

DRAFT 8 MAY 2019

**THE ANNOTATED
SMALL SCALE MINE REGULATION
WAOML MODEL MINING CODE (MMC)**

2019

PART I DEFINITIONS

Short Title

1. This Regulation may be cited as the Small Mine Regulation.

Definitions

2. In this Regulation, unless the context otherwise requires:

"Act" means the Mining Act.

"Child" means a natural person below the age of [16].

[Small-scale mining often involves community members from very impoverished areas who are accustomed to the use of (their) children in the performance of daily chores. Yet, the potential to trap children into a life of perpetual poverty is increased by their routine performance of adult work. The formal regulation of the ASM sector through a licensing regime enables government to discourage such entrapment and give children a chance at a different outcome.]

"Dealer" means a person holding a Dealer Licence pursuant to the Dealer Regulation.

[It is considered appropriate for most jurisdictions to create further regulations for the licensing of dealers. This will ensure that the tracing of minerals and associated revenue, exports, taxes, etc. are made possible.]

"Dealer Licence" has the meaning set out in the Dealer Regulation.

"Dealer Receipt" means a receipt for the purchase and sale of products produced from a Small Scale Mining Licence that details the quantity, nature and value of all products sold, along with the Blocks pertaining thereto.

"Dealer Regulation" has the meaning set out in the Dealer Regulation.

"Forced Labour" means a natural person who works or has been compelled to work under any kind of deception or threat of punishment, including: (a) the threat of physical harm; (b) the denial or restriction of freedom of movement; (c) the denial or restriction of access to any person; (d) blackmail; or (e) the promise of material benefits that are deliberately and repeatedly denied, reduced or deferred, which denial, reduction or deferment was intended, in whole or in part, substantially before its communication and is manifestly harmful to the well-being of such person.

[Small-scale mining often involves local community and transient persons who can be vulnerable to ill-treatment. The threat of being reported (to police or immigration) is one example where labour can be secured for 'slave wages' (e.g., minimal pay or basic subsistence). The SSM Regulation attempts to deal with this by imposing reporting and certification requirements on Holders and Dealers, training programmes for ASMs, and other checks and balances.]

"Simplified Mine Plan" means a document or documents that shows a sketch of the anticipated location of all facilities, waste and tailings piles, as well as ore anticipated to be mined over time, as well as all other development works that will be developed in order to access, remove and process such ore.

[The simplified 'mine plan' is really a basic outline of where the orebodies are relative to the SSML perimeters, where waste and other dumps may be located, etc. If completed it gives the Commissioner some confidence that an applicant has an idea of the property boundary, how and where mining will take place, etc. Unlike the MMC 'main stream' licensing regime, the simplified mine plan need not be certified by a qualified person.]

"Small Scale Mining Licence" means a Mining Licence issued to a person in respect of a proposed Small Mine.

[A Small Mine is defined in the Instrument Designating Mine Size.]

PART II Licence Grant

- Discretion to Grant* 1. (1) The Commissioner may issue a Small Scale Mining Licence in respect of a proposed Small Mine to:
- (a) any natural person who is lawfully resident in the Republic and has reached the age of majority;
 - (b) any company formed under the laws of the Republic whose shareholders and directors are lawfully resident in the Republic and have reached the age of majority; or
 - (c) any Dealer;

and any such natural person, directors or Dealer, in the case of Subsection 1(a), (b) and (c), respectively, shall be responsible for compliance with the Mining Act and its Regulations.

[The approach taken in the MMC is to regulate artisanal operations and very small mines, but to require a normal mining permit to engage in mining activities involving: (a) the movement of material in excess of [1,000] tonnes per day; (b) the use of water for power washing or enabling the movement of material through hydraulic pressure; or (c) the use of capital equipment in exceed of a value of [US\$500,000]. See Instrument Designating Mine Size. In addition, the SSM Regulation has adopted a unique system somewhat based on the CRAFT report of the Alliance for Responsible Mining and Resolve, whereby Dealers can apply for an SSML and 'formalise' artisanal operations from whom they are sourcing material. This may be invaluable where the local community members find it administratively difficult to apply for permits, such as where there is an inability to read, write or travel. Cooperatives can apply for an SSML through the formation of a corporation.]

(2) The application for a Small Scale Mining Licence shall set out the Blocks sought, the name of the applicant and such other information as may be required pursuant to Instrument, but in no event may a Small Scale Mining Licence be granted in respect of an area in excess of [two] Blocks.

[The size of a Block is to be specified by regulation and may vary by state.]

(3) Upon the grant of a Small Scale Mining Licence, it shall be recorded forthwith in the Registry.

