly,
- b. Office of the Attorney General,
- c. Kenya Law Reform Commission,
- d. National Treasury;
- e. County Governments;

- f. Large and Small scale scale miners;
- g. Artisanal miners;
- h. Kenya Association of Manufacturers;
- i. Kenya Chambers of Mines,
- j. Non-Governmental Organizations;
- k. Environmentalists; and
- l. Members of the public.

6.2.2 Public Consultation Approach and Methodology

The Ministry adopted the following methodology for purposes of public participation and inclusivity:

- a. The Drafts on Mining (Royalty Collections) Regulations, 2023, were developed with technical assistance from Kenya Law Reform Commission,
- b. The drafts were posted on the Ministry's website with links to download, where the stakeholders had access,
- c. Invitation of all stakeholders to public consultative meetings across the Country and submitting written memoranda,
- d. The stakeholders were also notified of the Regulation-making process and invited to give submissions on the draft Regulations within a specified period as per Statutory Instruments Act;
- e. Internal Stakeholder Consultations
- f. Executive Office Consultations
- g. A public notice in My Gov was published inviting all persons to submit their comments and also in; and
- h. The public notice also invited all stakeholders and members of the public for physical consultative meetings which were held as follows:-

REGION (CLUSTERED COUNTIES)	MEETING VENUE	DATE	TIME
Nairobi, Machakos, Makueni, Kajiado, Kiambu, Kitui	National Industrial Training Authority- Machakos County	4 th September, 2023	9.00 am - 4.00 pm
Nakuru, Uasin Gishu, Elgeyo Marakwet, Samburu, Nandi, Turkana, West Pokot, Baringo	Rift Valley Technical Training Institute- Eldoret	4 th September, 2023	9.00 am - 4.00 pm
Mombasa, Taita Taveta, Kwale, Kilifi, Voi, Lamu	Mombasa Beach Hotel- Mombasa	6 th September, 2023	9.00 am - 4.00 pm
Homabay, Kisumu, Siaya, Kakamega, Vihiga, Bungoma	Kisumu Hotel- Kisumu	6 th September, 2023	9.00 am - 4.00 pm
Garissa, Wajir, Mandera, Tana River	Garissa Farmers Training Centre- Garissa	11 th September, 2023	9.00 am - 4.00 pm

Kericho, Bomet, Narok, Kisii, Migori	Maasai Mara University - Narok	11 th September, 2023	9.00 am - 4.00 pm
Embu, Kirinyaga, Nyeri, Murang'a, Mbeere, Tharaka Nithi, Meru, Isiolo, Marsabit	Kenya School of Government -Embu	13 th September, 2023	9.00 am - 4.00 pm

Table 2: Meetings with Mining Stakeholders. N/B: Attached to this Regulatory Impact Statement is a detailed matrix report (Annexure) indicating representations received from the stakeholders and action taken in revising the Regulations.

6.2.3 Report on Stakeholder Consultative Process

A report on the stakeholder consultative meetings containing the records of comments and how they were considered and incorporated into the draft Regulations was prepared. The report is annexed to this report as a separate document as Annexure.

7.0. AN OVERVIEW OF THE PROPOSED ROYALTY COLLECTION REGULATION, 2023

The Mining (Royalty Collection and Management) Regulations, 2023 aim is to facilitate the collection of mineral royalties. The proposed regulation applies to holders of mineral rights and dealing rights. These regulations give effect to sections 188(2) and 223(2)(a) of the Mining Act, 2016.

The principles pertaining to royalty payment are to;

1. provide monetary compensation to the people of Kenya, as owners of the minerals as they are extracted, for the depletion of the nation's non-renewable resources.
2. Royalties should be based on the full market value of the mineral in its most processed, marketable form, taking into account all enhancements made to increase its saleability.
3. The basic rate to share is the full gross value from the minerals extracted, thus disallowing deductions or offsets in computing the value to which each royalty rate applies, except for specific deductions or offsets delineated in these Regulations or in the Act.
4. Ensure safeguards at appropriate and convenient points including periodic reconciliation from dealers, periodic reconciliation for the sale of any minerals or mineral products, and reconciliation on transfer of mineral rights to ensure recovery of all royalties due.

