

# Canada's National Contact Point's Final Statement - Seabridge Gold and the Southeast Alaska Conservation Council

13 November, 2017

## Summary

1. A Request for Review (RfR) was submitted to the Canadian National Contact Point (NCP) on 23 December, 2016 by the Southeast Alaska Conservation Council (SEACC), an NGO based in Alaska, USA, regarding allegations focussed on the company Seabridge Gold (Seabridge or “the Company”), concerning its Kerr-Sulphurets-Mitchell (KSM) Project in British Columbia (BC), Canada.
2. In the Request for Review (RfR), SEACC (the “Notifier”) makes a series of allegations related to disclosure, stakeholder engagement and environmental and human rights due diligence and states that the Company’s actions constitute non-observance of the OECD Guidelines.
3. The NCP is a dialogue facilitation mechanism to help parties resolve issues around the implementation of the [OECD Guidelines for Multinational Enterprises](#). The Canadian NCP followed the procedures prescribed in the Procedural Guidance to the OECD Guidelines (section C, page 72 of the 2011 edition) and the [NCP Procedures Guide](#). A summary of the NCP process is included in the Annex 1.
4. As per its procedures, the NCP conducted an initial assessment and reviewed all the documentation submitted by the Notifier and the company’s submission. The NCP did not find that the issues raised in the RfR with respect to disclosure, stakeholder engagement and environment and human rights due diligence, would benefit from an intervention from the NCP in the form of facilitated dialogue or mediation. The NCP rationale is explained below in the section on the NCP Initial Assessment.
5. The NCP thanks the parties for their good collaboration with the NCP during this process. The NCP makes the following recommendations to the parties and closes this specific instance.

## NCP Recommendations

6. The NCP recommends that Seabridge and SEACC meet and discuss in good faith, independently of the NCP process, with the goal of resolving any misunderstanding and outstanding concerns.
7. The NCP recommends that Seabridge continue to consult stakeholders, including Alaskan stakeholders, in the development and implementation of follow-up and monitoring programs

described in the Government of Canada's Comprehensive Study Report, British Columbia's Environmental Assessment Certificate, and in federal and provincial permits and authorizations that may be sought.

8. The NCP recommends that Seabridge officially and publicly endorse the [OECD Guidelines for Multinational Enterprises](#) as part of its corporate social responsibility policy framework, and implement them throughout its various activities and operations.

9. The NCP recommends that Seabridge endorse and implement the [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#).

## **The Request for Review and the Parties**

10. The Request for Review was submitted by the Southeast Alaska Conservation Council (SEACC), an Alaskan non-profit corporation headquartered in Juneau, Alaska, USA. SEACC is a member-based organization including Alaskans who participate in the commercial, recreational and subsistence uses of fisheries and wildlife in Southeast Alaska. It is dedicated to the conservation of natural resources, including watersheds and fisheries, in the region.

11. The request is focussed on the Kerr-Sulphurets-Mitchell project, a gold, copper, silver and molybdenum deposit, located approximately 65 kilometers northwest of Stewart, BC, Canada, and about 35 kilometers northeast of the Alaskan border. Seabridge Gold has proposed to develop the deposit into a combined open-pit and underground mine. Seabridge Gold is a Canadian mining company, incorporated in British Columbia and headquartered in Toronto. The company owns assets in Canada (BC and the Northwest Territories) and in the United States (Nevada).

12. The Notifier's Request for Review makes allegations regarding Seabridge's actions related to disclosure, engagement of stakeholders and due diligence with respect to environment and human rights, as summarized below:

- Regarding disclosure: that Seabridge failed to fully disclose its plans to avoid, mitigate or prevent all environmental concerns identified by SEACC, inter alia.
- Regarding engagement of stakeholders: that the Company did not provide for open, meaningful and timely engagement with SEACC and did not take meaningful account of issues and concerns raised by SEACC and other Alaskan stakeholders, inter alia.
- Regarding due diligence on environment and human rights: that Seabridge failed to consider or plan mitigation for the following, inter alia: environmental concerns and expected negative impacts of several contaminants on water and downstream fisheries; acidic conditions; recommendations of the Mt Polley investigation; impact on and loss of vital fish habitat; cumulative impacts; financial plans for the water treatment required over a 250 year period; avoid causing adverse impacts on human rights to clean water, healthy resources, and traditional and subsistence fisheries.

