



June 15, 2015

Barbara Bijelic, Legal Expert, Responsible Business Conduct
Organisation for Economic Cooperation and Development (OECD)
2 rue Andre Pascal, 75116
Paris, France

Sent by email to: barbara.bijelic@oecd.org

Re: Request for Comments – Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector

Dear Ms. Bijelic:

We are writing to offer our investor perspective on the draft OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector (the Guide).¹ We appreciate the opportunity to provide input and commend the OECD for creating a robust document that should further the intended goals of the OECD Guidelines for Multinational Enterprises.

With approximately C\$6.5 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 extractive 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 Guide is a strong document that reflects many current best practices. The Guide has numerous strengths and we commend the OECD for continuing to set a high bar for multinational enterprises. As investors we are keenly aware of the risks associated with extractive projects where stakeholder engagement has been poor or nonexistent. Effective stakeholder engagement is an essential test extractive sector companies must pass in order to qualify for our portfolio and we frequently exclude companies that do not have adequate processes in place. We are particularly interested in engagement that occurs with Indigenous communities and much of our commentary in this submission is specific to Indigenous engagement in particular. We see the responsibility to ensure that these risks are mitigated from both a values and value perspective.

¹ <https://mneguidelines.oecd.org/public-consultation-oecd-guidance-extractives-sector-stakeholder-engagement.htm>

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In accordance with the UN Guiding Principles on Business and Human Rights (Guiding Principles), 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 particularly vulnerable to human rights risks and believe it is our responsibility to ensure the companies in our portfolio are not contributing to the infringement of Indigenous rights. From an investment perspective, our experience has shown us that companies proficient at building and maintaining strong and respectful relationships with local communities (Indigenous and non-Indigenous) 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 note that the OECD Guidelines, subsequent to the 2011 update, now explicitly draw upon the Guiding Principles in defining the expectations placed on companies to respect human rights.² There is a tremendous overlap and confluence between the principles of due diligence as outlined in the Guiding Principles and as stated in the Guide. Effective stakeholder engagement is an integral aspect of proper due diligence on human rights impacts.

While the Guide does identify human rights among the issues that a due diligence process should encompass, we feel there is room for the Guide to reinforce the importance of the Guiding Principles and the requirement for due diligence on human rights impacts specifically.³ We recommend the Guide be more explicit in affirming that not only is meaningful stakeholder engagement a central feature of responsible business conduct and a smart business strategy, according to the Guiding Principles it is ultimately the company's responsibility to engage meaningfully with rights-holders. In other words, meeting the company's duty to respect human rights will in many cases require implementing the stakeholder engagement practices outlined in the Guide. We would like to see this relationship explicitly acknowledged in the guide.

We have the following specific comments that we feel would strengthen the document. However, we reiterate that in general the Guide is very comprehensive and we agree with much of the content that we have not addressed directly in this letter.

Recommendations to Management – Developing a clear policy framework on stakeholder engagement

The recommendations to management on developing a policy framework supported by senior management are all strong. We agree that the importance of stakeholder engagement needs to be acknowledged at the highest levels of the company. Annex B (Engaging with Indigenous Peoples) likewise outlines many best practices in engaging with Indigenous peoples (e.g. acknowledging traditional decision making structures, consulting on preferred engagement practices, providing support for participating in engagement, etc.). However, the Guide does not explicitly recommend that these Indigenous engagement practices also be codified in the policy framework. Whether these practices are documented in a separate policy statement on Indigenous engagement or within the stakeholder engagement policy, these expectations should be captured in a policy statement signed by senior management. As an investor, we do assess a company's commitment to Indigenous engagement in part by the presence, and strength, of Indigenous engagement guidelines and commitments.

² <http://mneguidelines.oecd.org/2011HumanRights.pdf>

³ Page 9 of the Guide references human rights along with disclosure, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, and consumer interests.



