



EARTHWORKS

July 31, 2023

Existing activities to enhance the environmental sustainability of minerals and metals, including best practices, responsible business practices, standards, guidelines, technical tools, environmentally sustainable technologies and the use of renewable energy in mining;

*Please include title/objective and a brief description of the activity/rationale*

### Free and Prior Informed Consent\*

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, is the main document and standard for Indigenous Peoples. The UNDRIP is the result of decades of struggle by Indigenous Peoples activists around the world and it enshrines the minimum standards for survival, dignity, and well-being for Indigenous Peoples globally.

In the Declaration, the collective rights of Indigenous Peoples to land, resources, and territory are protected. These rights cannot be found in any other human rights document.

Free, Prior, and Informed Consent (FPIC) is a collective right of Indigenous People to give or withhold their consent prior to any development project on their lands. It is very important to note that "consultation" does not equate to "consent". The Indigenous right to FPIC means that a community can say yes, no, or it can provide its consent with conditionalities depending on specific conditions and on a case by case basis, so they can say how.

As part of FPIC, Indigenous Peoples have the right to receive prior knowledge of the risks associated with a project before the company starts activities, to be protected from harassment and pressure or any type of coercion, to express their concerns and demands freely, and to say "no" to any company or project. Decision-making processes for FPIC should be developed by Indigenous Peoples themselves, should be independently supervised by authorities who have no vested interests in the projects in question, and should not be governed by box-ticking exercises that often violate cultural norms, provide insufficient information, and serve as marketing platforms.

It is imperative to codify UNDRIP and FPIC into binding documents in order to achieve a just transition that respects Indigenous Peoples' human rights, honours their strong connection with, and broad knowledge and wisdom of natural resources, and leaves no one behind. We need to move beyond voluntary guidelines, voluntary reviews, and voluntary audits to a framework that ensures and imposes legal responsibility for non-compliance for all types of companies.

*Dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions.*

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Even though FPIC is a specific right of Indigenous Peoples, FPIC can also be applied as best practice to other circumstances and is transferable to non-Indigenous communities.

\*These comments on FPIC were prepared in collaboration with the Securing Indigenous Rights in the Green Economy Coalition.

### Tailings management that prioritizes safety of impacted communities and the environment

There must be significant changes to the design, construction, operation, and closure of tailings facilities to prevent human rights violations and ecological damage. In the case of submarine tailings disposal, the outdated practice should be banned full stop.

In 2022, over 160 frontline community groups, Indigenous Peoples, environmental and human rights NGOs, and scientists from 32 countries endorsed a set of 17 guidelines for the safer tailing storage. The guidelines, *Safety First: Guidelines for Responsible Mine Tailings Management*, provide concrete steps that must be taken to move away from the riskiest technologies, to ensure consent from affected communities, to establish transparency and to hold mining companies accountable for implementing best practices. Unfortunately, other industry standards, including the 2020 Global Industry Standard on Tailings Management, do not go far enough to adequately protect communities and ecosystems from tailings dam failures.

Specific measures outlined in *Safety First* that should be considered by UNEA and members states as best practice for tailings management include:

- Operating companies must ensure the meaningful engagement, participation and consent of affected communities, including the right of communities to say no to tailings facilities;
- New tailings facilities must not be constructed if the operator cannot ensure the safe and timely evacuation of communities in the area, and where a tailings failure would materially impact public water supplies or critical habitat;
- Upstream dams must not be built at new facilities due to their demonstrated significant risk of failure, especially in seismic and wet climate areas;
- Filtered tailings should be considered best practice because eliminating or reducing the water content in and on tailings decreases the probability and consequences of failure;
- Design for tailing facilities must take climate change into account for both closed and operating facilities;
- Independent evaluations must be done for all aspects of tailings facility design, construction, operation, and maintenance. More detail on how to ensure and verify independence in Guideline 10 of *Safety First*;
- Operating companies must not be allowed to declare bankruptcy or sell to junior companies to avoid closure monitoring and liability and must provide sufficient funding and financial securities for closure and post-closure monitoring and maintenance;
- Operating companies must publicly disclose all information relevant to the safety of tailings facilities;
- Emergency preparedness and response plans (EPRPs), as well as compensation and indemnification criteria in case of catastrophic failures, must be prepared in advance with all

potentially affected communities, downstream agricultural producers and businesses, mine workers, first responders, and relevant authorities;

- Worst-case failure scenarios must be modeled, publicly disclosed, independently reviewed, and regularly updated;
- Operating companies must cover the costs of independent technical experts that are trusted and chosen by the affected communities and/or Indigenous Peoples impacted by their projects. These experts must be accountable to the communities, not the operating companies.