13. The NGO alleges that the Company's actions constitute non-observance of the OECD Guidelines and cites the following paragraphs of the OECD Guidelines (the full text of these paragraphs can be found in Annex 2):

- Chapter II – General Policies: section A, paragraphs 10 and 14
- Chapter III – Disclosure: paragraphs 1 and 2
- Chapter IV – Human Rights: paragraphs 1 to 6
- Chapter VI – Environment: paragraphs 1a), 1b), 2b) and 5.

14. The Notifier seeks a total of 15 specific remedies from the Company (2 related to disclosure, 5 for stakeholder engagement, and 8 related to due diligence). Some of the remedies sought are highlighted below:

- Timely, accurate and full disclosure of steps taken to avoid and mitigate environmental harm;
- Steps to be taken to identify and disclose liability mechanisms for reparation of environmental damage;
- Full and timely consideration of concerns raised by stakeholders;
- Signed commitment to implement the OECD Guidelines and changes into company policies;
- Dispute resolution and damage payment mechanisms for downstream Alaskan interests;
- Adequate consideration and due diligence of the foreseeable environmental impacts;
- Adaptive management plan for downstream impacts; and,
- Creation of a funding source for environmental monitoring and remediation;
- Commitment to halt further development of the mine or related infrastructure until after meaningful engagement of stakeholders has occurred.

15. The Notifier requests the NCP's good offices through facilitated dialogue or mediation with the Company.

## **Key Timelines**

16. The following provides the main milestones of the NCP process:

- 23 December 2016: NCP receives the RfR from the Notifier
- 28 December 2016: NCP Secretariat acknowledges receipt of the RfR
- 6 January 2017: NCP contacts SEACC to explain the process and seek consent for transmitting to the Company
- 13 January 2017: NCP calls the VP Environment of the Company
- 16 January 2017: NCP Chair letter to the CEO of the Company
- 19 January 2017: NCP meets with representatives of the Company at the Company's request
- 2 February 2017: NCP receives Company's submission in response to the RfR
- 28 February 2017: Company consents to share non-confidential parts of their submission with SEACC
- 3 March 2017: NCP forwards a redacted version of Company's submission to Notifier

- April 2017: NCP completes its initial assessment
- Early May 2017: Calls with each party to inform of the outcome of the initial assessment
- 24 October 2017: Draft Final Statement shared with parties

## **Context on the Project**

17. The KSM project was subject to both a federal environmental assessment under the *Canadian Environmental Assessment Act (S.C. 1992, c.37, 1992)* and a provincial environmental assessment under British Columbia's *Environmental Assessment Act (SBC 2002, c.43)*. While the conduct of the environmental assessments was coordinated, each level of government remained responsible for making its own final environmental assessment decision for the project. The environmental assessments involved participation by expert and technical federal and provincial authorities, representatives of United States federal and Alaskan state agencies, potentially affected Canadian Indigenous groups, Seabridge and other relevant stakeholders.

18. The environmental assessment processes afforded several opportunities for public comments, including from United States residents:

- In June 2010, the public was invited to submit comments on the scope of the federal environmental assessment;
- In July 2010, the public was invited to submit comments on the project and the conduct of the federal environmental assessment;
- In September 2013, the public was invited to comment on Seabridge's detailed Environmental Impact Statement / Application and participate in open-house meetings; and
- In July 2014, the public was invited to provide comments on the federal Comprehensive Study Report.

19. At the conclusion of the provincial environmental assessment, in July 2014 British Columbia's Minister of Environment and Minister of Energy and Mines issued an Environmental Assessment Certificate for the project which includes 41 legally-binding conditions. Following completion of the federal environmental assessment and taking into account public comments, in December 2014 Canada's Minister of the Environment concluded that the project was not likely to cause significant adverse environmental effects with the implementation of mitigation measures described in the Comprehensive Study Report. The Minister then referred the project to Environment and Climate Change Canada, Natural Resources Canada and Transport Canada to ensure the implementation of mitigation measures and a follow-up program, which are to determine the effectiveness of the measures taken to mitigate any adverse environmental effects and to verify the accuracy of the environmental assessment of the project.