Factors to Consider **2.**

(1) In considering whether or not the grant of a Small Scale Mining Licence is appropriate, the Commissioner shall consider:

- (a) the period of time in which the relevant land has been Open;
- (b) the location of any communities or Occupiers on or within the vicinity of the proposed Mining Area and the impact that Mining Operations might have upon such communities or Occupiers;
- (c) whether or not the applicant has submitted a Simplified Mine Plan, the reasonableness of the Simplified Mine Plan and the impact of the proposed Mining Operations on the environment;
- (d) the number of beneficiaries of the applicant, if more than one; and
- (e) in the case of an application by a Dealer, the terms upon which the Dealer proposes to engage any person or persons who will perform Mining Operations and whether or not the Small Scale Mining Licence will be transferred to any such persons.

[The rationale for considering these factors is the following: (a) where land has not been Open for at least 30 or 60 days, it may be appropriate to wait and see if any party wishes to secure an Exploration Licence to pursue a 'normal-size' deposit rather than a Small Mine; (b) if artisanal or small-scale mining operations are likely to disturb other land users, an assessment of the potential impact should be undertaken by the Commissioner in an attempt to avoid and prevent needless civil disturbances; (c) if the applicant has some understanding of the location of mineralization and the manner in which mining will be undertaken, this ought to position the applicant more favourably vis-à-vis the grant of an SSML and provide some evidence of the applicant's capacity to comply with the Mining Act and Regulations; (d) the number of people that will benefit from the Mining Operations so as to enable the Commissioner to weigh the grant of an SSML as against alternative uses and probable impacts; and (e) the benefits that will be conferred on local communities where the applicant is a Dealer.]

(2) For purposes of clarity, neither an Exploration Licence or a Feasibility Study is necessary for the grant of a Small Scale Mining Licence[,nor is Community Approval.]

[Clearly, these standards would result in an insurmountable obstacle to an artisanal miner. The only reason Community Approval is 'tentatively wrapped' is due to the fact that it is an optional section in the MMC; if adopted, the exclusory wording should be included in the SSM Regulation.]

(3) For purposes of clarity, no Dealer that holds a Small Scale Mining Licence may engage in Mining Operations directly.

[In order to avoid conflicts of interest, Dealer's may only serve as 'proxies' for ASMs. Dealers are expected to be honest brokers vis-à-vis the communities with whom they purchase mineral products.]

Denial of Licence 3. Where the Commissioner refuses to grant or renew a Small Scale Mining Licence, no appeal lies to Court.

[The SSM Regulation approaches the licensing of ASMs from the perspective of a state that is balancing the interests of ASMs, who are often relatively transient land users, as against the interest of other land users and the state itself (which has an interest in avoiding environmental damage for example). It treats ASMs as somewhat akin to 'tenants at will' prior to the grant of an SSML, but somewhat more secure rights once an SSML has been granted (vis-à-vis forfeiture).]

Annual Fee 4. There shall be no Annual Fee in respect of a Small Scale Mining Licence.

[The SSM Regulation eliminates virtually all obligations of a normal Holder under the MMC, save the firm obligation to sell mineral products to a Dealer. This latter requirement is critical to ensuring some indirect state engagement with ASMs and the imposition of some basic standards, such as the avoidance of child and forced labour.]

Term and Renewal 5. (1) Should the Commissioner determine to issue a Small Scale Mining Licence, the Small Scale Mining Licence shall be granted for a term of two years.

(2) A Small Scale Mining Licence may be renewed, on application therefor during its term, provided at least one Dealer Receipt has been issued during such term.

[The renewal of the SSML every two years permits the Commissioner to periodically review the licence in order to weigh the costs / benefits of the SSML. For example, negative impacts on community members or the adoption of poor operational standards might not be sufficient to forfeit the SSML, yet this might be sufficient to grounds to refuse a renewal.]

Transfer 6. (1) A Small Scale Mining Licence may not be transferred, subject to Subsection 6(2).

(2) Any person or persons qualified to hold a Small Scale Mining Licence may request the transfer of such licence from a Dealer, if performing Mining Operations with the relevant Mining Area.

[An SSML is intended to be personal to the ASMs. Transfers are permitted by Dealers to local community members in order to facilitate and formalize ownership. The intention of the Dealer to transfer the SSML is a factor that is required to be taken into account in the award of an SSML to a Dealer. In any event, a Dealer may not undertake mining activities directly.]