The proposed regulations provide a determination of the royalty base to which royalty is charged, which is divided into a royalty base for minerals and mineral products sold locally and minerals and mineral products meant for export. These proposed regulations also outline the royalty rates that will be charged for individual and individual classes of minerals and mineral products under the first schedule.

In addition, the proposed regulation also provides a basis under which the Cabinet Secretary may allow a reduction or suspension of a royalty rate and finally provides reconciliation points and royalty reconciliation periods.

7.1 The proposed Regulations provide for the following salient features:

These regulations are broken down into 18 regulations;

1. Citation- Provides that These Regulations may be cited as the Mining (Royalty Collection and Management) Regulations, 2023.
2. Interpretation- outlines the key definition of words and phrases used within these regulations.
3. Application- The application outlines the jurisdiction of these regulations that is the persons both natural and legal who shall be expected to adhere to the provisions of these regulations.
4. Principles pertaining to royalty payment- This part outlines the aim of royalty payment, what royalties should be based on, the base to which the computation shall be done and the necessary safeguards to ensure full payment.
5. Determination of royalty base and royalty base for export minerals - This part provides the formula that shall be applied in determination of the base for computation of royalties both for minerals extracted and consumed within the borders of Kenya and those that are meant for export.
6. Royalty rates- The proposed applicable royalty rates are as set out in the first schedule.
7. Determining royalty payable- this part just outlines that the determination of royalty payable shall be computed by applying the appropriate rate to the applicable appropriated royalty base.
8. Due dates for payment of royalty- this outlines the dates under which the royalty payment shall fall due but does not limit payment of royalty before the due dates.
9. Reduction or suspension of royalty rate- this provides for the conditions under which reduction or suspension can be applied and the applicable periods for reduction/ suspension.
10. Royalty on samples - This part of the regulations provides that samples determined to be valued beyond a given amount shall attract an applicable royalty.
11. Arm's length consideration- this outlines that under all circumstances the state shall seek to ensure that the declared value for the application of royalty was market value and was not determined by anything other than market forces. If it is determined that the same was not observed the values shall be adjusted to reflect the market value before computation of royalty due to the state.

12. Royalty assurance through reconciliation, reconciliation payment, dealer reconciliation, reconciliation for a mining permit/license holder and reconciliation for transferors of mineral rights - these parts aim to ensure the collection of unpaid royalty and provide the reconciliation points for dealers, mineral right holders and reconciliation during transfer.
13. First schedule - the first schedule outlines the applicable rates for various classifications of minerals.

8.0. CONSIDERATION OF ALTERNATIVES TO THE PROPOSED REGULATIONS

8.1 The Alternatives

8.1.1 *Option One: The Status Quo*

The High Court of Kenya on 12th May, 2023 nullified the Mining (Prescription of Royalties on Minerals) Regulations, 2013 on grounds of lack of public participation. Following the Court Ruling, an urgent letter of instructions was sent to the Office of the Attorney General on 18 May 2023, by the State Department for Mining requesting the Attorney General to file an urgent application for a stay of execution at the Court of Appeal against the High Court Order. The Attorney General however advised that the likelihood of success in the appeal was low, and the State Department should create new regulations in compliance with the Constitution and the Statutory Instruments Act, 2013. This nullification and expiry puts in jeopardy collections of approximately **Ksh 6 Billion** Revenue in the FY 2023/24 Budget, as the Regulations are the basis of these collections.

8.1.2 *Option Two: Application of Administrative Measures*

There are no administrative measures applicable to the proposed regulations.

8.1.3 *Option Three: Adopting the Proposed Regulations*

The proposed regulations will provide a legal instrument to enable the State Department for Mining to continue collecting royalties as provided for in Section 186 of the Mining Act 2016. By adopting the proposed regulations, the Department will efficiently and effectively discharge its mandate and enhance revenue collections. The regulations

also include royalty management and give guidance on all matters touching on royalty including; the royalty base, reconciliation, suspension, or reduction of royalties per the Mining Act 2016 among other provisions that were not previously included