20. In addition to this, permits under various federal and provincial statutes are required in order for the project to proceed. Seabridge continues to work with federal and provincial authorities to secure the required permits, licenses and authorizations.

## **Company's Position**

21. The Company's position as presented in its written submission to the NCP is summarized as follows:

- While the OECD Guidelines are not applicable to Canadian companies pursuing Canadian projects, Seabridge has complied with them, through meeting relevant Canadian federal and provincial laws and regulations.
- In a number of cases, the Company's engagement has exceeded the legal requirements such as consultations with Alaskan stakeholders, not required under Canadian law.
- Regarding disclosure, SEACC has extensive access to project information from Seabridge and the EA agencies (baseline data, potential environmental and health impacts, foreseeable risk factors, mitigation and adaptive management plans, and engagement). There is no additional information that can be disclosed that has not already been disclosed during the EA processes or through the project website. Baseline data collection was not done in Alaska because of an absence of authority and because, as alleged by the Company, Alaskan Tribes did not accept or respond to the Company's offer of funding.
- Regarding stakeholder engagement: the company has conducted several timely and good faith consultations with Alaskans, including SEACC (public information sessions, meetings with SEACC and Alaskan aboriginal groups, inter alia, letters and emails), while there were no legal requirement to consult Alaskan stakeholders. The Company continues to provide presentations at various events in Alaska regarding the project. Seabridge continues to be open to meaningful dialogue with SEACC and other stakeholders and would welcome their questions. Major design changes and mitigation measures were incorporated further to the stakeholder feedback received. Contrary to allegations, the Company did not ignore follow-up requests from SEACC. Further, Seabridge had to demonstrate that the project meets the environmental and economic, social and cultural well-being related provisions of the Nisga'a Final Agreement between Canada and the Nisga'a Nation. The Canadian and BC governments concluded that Seabridge conducted significant meaningful engagement with all concerned parties including Alaskans.
- Regarding due diligence on environment and human rights: Seabridge's due diligence is outlined in the company's application for the EA certificate, including a multi-year 35,000 page environmental assessment. Water quality, fisheries related impacts and cumulative impacts, characterized as human rights by SEACC, were addressed in the EA. Seabridge implemented an Independent Geotechnical Review Board as recommended by the Mount Polley Panel Report. One benefit agreement and one environmental agreement were negotiated by the Company with two BC First Nations. The BC and federal governments both concluded that the project was not likely to cause significant adverse environmental effects, taking into account the proposed mitigation measures. The CEAA also concluded that "identified mitigation measures for the project would address potential impacts in Alaska on fish, on recreational and commercial fisheries and on human health from changes to water quality and quantity in the Unuk River".

## **The NCP's Initial Assessment**

22. It is worth recalling that an NCP initial assessment is not a determination on whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines, although the NCP can make such a determination at its discretion during an NCP process. The initial assessment is an indication whether the NCP considers that an NCP-led dialogue between parties could be useful to resolve disputes related to the issues.

23. As per NCP procedures, the NCP reviewed all the information presented in the submission from SEACC, the information submitted by the Company, and conducted an initial assessment using the criteria listed in the NCP Procedures Guide and the Guidelines' Procedural Guidance as follows:

- the identity of the party concerned and its interest in the matter;
- whether the issues are material and substantiated;
- whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
- the relevance of applicable law and procedures, including court rulings;
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

24. As per NCP procedures, in order to operate with full transparency, the NCP's goal is to share, among the parties, the information received from both parties. Procedures also indicate, however, that in order to facilitate the resolution of the issues raised, the NCP can take appropriate steps to protect sensitive business and other information. Thus, to be able to balance transparency and confidentiality, the NCP procedures require seeking the party's agreement to share some or all of the information that it may provide to the NCP, with the other party. Seabridge provided a comprehensive response to the specific allegations and consented to share most of it with the Notifier. The Company asked the NCP to keep certain commentary and information in its submission confidential for commercial reasons. The NCP accepted the justification.