Ultimately, the safest tailings facility is the one that is not built. To avoid the long-term liability of mine waste sites and their social and environmental impacts, we must reduce the volume of tailings stored above ground, as well as the overall demand for primary raw minerals. This can be achieved through a waste mitigation hierarchy that includes:

1. Reduce the demand for metals and minerals by shifting away from disposable consumption and overconsumption.
2. Reduce the demand for new mines or expansion of existing mines by implementing circular economy solutions and minerals recycling, re-processing existing tailings, and deriving metals from other unconventional sources such as contaminated waters and other wastes.
3. Obtain commodities with the minimum production of tailings.
4. Maximize the conversion of tailings into useful and/or marketable products.
5. Maximize the use of tailings for the construction of mine infrastructure with proper safeguards in place to avoid contaminant leaching.
6. Maximize the backfilling of tailings into exhausted open pits or underground mine workings.

### Secondary Mineral Sourcing and Circular Economy

Secondary minerals sourcing must be actively promoted as a means of reducing demand for primary minerals and metals. This will require renewable energy technologies, and batteries, designed for disassembly and efficient recycling of all their material components, and investment into and incentives for building circular supply chains more competitive than linear ones. This is particularly true with regards to what are often referred to as “transition minerals”. There must be incentives for minerals recycling and requirements for companies to take back their products once they reach their end-of-life and laws should be passed that require original equipment manufacturers (OEMs) to meet minimum recovery rates by 2031, such as the [EU Battery Law](#).

### Mandatory Human Rights and Environmental Due Diligence and supply chain transparency

There is a growing global movement to legally require companies to undertake mandatory human rights due diligence across their supply chains. In addition to the recently passed EU Battery Directive, mandatory due diligence schemes are being proposed by civil society and/or at various levels of the legislative process in Mexico, Canada, the EU, and in the legislatures of more than a dozen European countries.

Any due diligence standard should align with the UN Guiding Principles on Business and Human Rights (UNGPs) and reflect mining companies’ past performance on human rights, anti-corruption, support for collective bargaining, project-level payment transparency, and beneficial ownership information.

Taken together, the UNGPs and the OECD Due Diligence Guidance for Responsible Business Conduct Guidelines and supporting guidance on mineral supply chains create an ongoing obligation of companies to implement Human Rights and Environmental Due Diligence (HREDD) to identify and address—through prevention or mitigation—the severe impacts these businesses cause the planet and people—women and girls in particular—in due consultation with affected rights-holders. Mining companies and mine operators should have oversight and responsibility for performing due diligence and report to regulators and underserved communities on performance.

HREDD involves assessing actual or potential adverse impacts on rights-holders, including Indigenous Peoples', integrating findings into management plans, taking action, providing remedy and gender-responsive grievance mechanisms when violations occur, and tracking and communicating externally on performance. It is an ongoing process, requiring periodic review and revisions as project operations and operating contexts change.

Mandatory HREDD is also bolstered when companies are required to be transparent with regards to their supply chains as it enables civil society and government to hold them accountable for any environmental harms and human rights abuses across their supply chains.

### Remining

Remining and reprocessing tailings, waste rock and other forms of mine waste may provide opportunities to access the minerals and metals needed for the energy transition, avoid the need for new virgin extraction sites, create economic opportunities for governments and communities, and help remediate abandoned or legacy sites with chronic contamination.

However, these potential benefits do not come without risk. Remining operations can reactivate pollution from waste that can lead to water, soil and air contamination. Remining tailings impoundments can cause stability issues that can result in failures, as was the case of the Jagersfontein failure in South Africa in 2022 and the Baia Mare failure in Romania in 2000. Additionally, remining has the potential to create large waste streams that will still need to be managed safely. Because mining projects, especially those associated with so-called “transition minerals,” tend to disproportionately harm Indigenous communities due to their close proximity to ancestral land, remining projects have the potential to exacerbate environmental injustice.