PART III Holder Obligations

Reporting by Holder 7. (1) The Holder of a Small Scale Mining Licence shall file an [annual] report with the Commissioner that:

- (a) specifies the number of persons actively engaged in Mining Operations as at the last day of such period;
- (b) outlines any complaints or protestations made with respect to the Mining Operations by any person or persons, including the name of any such person where an Occupier;
- (c) certifies that no Child or Forced Labour was engaged in Mining Operations during such period; and
- (d) includes all Dealer Receipts for product sold during such reporting period.

[The frequency of reporting should be tailored to the particular state / region (e.g., distance to Commissioner's office and the state of road and internet infrastructure). The information required to be reported is very easy to provide, even for the most poorly educated ASM. Moreover, a Dealer may provide the information on behalf of the Holder as per Subsection 7(3).]

(2) The report referred to in Subsection 7(1) shall be due within [90] days of the end of each anniversary date of the Small Scale Mining Licence, even if expired.

(3) Where one Dealer has purchased all product produced from a Small Scale Mining Licence during a reporting period, the Dealer may file the report referred to in Subsection 7(1) on behalf of the Holder.

[The SSM Regulation empowers Dealers to facilitate the formalization of the ASM sector and they have a vested interest in doing so in order to ensure that they can purchase mineral products legally. In this Subsection, a Dealer can file a report on behalf of an ASM, unless the ASM has been selling to more than one Dealer during the relevant year. If so, the expectation is that they are sufficiently sophisticated to be able to file a report once a year with very basic information.]

Sales to Dealer 8. (1) The Holder of a Small Scale Mining Licence shall sell products produced from Mining Operations only to a Dealer.

(2) The Holder shall obtain a Dealer Receipt, and a Dealer shall provide a Dealer Receipt, in respect of any such sale.

[Part of the 'formalisation' of artisanal operations is the establishment of a regulated mineral supply-chain (from Blocks to export markets or processing facilities) via licensed Dealers. The structure adopted in the SSM Regulation further enables small scale operators to fall into legal compliance by permitting interested Dealers to facilitate administrative filings on their behalf. Thus, a small artisanal or community mining operation that is supplying a single Dealer can avoid the administrative burden of acquiring an SSML (which can be done on their behalf by a Dealer), avoid filing basic annual reports (which can be done on their behalf by a Dealer) and avoid paying Royalty (which could be collected from Dealers or through compulsory sales to state agencies of any mineral products).]

PART IV Dealer Obligations

- Reporting by Dealer* **9.** (1) A Dealer shall file an [annual] report with the Commissioner that:
- (a) includes copies of all Dealer Receipts for product purchased during the reporting period;
 - (b) certifies that, after undertaking reasonable due diligence through at least one site visit during such period, no Child or Forced Labour was present in any Mining Area or engaged in any Mining Operations pertaining to any of the relevant Blocks referenced in any of the Dealer Receipts; and
 - (c) certifies that all applicable Royalty has been paid.
- (2) The report referred to in Subsection 9(1) and the payment of any Royalty shall be due within [90] days of the end of the applicable period.
- (3) Where the Commissioner requests additional information in respect to the calculation of Royalty, the Dealer shall comply forthwith.

[The regulation of Dealers is not addressed within this SSM Regulation; it is anticipated that a separate Dealer regulation would be approved to ensure that penalties, including the loss of a Dealer Licence, could be imposed for serious breaches of non-compliance.]

PART V Commissioner Obligations

- Training* **10.** (1) The Commissioner shall establish and make available to Holders of Small Scale Mining Licences and other interested persons training programmes providing guidance on:
- (a) the obligations of Holders of Small Scale Mining Licences arising pursuant to the Mining Act;

- (b) best practices and standards for environmental compliance, hygiene, safety, community engagement, mining, processing and accounting matters;
 - (c) the impact of deleterious elements, such as mercury and cyanide, on the environment;
 - (d) the use of Child labour on the future development potential of such children;
 - (e) the impact of Forced Labour on the well-being of affected persons and other community impacts;
 - (f) available equipment and monitoring devices to assist in Mining Operations and the purposes of any such equipment or devices; and
 - (g) such other matters as the Commissioner should determine.
- (2) The training programmes offered by the Commissioner shall be free of charge to any Holder of a Small Scale Mining Licence and offered at least once per annum in a location where accommodation and meals are made available to attendees at nominal cost.
- (3) The Commissioner shall consider, where relevant, the good faith efforts of the Holder to obtain appropriate training when exercising discretion pursuant to Subsections 11(2) and 11(2).

[The training model outlined in the SSM Regulation follows the example of Peru, where the Law on the Formation and Promotion of Small-Scale Mining and Artisanal Mining provides precedent and leadership.]