25. Through its initial assessment, while the NCP found that the issues were material to the Guidelines, the NCP did not find that the issues raised in the RfR would benefit from an intervention from the NCP in the form of facilitated dialogue or mediation. The rationale is presented below.

26. Regarding allegations with respect to disclosure: All reports and studies prepared by Seabridge are available from the Canadian Environmental Assessment Agency or British Columbia's Environmental Assessment Office. Key documents are posted online on the [Canadian Environmental Assessment Registry](#) and on [British Columbia's Environmental Assessment Office Project Information and Collaboration site](#). The NCP has found that Seabridge disclosed all its relevant studies and plans related to environmental impacts.

27. Regarding allegations on stakeholder engagement: the Company's submission to the NCP which was transmitted to the Notifier contains evidence that the Company held consultations in

2011 with Alaskan stakeholders in Alaska, which SEACC attended, despite the fact there was no legal obligation to consult Alaskan stakeholders. Over the period 2013-2016, communications and meetings between the Company and SEACC took place, as well as with some Alaskan aboriginal groups, namely the Tlingit-Haida Central Council of Alaska and the Southeast Alaskan Tribal Council. The Canadian Environmental Assessment Agency noted these facts in its Comprehensive Study Report for the project. The project proponent is required by law to do extensive consultations during the environmental assessment. Of note, both the federal and provincial environmental assessment agencies also conducted public consultations. The NCP received evidence in the Company's submission that concerns of stakeholders were integrated into the environmental assessment processes and did lead to changes in project design.

28. Regarding allegations on due diligence (environment and human rights): As described in paragraph 17 of this Communiqué, the KSM project was subject to a rigorous and detailed environmental assessment process by both the federal and provincial governments. British Columbia granted the project an environmental assessment certificate in July 2014. In December 2014, Canada's Minister of the Environment concluded that the project was not likely to cause significant adverse environmental effects with the implementation of mitigation measures described in the federal Comprehensive Study Report. The review of potential negative impacts and the design of mitigation of such impacts is a major component of environmental assessment processes, as required by law. The NCP understands that all potential negative impacts were examined in both processes and that mitigation measures were identified where needed. It is important to clarify that the NCP does not review decisions of other governmental agencies. In addition, it is useful to note that the *Canadian Environmental Assessment Act (S.C. 1992, c.37, 1992)* requires that all federal environmental assessments consider the effect of any environmental change caused by the project on the current use of lands and resources for traditional purposes by Aboriginal peoples.

## **NCP Conclusions**

29. Based on the rationale explained above, the NCP has decided not to offer a facilitated dialogue or mediation to the parties and to close the specific instance.

30. The NCP would like to thank Seabridge and the Notifiers for their cooperation with the NCP during the process. While the NCP accepted the justification provided by the Company to keep parts of its submission confidential, the NCP reminds the parties that its default modus operandi is to share all information received from one party with the other party. The NCP did not use the information provided in confidence by the Company to make its decision.

31. The NCP wishes to recall that the OECD Guidelines Chapter II – General Policies, paragraph 14 (page 20) states that companies should engage with relevant stakeholders to provide them with meaningful opportunities for their views to be taken into account in relation to planning and decision making.

32. The company may find useful guidance in the [\*OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector\*](#). The guide, which includes targeted guidance for two-way, responsive and participatory stakeholder and community

participation, offers practical tools for companies to help them implement the provisions of the OECD Guidelines on due diligence for effective stakeholder engagement as per paragraph 14 cited above. Best practice is regular, frequent, and formalized engagement of stakeholders.

33. The Guidelines and this associated due diligence guidance are relevant and applicable to all mining companies and in all countries, not just developing countries. In particular, the NCP wishes to clarify with the Company that the Guidelines apply to Canadian companies regarding their Canadian projects or operations, and not just their activities in foreign countries.