8.2 Cost-Benefit Analysis

Option	Description	Costs	Benefits	Impacts and Distribution of Impacts	Risks	Compliance and enforcement
Option One: Status Quo	Non existence of legal instruments for charging royalty rate due to court nullification of Legal Notice 187 of 2013.	Loss of Revenue for the Government: Ksh. 6 Billion Reduced investor confidence due to unpredictable fiscal regime;	No benefits	No shareable royalty to the National Government, Counties and Communities; Reduced efficiency in Service Delivery; Lack of finances to formalize ASMs; Reduce Regional Competitiveness; Reduced	May Contribute to illegal Mining; Depletion of mineral resources without benefits to Kenyans; Degradation of environment; Exposure to	Inability to collect royalty and levies translates to lack of resources to build capacity in the mining sector

				community support to mining investment;	potential Litigation;	
Option Two: Application of Administrative Measures	Not applicable since the Mining Act 2016, Section 223(2)(a) requires the Cabinet Secretary to prescribe royalty rates by way of regulations	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

<p>Option Three: Adopting the Proposed Regulations</p>	<p>Legal instrument for charging royalties with prescribed royalty rates</p>	<p>Regulations implementation cost: KSh. 385m</p>	<p>Increased Royalty collection from KSh. 3.7bn to KSh. 6 billion.</p> <p>Promoted mining investment due to predictability in the fiscal regime;</p>	<p>Increased Royalty shared amounts to the county and community;</p> <p>A formalized ASM sub-sector;</p> <p>Improved Regional Competitiveness (mining);</p> <p>Enhanced inspection and surveillance;</p> <p>Improved social economic developments in the mining areas;</p> <p>Increased availability of geological data;</p> <p>Improved mineral laboratory services;</p>	<p>Potential mineral smuggling in absence of effective compliance and enforcement;</p> <p>Potential investor flight risk;</p>	<p>Fast-track development and implementation of a Royalty Management System;</p> <p>Undertake stakeholder sensitization on the Royalty Collections and Management Regulation;</p> <p>Quarterly inspections and mineral audits</p>
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8.3 Conclusion: The Preferred option

The preferred option for the State Department for Mining is to adopt the proposed regulations as they will seal the existing gap created by the nullification and expiry of the Mining (Prescription of Royalties on Minerals) Regulations, 2013.

9.0. Compliance and Implementation

It is necessary to consider and determine how compliance and implementation of the proposed Mining (Royalty Collection) Regulations, of 2023 will be achieved. As per Executive Order No. 1 of 2023 and the Mining Act, it is the duty of the State Department for Mining to oversight, regulate, and enforce compliance on all mining operations within the Country. It is therefore the mandate of the State Department to assess the effectiveness of its regulatory provisions concerning compliance and design responsive implementation strategies.

9.1 Conforming to legal obligations in developing the proposed Regulations

Section 223(2)(a) of the Mining Act, 2016 grants powers to the Cabinet Secretary responsible for Mining to make regulations necessary to give effect to the Act. As for these proposed regulations, the Act under section 183 provides for the Cabinet Secretary to prescribe royalty rates. Therefore, the Cabinet Secretary has the required legislative powers to propose these Regulations.

The Statutory Instruments Act, No. 23 of 2013 under Section 5 requires that the State Department for Mining conduct public consultations and draw on the knowledge of persons having expertise in fields relevant to royalties prescription and collection. Also, through public participation, persons likely to be affected by the proposed regulations have an adequate opportunity to provide views on the proposed regulations. Sections 6 and 7 require that a Regulatory Impact Assessment (RIA) be prepared where a statutory instrument is likely to impose significant costs on the community.

9.2 Implementation of the Regulations

Implementation of these proposed Regulations shall give effect to the provisions of the Mining Act on payments of royalty upon extraction and sale of mineral resources. These Regulations will be implemented through the set out legal and institutional framework at the State Department for Mining to ensure there is adequate compensation to Kenyans on extracted minerals through royalties and promote the mining industry.

These proposed Regulations do not propose to amend any of the existing laws. It harmonizes with other laws and regulations making its implementation more effective. The proposed Regulations as drafted are clear, consistent, comprehensive, and comprehensible enough to cover all matters.

9.3 Conclusion and Recommendation

After conforming to the legal obligations in developing these proposed Regulations like undertaking the necessary public participation and developing an accompanying Regulatory Impact Assessment, it is apparent that all the necessary measures and implementation safeguards have been considered. In view of this conclusion, it is recommended that the proposed Mining (Royalty Collection) Regulations, 2023 be adopted.

ANNEXURES

Annexure 1: Report on Public Participation for the Development of Royalty Collection Regulations, 2023 ()