March 12, 2015

International Council on Mining & Metals
35/38 Portman Square
London, W1H 6LR
United Kingdom

Sent by email to: gpgfeedback@icmm.com

Re: Request for Stakeholder Feedback – Indigenous Peoples and Mining Good Practice Guide

We are writing to offer our investor perspective on the updated draft of Indigenous Peoples and Mining Good Practice Guide (the Guide)[1]. We appreciate the opportunity to provide input and commend the International Council on Mining & Metals (ICMM) for updating the Guide, which we believe will serve as a practical resource for mining companies with an interest in ensuring that mining projects bring long-term mutual benefits to companies and host Indigenous communities. We have previously provided feedback on ICMM's Indigenous Peoples and Mining Position Statement and see the Good Practice Guide as a strong companion document for the Position Statement.

With approximately C$6.7 billion in assets under management (AUM), NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders, and provide higher risk-adjusted returns to shareholders. The company evaluations, corporate engagement and research activities that we conduct to fulfill our responsible investment commitments give us insight into mining companies' progress in responding to ESG risks, the obstacles they face, and how appropriate standards could support their efforts. In this context, we would like to offer the following comments.

General Comments

In general, the draft Guide is a strong document that reflects current best practices. The Guide has numerous strengths and we commend ICMM for continuing to set a high bar for its member companies. As investors we are keenly aware of the risks associated with mining projects operating in or near traditional Indigenous or Aboriginal territories. We see the responsibility to ensure that these risks are mitigated from both a values and value perspective.

In accordance with the UN Guiding Principles on Business and Human Rights, we are responsible for understanding, and mitigating, the risks that our investments have in regard to impacts on human rights. We see Indigenous communities as being particularly vulnerable to human rights risks and believe it is our responsibility to ensure the companies in our

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[1] http://www.icmm.com/ips-gpg-feedback

portfolio are not contributing to the infringement of Indigenous rights. From a value perspective, our experience has shown us that companies who are proficient at building and maintaining strong and respectful relationships with local Indigenous communities tend to provide better long term returns while having a much lower risk profile. As such, the Guide represents a welcome risk mitigation tool for companies.

We support the efforts of the Guide to ensure compatibility with internationally recognized Indigenous Peoples' rights instruments, through references to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), International Labour Organization's Convention No. 169 (ILO Convention 169), and the IFC Performance Standards.

We agree that the extent to which Indigenous Peoples are legally recognized and their rights protected varies widely among countries. We very much support the Guide's adoption and acknowledgement of the broadest scope of Indigenous People's rights, by expecting companies to acknowledge and respect the rights of Indigenous Peoples even if there is no formal recognition of these rights by a host country, or if there is a divergence between a country's international commitments and its domestic law.

Our chief concern regarding the Guide is the lack of rights-based language. We believe the adoption of a rights-based framework is the best way to ensure that impacts on Indigenous rights are mitigated effectively. There are certain sections (discussed in our detailed commentary below) where we feel that utilizing the language of rights would strengthen the document and in turn make for a more effective risk mitigation tool for companies. Of particular interest to us is the treatment of the free, prior and informed consent (FPIC) expectation of the ICMM Indigenous Peoples and Mining Position Statement. As reiterated below, we believe that the Guide could provide stronger guidance in regard to the risks of proceeding without the consent of local Indigenous communities in those instances where the company has identified a significant breach of Indigenous rights as highly probable.

We appreciate the new structure of the Guide and feel that it has some practical advantages over the previous version. The draft Guide is now divided into two parts: good practice principles and practical tools for effectively managing Indigenous relationships. We believe by separating the toolkit from the principles, the Guide leaves capacity to adapt as best practices evolve and new engagement tools can be added.

We would point to SHIFT, an independent and non-profit center for business and human rights practice, as a good example of how guidance can be developed over time through an active workshop approach. SHIFT's mandate is to help companies put the United Nations Guiding Principles on Business and Human Rights into practice. Since its establishment in 2011, SHIFT has published a number of studies and workshop reports on specific human rights issues, which deepened companies' understanding on these topics. Similarly, ICMM could look to workshop specific tools with the intent of deepening member company knowledge while also refining the tool based on the feedback and experience of companies in the room.