Recommendations to Site-Level Staff – Step 1: Ensuring staff leading on-site stakeholder engagement understand the local and operating context

We strongly support the inclusion of Human Rights Impact Assessments (HRIAs) in the discussion of effective impact assessment. We believe that HRIAs are a key tool for companies to understand and mitigate any potential human rights impacts from their operations. We have seen companies and communities derive significant and lasting benefit from the undertaking of a robust HRIA process. As such, we would like to see the visibility of this tool increased in the Guide, along with some key recommendations on how to make a HRIA effective.

To enable companies to assess their human rights impacts accurately, HRIAs should include community concerns and should be shaped through meaningful consultation. The Guide correctly identifies the need to involve community participation in the design and conduct of impact assessments (page 79), and this would also apply to HRIAs. 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. The assessment should be viewed as not only an effective strategy to mitigate impacts, but as an important foundation for community relationships and the strengthening of its social license to operate. The Guide could be explicit in acknowledging that the very act of engaging communities to identify potential impacts on human rights is a critical step in developing a rapport with the community.

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 communities. Regardless, we recommend the Guide 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.

In our discussions with companies 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 communities (in particular 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 Guide does note the importance of ensuring follow-through on agreements, commitments and remedies. The Guide should also consider providing some guidance on the merits of providing disclosure on impact assessments specifically. We believe this can ensure that the value of the assessment process is maximized.

Table I(2): Understanding Local Context to Shape Stakeholder Engagement Activities

Table I(2) correctly notes that special attention should be paid to potential cumulative impacts when understanding the local context. We believe this is a critical point that should be given greater visibility in the main text. For Indigenous communities in particular, the issue of cumulative impacts will weigh heavily on any proposed new projects.



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 extractives projects will inevitably be strongly influenced by the community's 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 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. Thus by not addressing cumulative impacts companies are increasing the risks facing their projects – risks that are subsequently borne by investors as well.

Recommendations to Site-Level Staff – Step 3: Establishing the necessary support system for meaningful stakeholder engagement

We support the Guide's suggestion that the company ensure staff are trained to understand the importance of cultural appropriateness and respectful behavior. This is clearly an important aspect of engagement that cannot be overlooked, in particular in relation to engaging with Indigenous communities. However, we believe the focus of the recommendation to be too narrow. The current wording does suggest training for all staff that *may* come in contact with stakeholders, but realistically this must cover the entire complement of employees as it is entirely possible that any individual working for the company could have a stakeholder interaction. The company needs to have a consistent understanding and cultural awareness across all employees. Further, creating an internal culture that acknowledges the importance of external stakeholders requires the buy-in of all employees – including senior management. This implies a recommendation that all employees receive training in this regard. Individuals tasked with actual stakeholder engagement responsibilities will of course require a higher degree of training, but the requirement for cultural awareness training should be applicable to all.

In regard to best practice in this space, we have seen companies enact a range of different training approaches, from online tutorials to in-person sessions. From our perspective we have seen companies derive the greatest benefit from in-person training that has been designed in conjunction with the local Indigenous community, and possibly even delivered by members of that community. We recommend that the Guide explicitly state the need for all employees to be trained in cultural awareness and to include the suggestion that companies work with local community members in the design of that training.

Recommendations to Site-Level Staff – Step 5: Ensuring follow-through

We strongly agree with the inclusion of ensuring follow-through as a core recommendation to site-level staff. Our experience with companies who have performed extensive stakeholder engagement processes is that this is possibly the most overlooked aspect of good stakeholder engagement. In particular, when impact assessments (such as HRIAs) have been performed there is often a lack of both follow-up and follow-through. This leaves communities with the sense that their concerns have not been heard and can lead to rifts in the relationship. Therefore the inclusion of this recommendation is valuable.

The only addition we would make to this section is that there should be a recommendation that companies consider public disclosure (such as in investor focused reporting or on the company website) on follow-through outcomes. For investors, this disclosure provides assurance that the company is actively mitigating impacts and thus actively mitigating risks to the



project and ultimately shareholders. Generally speaking, current disclosure in regard to follow-through is relatively sparse and does not provide the kind of assurance that investors require. There should however be caveats to full public disclosure such that privacy, confidentiality, and security issues are taken into account.