Currently there are no standardized industry-wide best practices for remining. Best practices are necessary for baseline mineral characterization; evaluation of effective and safe methods for mineral processing; understanding and safeguarding cultural and spiritual sites for Indigenous Peoples. They should also include guidelines for environmental, human ecological health; worker safety protections; emergency evaluation and preparedness; and requirements for financial bonding and insurance. At a minimum remining facilities should be required to adhere to all relevant mining regulations in their country of operation, and mining regulations and best practices should be updated to reflect the unique circumstances surrounding remining.

## Proposed opportunities for enhanced international cooperation

*Please include title/objective and a brief description of the activity; rationale or justification; as well co-proponents (if any), including names/organization and contact details*

Earthworks would like to submit the specific comments of our partner Salmon Beyond Borders to highlight an identified need for cross-border cooperation around tailings management in critical watersheds, especially when the sovereign lands of Indigenous Peoples are impacted.

Salmon Beyond Borders (SSB) is based in Southeast Alaska. Alaskans and Indigenous peoples are deeply concerned about the over 30 Canadian large-scale gold-copper mines and mine waste (“tailings”) dams in some phase of abandonment, exploration, development, or operation along shared Alaska-British Columbia transboundary rivers, without the consent of Tribes and Alaskans downstream.

SBB is focused on protecting and restoring healthy, productive watersheds, resilient ecosystems, and on responsible industrial development. For almost ten years, SBB has worked closely with communities, fishermen, businesses, scientists, and conservation organizations, alongside Tribes and First Nations on both sides of the Canada-U.S. border, who are already or will potentially be impacted by mining activity within British Columbia (B.C.) –including and especially along the Alaska-B.C. transboundary T'aaku (Taku), Shtax'héen (Stikine), Joonáx̄ (Unuk), and Nass Rivers, as well as around the transboundary Portland Canal.

Salmon Beyond Borders and Tribes, elected leaders at every level of government, businesses, sport and commercial fishing groups, conservation organizations, and thousands of individual citizens on the Southeast Alaska side of the international boundary have called repeatedly for the involvement of the U.S. and Canadian federal governments and the International Joint Commission in order to ensure the evaluation of potential projects along shared rivers meaningfully involves all jurisdictions. Despite this outcry, neither B.C. nor Canada has yet agreed to an international forum in which all jurisdictions in this transboundary region develop binding watershed protections for these iconic, salmon-rich rivers. This current situation is unacceptable to many Tribes and thousands of Southeast Alaskans.

**Salmon Beyond Borders fully supports the resolutions passed by multiple Southeast Alaska Tribes and nine Southeast Alaska municipalities in 2021-2022 calling on President Biden to secure, with Prime Minister Trudeau, two key provisions along the Alaska-British Columbia transboundary Taku, Stikine-Iskut, and Unuk-Nass Rivers:**

- (1) an immediate, temporary pause on permits for new British Columbia mines until binding watershed protections developed by communities and Indigenous and federal governments are in place;**
- (2) a permanent ban on earthen mine waste (“tailings”) dams.**

Salmon Beyond Borders is specifically interested in ensuring that safety comes first in mine waste tailings design. New reports, published in Summer 2022, detail the specific existing and proposed B.C. mine waste dams that are predicted to destroy ecosystems, wipe out infrastructure, and/or kill people when they fail. In his 2022 report, “The Risk of Tailings Dam Failure in British Columbia: An Analysis of the British Columbia Existing and Future Tailings Storage Database,” geophysicist Steve Emerman, Ph.D., states

that six of the twelve B.C. mine waste dams of greatest concern are located along Alaska-B.C. rivers, including those at the Eskay Creek and KSM gold mine projects in the Unuk and Nass River headwaters. **Emerman also refers to a quote of British Columbia Mount Polley mine expert review panelist Steven G. Vick, Ph.D.: “For closure [of every tailings dam], system failure is inevitable....”**

Moreover, the Center for American Progress (CAP) published a key report, “U.S. Diplomacy Can Prevent Canadian Mining Pollution from Flowing Into Alaska,” in April 2023. In this report, CAP recommends the U.S. government secure with Canada International Joint Commission involvement and Indigenous leadership for the Taku, Stikine-Iskut, and Unuk-Nass waterways. **The CAP report author Michael Freeman writes, “The dams used to capture and retain the toxic mine waste associated with gold mining are prone to leakage and collapse, putting Southeast Alaska communities, Tribes, and ecosystems at serious risk.”**

