

CMSI Consultation Response

Respondent Details

NAME

AnnaMae Dziallo

COUNTRY

United States

PERMISSION

Yes, CMSI can disclose my feedback, name, and organisation.

STAKEHOLDER

Indigenous peoples / organisation

ORGANISATION

First Peoples Worldwide at CU Boulder

COMMENTS & QUESTIONS BY DOCUMENT

Document:
Governance

QUESTION 1

The governance principles that guided the development of the governance model are inclusive, effective, credible, impact-driven, pragmatic and efficient. From your perspective, does the proposed governance model meet expectations for consistency with these principles?

Response: **1: Significantly below**

QUESTION 2

Does the proposed governance model ensure no single group is able to unduly influence decisions?

Response: **no**

Document:
Assurance

4. Consolidated Standard External Assurance Process

SECTION: Assurance Providers

COMMENT:

Absence of decision-making mechanisms for affected Indigenous Peoples to participate in the assurance process

The assurance process fails to incorporate decision-making mechanisms that ensure the participation of Indigenous Peoples in the assurance process. This compounds the previously discussed concern that the assessment process provides the Facility with disproportionate control and may not accurately capture impacts on Indigenous Peoples and affected Indigenous Peoples' perspectives.

1. Lack of Indigenous Peoples' participation in Assurance Provider selection and training

The proposed assurance process does not provide a mechanism for Indigenous Peoples to meaningfully participate in the selection, nomination, or training of Assurance Providers. The input of Indigenous Peoples is

critical to develop trust with affected Indigenous communities and equip Assurance Providers with the knowledge and skills to effectively evaluate a facility's performance as it relates to Indigenous Peoples.

The consideration of Indigenous Peoples in the Assurance Provider selection process and training curriculum is limited. One member of the Assurance Provider team must demonstrate "an understanding of Indigenous Peoples' rights, the local context and suitable communication and engagement methods." While this criterion is a positive inclusion, the standard does not disclose how this criterion will be evaluated in Assurance Provider candidates and to what extent Indigenous Peoples' will be consulted in the selection process overall. The training program for each Assurance Provider includes facilitated workshops and a self-directed online training program. While the training program includes, "Presentations and case study exercises to support understanding and interpretation of the Performance Areas and the requirements of the Consolidated Standard," there is not a guarantee that Indigenous Peoples' rights, engagement protocols, and perspectives will be incorporated into the training curriculum. There is also no mechanism to ensure any Indigenous-specific training will be co-developed with Indigenous Peoples. The active participation of Indigenous Peoples in the selection, nomination, and training of Assurance Providers would increase trust and the reliability of the facility's performance area evaluations.

b. Insufficient participation of affected Indigenous communities in developing assurance process timeline

The Facility will inform the affected Indigenous communities of the Assurance Provider's site visit a minimum of 30 days ahead of time. During the site visit, the Assurance Provider may interview affected Indigenous Peoples. This opportunity for in-person consultations is critical for rights holders to fully and meaningfully participate in the assurance process and requires preparation. While facilities may choose to provide an earlier notice to a community, the minimum notice period and the lack of mandated consultation between the Assurance Provider and Indigenous communities to co-develop a consultation timeline fails to align with Indigenous Peoples' right to FPIC as enshrined in the UNDRIP. Thirty days may not be sufficient time for a community to prepare for the site visit given Indigenous communities may have formal decision-making protocols to engage through, including consulting with elders. The community may also need time to thoroughly understand the CMSI framework and process to be sufficiently informed and equipped to meaningfully engage. These factors mean that a 30-day notice period is insufficient for Indigenous communities to meaningfully participate in the site visit and misaligns with the prior and informed components of FPIC, compromising Indigenous Peoples' meaningful participation and violating their right to FPIC.

COMMENT:

Lack of rigorous reporting standards for Assurance Report risks not accurately capturing impacts to affected Indigenous Peoples

As a deliverable, the Assurance Provider prepares an Assurance Report with Facility ratings on each of the 24 Performance Areas. In the Assurance Report, the Assurance Provider must "provide ratings for each sub-category of each Performance Area." The Assurance Provider must also "provide brief commentary regarding these indicators where relevant," which includes key elements that contribute to the Facility's rating, description of evidence observed, number of interviewees by stakeholder category, identification of which requirements are not adequately supported, and gaps in performance necessary to achieve the Good Practice level. While the Assurance Provider must provide a brief summary, including the aforementioned items, the Assurance Provider does not need to provide supporting evidence for a Facility's compliance with each criteria in a performance area. The Assurance Provider must identify gaps on what requirements in a performance area are not achieved by the Facility. While the identification of gaps is important to help identify areas for Facility progress, the lack of mandate to report information on a Facility's verified compliance with each performance area criteria may lead to ratings that are not sufficiently tied to Facility performance. This risks creating a vague, unreliable, and non-rigorous reporting structure that does not provide an accurate performance rating. It also undermines the importance of the performance area criteria as critical benchmarks to evaluate Facility impacts.