Annex B: Engaging with Indigenous Peoples

In general the document in its entirety, including the discussion in Annex B, provides a good framework for effectively engaging with Indigenous Peoples. We note that the Guide makes reference to several external sources that would provide greater detail on best practices and we support their inclusion. We do wonder if there was consideration of a separate document for Indigenous engagement in recognition of the unique nature of Indigenous rights. Perhaps future updates could separate the two. We have some comments that we feel would strengthen the document in its current form.

We believe Table B(1) could be strengthened with a deeper discussion of the complexity inherent in identifying decision makers in Indigenous communities. Relying too heavily on formal leadership structures can bring significant hidden risks. We feel the Guide could 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 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. These reversals can include agreements negotiated with companies. On occasion, there can be 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. Perhaps further guidance could be provided on how to identify potential internal divisions and how these divisions could impact the relationship and/or project.

We note that on page 80 the Guide recommends that companies respect the authority of community-chosen representatives, and we don't disagree with the concern relating to undermining these representatives. Companies do need to tread a careful line. However, companies also need to be aware of internal divisions and do have a role to play in ensuring community representatives are effectively engaging with their constituency. We suggest that the Guide could reference the discussion of how to do this respectfully that is found in the most recent draft of the *ICMM Indigenous Peoples and Mining Good Practice Guide*.⁴

Box 5: Identifying Indigenous Peoples

We agree that the extent to which Indigenous Peoples are legally recognized and their rights protected varies widely among countries. We support the Guide's adoption of ILO Convention No. 169 as the framework with which to identify Indigenous people. We recommend the Guide explicitly recommend that companies 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

⁴ See specifically *Chapter 2.2 – Understanding the local context for engaging with Indigenous Peoples*, and Tools 1.4 and 3.1



between a country's international commitments and its domestic law. This is currently implied in the text of Box 5, but not explicitly stated.

Box 6: Responding to Lack of Consent or a Refusal to Engage

In general, the Guide provides good guidance to companies in regard to the concept of free, prior and informed consent (FPIC). The discussion of why and how to undergo a consent seeking process is strong. Box 6 is particularly clear in its guidance that in situations where consent is not given, and there are identified adverse impacts to Indigenous rights, companies should not proceed with the project. We feel that this is not only best practice in regard to the duty to respect human rights it is also sound business advice. We support the clarity and conciseness of the approach taken and hope that this approach remains intact in the final version.

B. Identifying and applying best practices

While there are clearly practical restraints to having more senior management present at all engagement activities, we believe that including senior management representation as much as possible at critical meetings is 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 demonstrated by senior executives. We recommend that the guide also provide this guidance.

Indigenous Peoples living in voluntary isolation

We note that the Guide does not address how extractives 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 Americas⁵. 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 cultures⁶. 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."⁷

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 the Guide 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.

⁵ http://www.iwgia.org/iwgia_files_publications_files/0617_ENGELSK-AISLADOS_opt.pdf

⁶ http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf

⁷ <http://unsr.jamesanaya.org/statements/ecuador-experto-de-la-onu-pide-el-fin-de-la-violencia-entre-indigenas-tagaeri-taromenane-y-waorani>



Conclusion

In conclusion, we once again commend the OECD for its proactive effort to provide guidance for extractives companies on conducting meaningful stakeholder engagement. The document is strong and if implemented effectively, has the potential to establish constructive and mutually respectful relationships between communities and extractives companies. If you have any questions regarding this letter please contact **Jamie Bonham, Manager, Extractives Research & Engagement, NEI Investments** (jbbonham@neiinvestments.com; +1-604-742-8328).

Sincerely,

NEI Investments

A handwritten signature in black ink, appearing to read "Bob Walker", followed by a long horizontal line extending to the right.

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