PART VI Forfeiture of Licence

Forfeiture

- 11.** (1) A Small Scale Mining Licence shall be automatically forfeit without any further action or notice where:
- (a) its term has expired;
 - (b) the Holder is no longer eligible therefor;
 - (c) the Holder has deliberately filed a false report; or
 - (d) the Holder has permitted a Child or Forced Labour to be used in furtherance of any Mining Operations.

[The existence of any of these conditions will result in automatic forfeiture. The reference to the use of children and forced labour

reiterates the seriousness of this particular standard to the community of artisanal and small-scale miners. The standard for filing a false report has been qualified by the word 'deliberate' so that only reports that are knowingly false will lead to loss of title. As this will always be difficult to prove, title will only be jeopardized when the attempt to mislead the Commissioner is manifestly obvious.]

(2) The Commissioner may also order a Small Scale Mining Licence to be forfeit in any of the following circumstances:

- (a) the Holder has systematically engaged in Mining Operations within the Mining Area or other areas prior to the grant of a Small Scale Mining Licence;
- (b) the Holder has not filed a report when due;
- (c) there exists no agreement by the Holder to compensate lawful Occupiers or other affected community members for access, egress or use of the Mining Area and, in all of the circumstances, the Commissioner is of the view that the resulting inequity or the potential for civil unrest does not justify continued Mining Operations;
- (d) there exists an agreement or order to compensate lawful Occupiers or other affected community members for access, egress or use of the Mining Area, which the Holder has breached;
- (e) the environmental impacts and other related harms that have arisen or are anticipated to arise from further Mining Operations do not justify continued Mining Operations; or
- (f) the cancellation is in the public interest.

[The power under Subsection 11(2) is discretionary. The existence of any of these conditions may or may not result in mandatory forfeiture of an SSML. The community impact and 'public interest' standards give the Commissioner broad discretion to consider any negative impact arising from the SSML in weighing a decision to compel its forfeiture. It is expected that the use of this power would be subject to constraints imposed by law in relation to the abuse of power by administrative agents and officers of the state.]

(3) An appeal lies to Court for an order of forfeiture.

[On appeal, the Commissioner would need to demonstrate his or her valid use of one of the forfeiture limbs.]

(4) Notice of forfeiture shall be recorded on the Register and the relevant Blocks shall not become Open until a period of 30 days following such notice or any decision upon appeal.

Holder Suspension

12. (1) Where a Holder of a Small Scale Mining Licence has had his or her Small Scale Mining Licence cancelled pursuant to Subsections 11(1)(c) or (d),

the Holder may not apply for a Mineral Right for a period of two years either directly or through another person that is Controlled by the Holder.

[The use of child or forced labour and the filing of deliberately false reports is clearly something worthy of sanction. Of course, nothing would preclude criminal prosecution for more serious breaches of law.]

(2) Where a Holder of a Small Scale Mining Licence has had his or her Small Scale Mining Licence cancelled pursuant to Subsection 11(2), the Commissioner may make an exclusionary order disentitling the Holder from applying for a Mineral Right for a period of two years either directly or through another person that is Controlled by the Holder.

[The power to exclude a person from benefits under the SSM Regulations is possible in the case of the other limbs of forfeiture where, generally, such a power would not be used. It would have to be a particularly egregious set of facts.]

PART VII Rights of Holder

Surface Rights

13. (1) The Holder of a Small Scale Mining Licence shall be entitled to carry out Mining Operations in respect of the land pertaining to the Mining Area, subject to Subsection 13(2).

(2) Where the land that is the subject of a Small Scale Mining Licence is Occupied, an Occupier may apply to the Commissioner for an order suspending Mining Operations pending an agreement or order to compensate the Occupier for access, egress or use of the Mining Area, including an order that his or her land or rights thereto be acquired in full and, in such case, the Fair Market Value of such land or rights shall be assessed and paid by the Holder to such Occupier.

[Unlike mainstream mining operations, where there is an absolute right to mine, small-scale miners have no such right under these Regulations; indeed, there is potential for an Occupier to apply to block mining operations permanently absent an agreement to acquire their land. This is an important distinction as the land may have more value as agriculture or grazing use than minor artisanal operations that might pocket the land with holes and cause disproportionate damage to its other or alternative uses. The regime encourages small-scale operators to not ignore other users of the land and to come to terms with them.]

(3) All reasonable legal costs incurred by a lawful Occupier in bringing an application pursuant to this section shall be paid by the Holder of the Small Scale Mining Licence, provided the lawful Occupier, prior to such application, made a proposal to the Holder to resolve the matter that was not unreasonable in all of the circumstances, even if greater than the award of damages made.

[This language tracks language found in the MMC.]