We understand that case studies will be made available on ICMM's website when the Guide is published. We believe the inclusion of case studies, both positive and negative, brought significant value to the previous version of the Guide. We recommend that the Guide continue to include them, or at a minimum, provide direct reference and hyperlinks to the cases in the text of the Guide itself. We feel that ensuring the easiest access to the case studies, in order to maximize the actual use of them, will best support the goals of ICMM in creating the Guide. We have a perspective on what we believe are valuable case studies that would effectively illuminate many of the points raised in the Guide. Please let us know if it would be of interest to share those with you.

We also have a question in regard to if and/or how Indigenous perspectives were incorporated into the Guide's recommendations. Further, we believe the Guide could use an explanation of how Indigenous perspectives were gathered and incorporated.

We have the following, specific comments that are relevant to the respective chapters of the Guide.

Chapter 1.6 – Indigenous Peoples and Mining

The Guide correctly identifies the unique relationship Indigenous Peoples have with the land as a defining feature of Indigenous cultures. Table 1 likewise correctly identifies the potential environmental impacts that mining could have on traditional livelihoods and the tangible and intangible impacts of damage to culturally important landscapes. However, we note that discussion on the impacts of mining to Indigenous Peoples is increasingly utilizing a rights-based framework. In this context, there are a couple of additions that could be made in this chapter that might be helpful.

It would be useful to utilize the language of rights in this chapter, to reflect the growing consensus that Indigenous rights exist, and further, are inextricably tied to the lands Indigenous groups occupy. It is important to provide guidance to companies to ensure that when talking about the potential impacts of mining they are well aware that environmental impacts are likely to be considered to be rights impacts by Indigenous communities. Explicitly acknowledging this, and effectively internalizing it, should be beneficial to the creation of a strong relationship. For the purposes of the guidance, we would recommend an explicit recognition that potential impacts could include human rights impacts, and more specifically, Indigenous rights impacts. Further, a more detailed discussion of the link between environmental impacts and Indigenous rights would be helpful for companies navigating these risks.

Tool 2.1 - Impact Avoidance and Mitigation
This tool should have similar rights-based language for the purposes of consistency.

Tool 3.3 – Working to obtain consent: a suggested process across corporate engagement
We note that on page 85 there is some discussion of the link between social and environmental impacts that provides helpful context. This language would be made stronger by the inclusion of rights.

Tool 2.3 – Baseline studies and impact assessments

We have some related feedback specific to the identification of impacts that we believe could strengthen the document.

Similar to our feedback above, we note that the language of rights is not utilized in this section; instead, only social and environmental impacts are addressed. We strongly recommend this section in particular align with the language of the United Nations Guiding Principles on Business and Human Rights (the Guiding Principles)[2]. According to the Guiding Principles, companies are required to assess their human rights impacts as an integral part of human rights due diligence. This can happen in the form of a human rights impact assessment (HRIA). The Guiding Principles do not specify the form of assessment companies are required to undertake, therefore the process for assessing human rights impacts can be either a standalone process, or incorporated within other processes such as risk assessments or environmental and social impact assessments. Whatever form is adopted, these assessments should include all internationally recognized human rights as a

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[2] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

reference point. The Tool should explicitly acknowledge the responsibility to assess impacts from a human rights perspective and provide some guidance on best practice.

We encourage companies to conduct a HRIA at the earliest stage possible. As well, because human rights situations are dynamic, human rights impacts should be monitored regularly throughout the life of the mining project.

To enable companies to assess their human rights impacts accurately, HRIAs should be inclusive of community concerns and should be shaped through meaningful consultation with the potentially impacted Indigenous community. The Tool correctly identifies the need to involve Indigenous input and participation in assessing impacts, and this would extend to human rights impacts. Not only is this crucial to capturing the human rights concerns of the community, it is a critical opportunity for the company to develop a relationship with the community that is rights-based.

Although we respect the desire of companies to build internal human rights expertise, we believe companies should consider utilizing independent third-party expertise in performing HRIAs, particularly if there are tensions or human rights issues that are pre-existing. In regions where trust is an issue, we doubt that internal experts will be viewed as impartial by Indigenous communities. Regardless, we recommend the Tool be explicit about the expectations for human rights expertise (be it in-house or external) at all stages of the HRIA. In areas where stakeholder and community trust is a particular worry, companies could be encouraged to create a governance structure for the impact assessment that provides independent oversight of the assessment itself, similar to a steering committee. An oversight function that the local community understands (i.e. has representation that they know and trust) can alleviate concerns about the impartiality of the assessment.