**Freeman also writes:** “Because of the momentum for critical minerals, British Columbia gold mining corporations have attempted to rebrand their mining operations as focused on extracting copper for the burgeoning electronic market.<sup>1</sup> But these are not critical minerals mines. While raw copper is indeed important for electronics and energy infrastructure, the low-grade copper ore in these deposits is extracted as a byproduct of the more valuable gold deposits. In fact, mineral deposits throughout the region are so rich in high-value gold that the industry has nicknamed the area “the Golden Triangle.” This gold extraction is not necessary for the transitioning economy; it simply enriches the wealthy. According to the World Gold Council, 93 percent of mined gold becomes jewelry or bullion, and extracting the amount of gold needed to create one gold ring generates 20 tons of waste.

Claims that these gold mines are “critical minerals” mines masks their true purpose; it also undermines the growing need for critical minerals to support clean energy expansions by taking advantage of new regulatory processes while putting sensitive ecosystems and the communities that rely on them at risk. The steady decarbonization of the energy, transportation, and industrial sectors presents an opportunity to transition to a clean economy with a net conservation benefit, and international cooperation will play a critical role in achieving this goal. President Biden and Prime Minister Trudeau have both stressed the need for a clean energy transition that protects ecosystems and communities—now is their chance to prove that commitment.”

## Text for non-prescriptive proposal(s)

*Please include title/objective, description, rationale/justification and the text of the non-prescriptive proposal(s)*

### UNEP leadership in Global Tailings Management Institute

On its website, UNEP is described as a leader and “the global authority on the environment and has the global convening power to bring all environmental stakeholders together, provides strong science policy data and solutions to its Member States, and effectively raises awareness about critical environmental issues”. UNEP also plays a critical role as a convener in the Global Tailings Management Institute (GTMI). UNEP should leverage its position as a global convening power to work with Member States, communities and civil society to identify to document gaps in the current Global Industry Standard on Tailings Management (GISTM) and it should spearhead a process for future revisions of the standard that address those gaps. It also should take an active role in ensuring that the GTMI is a truly independent body, not captured by interests from the mining industry, by actively recruiting and ensuring representation of Indigenous Peoples, impacted communities, labor and civil society on the GTMI Board. The proposal from the GRULAC regional consultation to continue convening the National Focal Points in a working group on tailings management and the GISTM could be a mechanism to facilitate the engagement with stakeholders and to support UNEP its role in the GISTM.

### Re-mining Best Practices

Given the interest from Member States during the regional consultations to explore and promote re-mining, UNEP should convene a multi-stakeholder process, including Indigenous Peoples, impacted communities, independent technical experts, and labor, in order to identify and promote best practices to regulate re-mining activities. A focus could be placed on developing suggestions for regulatory frameworks that take into account the risks and opportunities presented by re-mining including the social, environmental and economic impacts.

### Abandoned Mine Inventories

Earthworks supports the proposal made by the EEG intergovernmental consultation of an “initiative to develop an inventory or inventories of abandoned mine sites, including enhanced collection and dissemination of data and knowledge on environmental risks posed by these mines, to assist safer management.” Abandoned mines pose risks to downstream communities, ecosystems, as well as national and transboundary watersheds. A comprehensive database of these facilities would help Member States and other stakeholders assess these potential risks and create adequate emergency preparedness and response plans. Any inventory should include multi-stakeholder input in the design stages, contain information on risk analysis on a site by site basis, and be made publicly available.

### Free and Prior Informed Consent and Human Rights and Environmental Due Diligence

Any standards, guidance documents, reports, best practices, or other tools developed by UNEP or in relation to the UNEP/EA.5/Res.12 on mineral governance should specifically require the Free and Prior Informed Consent of Indigenous Peoples as established in The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169. It is important for Member States and UNEA to distinguish between the sovereign right to FPIC of Indigenous Peoples and a process of meaningful

engagement with impacted communities, as established in the OECD Guidelines, for example. In order to ensure the right to FPIC is recognized for Indigenous Peoples, Member States should ratify a resolution that establishes mechanisms for codifying FPIC in mineral supply chains.

Similarly, requirements for Human Rights and Environmental Due Diligence should also be included in any documents developed by UNEP in relation to the UNEP/EA.5/Res.12 on mineral governance and UNEA 6 should include a resolution to ensure HREDD across mineral supply chains.