Processing

14. (1) The Commissioner may make an order directing the Holder of a Mining Licence to accept for processing any material produced by the Holder of a Small Scale Mining Licence that is located within a radius of [ten kilometres] of the Mining Licence.

[This is a very unusual provision that is bound to attract attention and critique. It is important to emphasise that there are important conditions to its operation, which are found below, and it is completely discretionary. Accordingly, the first hurdle would be that the Holder of the SSML have sufficient resources to bring an application in the first place.]

- (2) No order under Subsection 14(1) may be made unless the processing facilities of the Holder of the Mining Licence have the capacity and immediate operational capability to accept the relevant material for processing without alteration, damage or any other negative operational impact, excepting inconvenience, accounting and additional handling requirements.

[The wording is quite important here - in order to secure an order the ASM material has to be easily processed through active, operating facilities without deleterious elements that might cause damage to operations.]

- (3) Any such order shall consider the submissions of the affected Holders as to terms and conditions that ought to apply thereto, including processing terms and conditions that have been accepted by the Holder of the Mining Licence to process material supplied by any third parties.

[The Commissioner, with experience, would clearly need to set out the specifications for the material to be delivered so that off-spec material could be rejected; submissions as to commercial terms would be heard from both parties, but a processor that knew it might be the subject of an order could arrange third party purchases to demonstrate terms that were operative in the marketplace and lend guidance to the Commissioner.]

- (4) A Holder may appeal against such an order to Court and the order shall be suspended pending such appeal.

[An order compelling a commercial relationship between a processor and ASMs is not something that should be imposed lightly. Accordingly, the SSM Regulation gives the balance of power to the processor to enable an appeal against an unwanted order if it feels justified in refusing to accept the ASM material. This could arise for any number of reasons, including the failure of the Commissioner to understand that certain specifications as to material quality are essential to avoiding a threat to the good working order and condition of the facilities. It is expected that if little inconvenience arose from the order, the processor would readily resolve the matter on

commercial terms. Indeed, this would likely occur even prior to the making of an order; but the power to do so could compel a resistant processor to be a good neighbour to those smaller ASMs surrounding their operation.]

**[PART VIII
Other Provisions**

Exceptions

16. (1) Notwithstanding the foregoing part of this Regulation, it shall be permissible for:

- (a) the Holder of an Exploration Licence or Mining Licence, with consent of the Commissioner; or
- (b) the Holder of a Mining Licence that pertains to a Large Mine;

to authorize one or more individuals, who are eligible to hold a Small Scale Mining Licence, to undertake Mining Operations consistent with this Regulation within the boundaries of the applicable Mineral Right.

[There may be circumstances where a mining company or the developer of a large mine wishes to accommodate a local community by providing land available for artisanal activities. This may be important for quelling community objections to a larger development. As stated in the IFG report entitled “Global Trends in Artisanal and Small-Scale Mining: A. Review of Key Numbers and Issues” at page 33: “ASM [artisanal and small-scale mining] activities are increasingly in contact with LSM [large scale mining] operations, making the probability for conflict – as well as the potential opportunity for cooperation between the two – greater than ever before. ... Often, extensive mining concessions are given over to LSM companies without communities being informed or consulted. This leads to LSM companies essentially arriving overnight and dispossessing informal small-scale miners of claims they believe to be rightfully theirs through customary land tenure systems and traditional laws ... This can create significant tension and conflict if the community and miners are not actively and meaningfully engaged prior to the start of large-scale activities”]

(2) It shall be the responsibility of the Holder of the applicable Mineral Right to ensure that such individuals comply with the terms of this Regulation as if they held a Small Scale Mining Licence, including the provisions of Sections 7 and 8.

[Once again, the SSM Regulation attempts to ensure that as light a burden as possible is placed on ASMs. In this case, where the ASMs are operating under authority of a (large) Mining Licence, the Mining Licence is required to gather the information and regulate the activity taking place within the rules of this Regulation. This administrative assistance will be invaluable to the ASMs who are so authorized to

undertake Mining Operations.]

Mining Act

- 17.** (1) For purposes of clarity, the provisions of Parts I, II, III, VIII, X, XI and XII of the Mining Act apply in all respects to the Holder of a Small Scale Mining Licence, but the provisions of Parts IV, V, VI and VII do not apply to the Holder of a Small Scale Mining Licence.
- (2) Notwithstanding Subsection 17(1), the Holder of a Small Scale Mining Licence shall apply for Environmental Approval on the basis that the proposed Mining Operations constitutes Modest Impact Work and no review is available in respect of a decision to deny Environmental Approval or to grant Environmental Approval subject to conditions.