The Tool recognizes that in some jurisdictions, Indigenous peoples are encouraged to conduct their own impact assessments. We strongly support Indigenous participation. However, there may be genuine capacity constraints that do not allow the Indigenous communities to have a thorough assessment of the impacts, which could have various unintended consequences. Having some form of capacity building would be necessary to mitigate these risks and potentially lead to more positive outcomes, and the Tool could explicitly reference this need.

We note that the Tool does not guide companies to incorporate consideration of cumulative impacts among the other impacts of the project. We acknowledge that the requirement to include cumulative impacts in environmental and social impact assessments is not universal across jurisdictions or even common practice, nor is it always easy to effectively determine cumulative impacts based on the availability of requisite information. However, despite these challenges, we believe that the level of acceptance of new mining projects will inevitably be strongly influenced by the communities understanding or perception of the cumulative impacts of development regardless of whether these are provided by the company. In this sense, not acknowledging or investigating the cumulative impacts is on the one hand a missed opportunity to strengthen community relationships by identifying potential impacts to mitigate while at the same time also opening the company to the risk of having these impacts defined for it. We believe it is in the best interests of all stakeholders to encourage the consideration of cumulative impacts in order to ensure that these impacts do not overwhelm the ability of communities to manage them effectively. Communities that reach this point have a much higher risk of rejecting proposed projects outright.

We note that *Tool 1.5 – Dealing with the challenges of engagement* raises the issue of legacy impacts from other projects negatively influencing the present-day relationship with communities. We would suggest that these legacy impacts are part of the cumulative impacts discussion and suggest that the section of Tool 1.5 that addresses legacy impacts could be broadened to discuss cumulative impacts instead.

In our discussions with companies who are attempting to implement HRIAs, we have been consistent in advocating for transparency on the results of the HRIA – at the very least to the communities who took part in the assessment. We believe that transparency is crucial to ensuring an ongoing and trusting relationship with the Indigenous communities, and is a fundamental driver of accountability. However, we are sympathetic to the argument that full public disclosure of results could potentially do more harm than good. Therefore, ethical and privacy considerations should be taken into account prior to disclosure. The Tool should consider providing some guidance on the merits of providing disclosure.

Chapter 2.2 – Understanding the local context for engaging with Indigenous Peoples

We strongly agree that it is important to ensure inclusivity at the earliest stage. In particular, companies need to be sensitive to those sections of the community who are frequently excluded from the decision making process, such as women and young people. The Guide does a very good job of making this clear, and the multiple references to ensuring that all gender perspectives are gathered (in both the main text and the accompanying tools) is commendable.

Likewise, the Guide provides helpful guidance to companies on taking the time to understand the often complex social dynamics of Indigenous groups in order to ensure that the broadest possible representation of Indigenous members are informed and their perspectives heard. The box on page 14 is very helpful in this regard. However, we do feel that the Guide could actually be more explicit in detailing the risks to the company of not expending the necessary effort to ensure the broader community is aware of the ongoing discussions between company and community leaders. There are numerous examples of agreements negotiated in good faith between companies and community leaders being derailed due to a lack of engagement with the broader community.

If the information on project impacts and details of any negotiations of proposed benefits is not shared beyond the formal leadership of the community, companies can be lulled into a false sense of confidence in regard to the level of support for the project. Communities can often have complex clan and familial relationships that result in leadership regularly swinging between competing clans or families. This can result in the decisions of the previous leadership group being overturned or at the very least downgraded in importance. This can include agreements negotiated with companies. Sometimes there can be quite virulent opposition to the project within a community (possibly due to a lack of information), that is outside of the formal leadership structure and can rear its head in the form of blockades, campaigns, or even violence.

The Guide does a good job of recommending how to address this issue while not offending formal leadership structures, but we feel the actual risk this is meant to mitigate is not adequately discussed. We feel the Guide would be strengthened by an explicit discussion of why inclusivity is not only advisable from the perspective of 'doing the right thing' but is actually a business imperative.