34. The NCP also notes that the Company indicated several times throughout its written submission to the NCP that it has been and continues to be committed to engaging with Alaskan stakeholders, including SEACC, regarding the project, and that it is open to meaningful dialogue with SEACC and would welcome their questions, in person or via correspondence.

35. In concluding, while not offering an NCP-led dialogue or mediation, the NCP nonetheless, consistent with its mandate, is encouraging parties to maintain a constructive line of engagement and communication on the issues raised by the Notifier. Consistent with its promotion mandate, the NCP also makes several recommendations to the Company that are intended to further the implementation of the Guidelines by the Company.

## **Annex 1: OECD Guidelines and the NCP Process**

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct (human rights, labour, environment, disclosure, corruption...) in a global context consistent with applicable laws and internationally recognized standards.

National Contact Points (NCPs) are a voluntary, non-judicial dialogue facilitation mechanism. Established through countries' adherence to the OECD Investment Declaration, they are mandated to: (a) promote the adoption of the OECD Guidelines for Multinational Enterprises on responsible business conduct by companies, as guiding principles in their day-to-day operations, and (b) facilitate dialogue between companies and affected parties, when specific issues related to a company's operations fall within the scope of the Guidelines. The process to be followed by the Canadian NCP in dealing with issues that arise relating to the implementation of the Guidelines in specific cases is prescribed in the Procedural Guidance to the OECD Guidelines (section C, page 72 of the 2011 edition) and further explained in the Canadian NCP Procedures Guide.

Following the receipt of a request for review, the NCP conducts an initial assessment to review the issues raised. In doing so and in determining whether to offer its good offices to the parties in the form of mediation or facilitated dialogue, the NCP takes into account a number of factors, as outlined in paragraph 25, page 83 of the 2011 edition of the Guidelines.

If the NCP establishes that a facilitated dialogue could potentially address the issues raised, the NCP can offer to the company and those making the claim to participate in a facilitated dialogue



or a mediation on a voluntary and good faith basis. The objective of a dialogue is for parties to establish a better understanding of the issues and identify a path forward and/or solutions to the concerns identified in the submission to the NCP. The Canadian NCP is not required by the OECD to render a finding of “breach” to the Guidelines, but it can do so, at its sole and entire discretion. It is not the role of the Canadian NCP to provide the remedy. The NCP offers a neutral forum for a facilitated dialogue or mediation, for parties to find solutions together, when there is reason to believe that such dialogue can help parties find mutually agreeable solutions, while advancing the implementation of the OECD Guidelines by companies.

Whether the NCP offers its good offices to the parties or not, and whether there is any agreement or not between the parties, the Procedures require the NCP to make the results of its proceedings publicly available by publishing a Final Statement on its web site.

## **Annex 2: Sections of the OECD Guidelines cited in the Notifier’s Request for Review.**

### **Chapter II. General Policies**

- Paragraph A(10): Enterprises should...carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- Paragraph (A)(14): Enterprises should ... engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

### **Chapter III – Disclosure**

- Paragraph 1: Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
- Paragraph 2: Disclosure policies of enterprises should include, but not be limited to, material information on: ... f) foreseeable risk factors [and] g) issues regarding workers and other stakeholders.

### **Chapter IV - Human Rights**

- Enterprises should:

- Paragraph 1: Respect human rights, which means avoiding infringement on the human rights of others and address any adverse human rights impacts with which they are involved.
- Paragraph 2: Within the context of its own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- Paragraph 3: Seek ways to prevent or mitigate adverse human rights impacts directly linked to its business operations, products or services by a business relationship, even if it does not contribute to those impacts.
- Paragraph 4: Have a policy commitment to respect human rights.
- Paragraph 5: Carry out human rights due diligence as appropriate to its size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
- Paragraph 6: Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts when it has caused or contributed to these impacts.

## **Chapter VI – Environment**

- Paragraph 1.a): Establish and maintain a system of environmental management appropriate to the enterprise, including...collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities.
- Paragraph 2.a): Provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance.
- Paragraph 2.b): Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.
- Paragraph 5: Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.

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**Link to the website:** [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final\\_stat-seabridge-comm\\_finale.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-seabridge-comm_finale.aspx?lang=eng)