Tool 1.4 – Ensuring engagement is consistent with Indigenous Peoples' decision-making processes
Tool 1.4 provides some helpful guidance to companies on how to maintain consistency and respect for traditional decision making structures. Perhaps further guidance could be provided on how to identify potential internal divisions and how these divisions could impact the relationship and/or project.

Tool 3.1 – Making agreements
Page 73 notes that companies should encourage and assist communities to have an internal dialogue on the project. This would be an opportune place to reiterate the importance of ensuring this conversation happens.

Chapter 2.4 – Making initial contact

We strongly agree that the quality of initial contact between mining company personnel and local community members can set the foundation for a solid relationship and long-term trust. Challenges can easily arise if companies do not commit to open and transparent communication with Indigenous communities from the very beginning of a mining project. The practical actions listed in the Guide should be helpful in this respect. The use of local Indigenous advisors could be beneficial in ensuring a company understands the local protocols and customs, as suggested in the Guide. However, we believe the Guide could be stronger in acknowledging the risks that could accrue to these individuals should they be too closely associated with the company. Perhaps the Guide could recommend ways to ensure the independence of these advisors is both assured and transparent to community members.

We also agree with the recommendation to include senior management representation as much as possible in initial meetings as a sign of respect. We note from our experience that some of the strongest agreements are enacted precisely because of the commitment to the relationship shown by senior executives.

Tool 1.1 – Applying principles of good engagement
On page 42 of the tool, the Guide notes that the appropriate people should be present at the appropriate times, a recommendation we agree with. However, in the subsequent example the Guide states that the General Manager should be present at critical meetings. While there are clearly practical restraints to having more senior management present at all meetings, we believe that the appropriate level of leadership required at the most critical stages of negotiation is in fact much higher, if community leadership is likewise represented. This implies the presence of members of the senior executive leadership team, including the Chief Executive Officer, where practical. While perhaps not always possible, it is certainly preferable from a relationship building perspective and should be reflected as such in the Guide.

Chapter 2.6 – Free, Prior and Informed Consent (FPIC)

We are aware that ICMM is not intending to revisit the Indigenous Peoples and Mining Position Statement at this juncture. As such, the Guide is aligned with the position statement when it advises companies to consider for themselves whether they wish to continue involvement with a project if they have not received consent from the impacted community. However, we believe that in order to be consistent with the *intent* of the position statement the Guide requires some clearer guidance in the case of a lack of consent. The Guide as it currently stands may expose communities and companies to unnecessary risks.

In those instances where the company has not achieved FPIC, but in its due diligence has identified significant negative impacts on Indigenous rights, the Guide should be explicit in stating the risks inherent in this situation. Namely, that the company will be directly responsible for the infringement of Indigenous rights if it proceeds and will be exposed to legal, reputational, and social license risks. As investors, we would counsel companies to avoid proceeding in situations where such significant negative impacts have been identified and consent has not been acquired. If such guidance is not provided we believe the Guide should at the very least explicitly discuss the ramifications of proceeding without FPIC and recommend that the company seek further counsel from independent Indigenous experts before further action is taken. Ultimately, we believe that ICMM should revisit the topic of FPIC to consider if there are certain situations where it believes FPIC is mandatory in order to live up to the spirit and intent of the position statement.

We note that in *Tool 3.3 – Working to obtain consent: a suggested process across corporate engagement* – the Guide states that companies should perform proper due diligence to ensure that the project will *not* breach Indigenous rights. We

support this statement and note that the Guide is currently silent on what to do if that due diligence *does* identify a breach of Indigenous rights.

Chapter 3.4 – Environmental protection, rehabilitation and monitoring

We strongly agree that it is a good practice to partner with Indigenous peoples in identifying, planning, mitigating and monitoring environmental impacts. We particularly support the idea of involving Indigenous peoples in the collection and analysis of environmental monitoring data. Given the potential technical facility and skill constraints of Indigenous communities, there may be some level of capacity building required to achieve meaningful Indigenous participation. The Guide could encourage companies to plan for providing the necessary training and equipment to enable Indigenous Peoples to conduct analysis independently. We believe that this is a mutually beneficial method to ensure the Indigenous community is aware of the environmental impact of the mining project and is able to give ongoing, informed consent to it.

Chapter 3.5 – Preparing for mine closure

The Guide correctly identifies transparency and consultation with the community on mine closure plans as a way to increase the likelihood of positive post-mine development results. We note that the focus in this chapter is exclusively on the potential economic impacts of closure and how to mitigate them. These impacts are clearly important and worth addressing. We would suggest that best practice in addressing mine closure plans with Indigenous communities should also place a substantive focus on the environmental aspect of mine closure and reclamation. Communities should be consulted well before actual mine closure on the proposed plans to reclaim, remediate, or manage ongoing impacts once the mine is closed. We recommend that the Guide explicitly note the importance of incorporating Indigenous perspectives into the closure plan from an environmental point of view.

One of the key aspects that will need to be addressed, early on in the life of the mine, is the company's plan to ensure the reclamation of the mine site is adequately funded. Discussions should be had about reclamation bonds and other measures taken to ensure that adequate funds are available to address future remediation and reclamation needs.

Tool 3.1 – Making agreements

In regard to the discussion in Tool 3.1 on the confidentiality of the terms of company/community agreements, we would note the potential impact of mandatory transparency initiatives such as Canada's Extractive Sector Transparency Measures Act. Under the proposed legislation, it will be mandatory for companies to report publicly on the revenue provided to all levels of government, including Indigenous and Aboriginal governments. While the mechanism for how this works is still being determined, we believe that the Tool could benefit from an acknowledgement that this type of legislation could add complexity to negotiations in the future and should be acknowledged by all parties.

Indigenous Peoples living in voluntary isolation

We note that the Guide does not address how mining companies should manage the issue of operations near Indigenous Peoples living in voluntary isolation. Although there is no universally-accepted definition of this status, Indigenous Peoples living in voluntary isolation are, in general, Indigenous Peoples who do not maintain or have never had regular contacts with the population outside their own group, and who tend to refuse contact with such outside persons. Estimates indicate

that there are approximately 200 Indigenous groups in isolation in the Americas[3]. The Guidelines on Indigenous Peoples' Issues published by United Nations Development Group recognizes that Indigenous Peoples in voluntary isolation have the right to live freely in that condition and States should adopt adequate measures to protect their territories, environment, and cultures[4]. A former United Nations Special Rapporteur on the Rights of Indigenous Peoples has indicated in this regard that "we must respect the principle of no contact, which implies implementing a public policy that protects their vital spaces and preserves them from pressures by extractive companies, illegal logging, and unauthorized settlement in the area."[5]

As such, the exemplary engagement procedures outlined in this document would not apply to Indigenous peoples living in voluntary isolation. Rather, it is widely accepted best practice that companies refrain from any contact with these communities at all. The issue of Indigenous Peoples living in voluntary isolation is only topical in certain geographies, and clearly not the intended subject of the Guide. However, due to the seriousness of the potential impacts, we would recommend that ICMM reference the possibility of encountering this situation and provide clear guidance on how to mitigate the risks of contact. This could simply involve referencing other sites or standards.

Conclusion

In conclusion, we once again commend ICMM for its proactive effort to provide guidance for mining companies on building positive relationship with Indigenous Peoples and for the opportunity to provide feedback. We believe that if implemented effectively, it has the potential to establish constructive and mutually respectful relationships between Indigenous Peoples and mining companies. If you have any questions regarding this letter please contact **Jamie Bonham, Manager, Extractives Research & Engagement, NEI Investments (jbonham@neiinvestments.com; +1-604-742-8328)**.

Sincerely,

NEI Investments

Bob Walker
Vice President, ESG Services & NEI Ethical Funds

cc:
Board of Directors, NEI Investments
Ms. Michelle de Cordova, Director, Corporate Engagement & Public Policy, NEI Investments
Mr. Jamie Bonham, Manager, Extractives Research & Engagement, NEI Investments
Ms. Hanna Yang, ESG Analyst, NEI Investments

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[3] http://www.iwgia.org/iwgia_files_publications_files/0617_ENGELSK-AISLADOS_opt.pdf
[4] http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf
[5] http://unsr.jamesanaya.org/statements/ecuador-experto-de-la-onu-pide-el-fin-de-la-violencia-entre-indigenas-tagaeri-taromenane-y-waorani