Reporting is a critical component of the assurance process and standard. It is a primary mechanism through which the Assurance Provider's experiences and the assurance process are documented. The proposed

model risks that Facility compliance is not accurately and credibly summarized, assessed, and reported by the Assurance Provider and risks overall undermining the assurance process. For transparency and credibility, it is critical that each criterion deemed met is sufficiently evidenced in the assurance report. For the assurance process and the standard as a whole to be credible and for the performance areas to be meaningfully assessed, the assurance report must accurately and transparently capture the impacts of the Facility by disclosing sufficient evidence of compliance with each performance indicator and how this informs the Facility ratings. This structure would support building trust, transparency, and accountability between the Assurance Provider, Facility, and affected Indigenous Peoples.

COMMENT:

Lack of independent oversight and disproportionate Facility control comprises Indigenous Peoples' participation and input

The proposed assurance process provides the Facility with disproportionate control and influence over the audit process which may compromise the audit's capture of information on impacts on Indigenous Peoples and pose a danger to affected Indigenous communities.

a. *The Facility largely informs the scope of engagement with affected Indigenous Peoples*

The Facility holds a responsibility to provide the Assurance Provider with a comprehensive list of identified stakeholders and rights' holders, including Indigenous Peoples, to inform the Assurance Provider's interview selection process. The Facility may additionally provide "any context around the list provided, including any sensitivities, such as ongoing negotiations or legal action, local political influences or entrenched opposition of certain individuals/groups." The Facility can request that the Assurance Provider not interview a rights holder in certain circumstances such as "active legal disputes or sensitive negotiations." Furthermore, the Facility works with the Assurance Provider to determine whether any of the performance areas are deemed to be not applicable "due to the type of operations, infrastructure, activities and operating environment."

It is reasonable for the Facility to provide input on stakeholder mapping, however, the Facility is responsible for developing the initial recommended list of affected Indigenous communities for the Assurance Provider to interview. This means the Facility is largely responsible for the bulk of identifying affected Indigenous communities and provides the Facility disproportionate influence in defining the initial scope of consultations. The Facility is also well positioned to undermine the perspectives and credibility of affected Indigenous Peoples by providing the Assurance Provider with context on sensitive circumstances and interviewees. While the Facility must communicate a rationale for requesting a rights holder not be interviewed and the Assurance Provider may override the facility's interviewee exclusion request, the Facility's ability to request certain rights' holders be excluded from the interview process, even if rare in occurrence, is highly concerning given the Facility's potential to undermine the Assurance Provider's perspective. These concerns are exacerbated considering that heightened due diligence protocols are not required for circumstances identified as sensitive.

While the Assurance Provider is expected to critically consider any list of rights holders provided by the Facility and will consider due diligence research conducted by the Secretariat in the form of media scans and mapping of nearby communities, among other materials, these methods may not adequately identify affected Indigenous Peoples or capture impacts to affected Indigenous communities. The Assurance Provider is also not mandated to conduct on-the-ground consultations to independently identify affected Indigenous communities or confirm the Facility's provided list of affected rights' holders. Additionally, the standard states, "Where there are Indigenous rights holders identified, there must be a sufficient number of Indigenous rights holders included in the list to appropriately inform the Assurance Provider's assessment." All Indigenous Peoples, whether recognized by the State or not, hold rights specific to Indigenous Peoples, as enshrined in international frameworks. The language specifying that interviews with Indigenous Peoples are mandated only when "Indigenous rights holders" are identified risks creating a loophole where the Assurance Provider is only mandated to interview Indigenous Peoples if a state recognizes them as Indigenous rights holders or in accordance with other criteria of "Indigenous rights holders." For this reason, the Assurance Provider must be mandated to undertake identification of and interviews with affected Indigenous Peoples, regardless of a state's recognition of Indigenous Peoples or Indigenous Peoples as rights holders.

The Assurance Provider may choose to perform due diligence to independently identify affected Indigenous communities, but failing to embed it as a vital undertaking for the Assurance Provider compromises the independence, standardization, and integrity of the assurance process and affected Indigenous Peoples' meaningful participation. To ensure the Assurance Provider includes Indigenous Peoples in the interview process, the Assurance Provider must be required to conduct an independent on-the-ground consultation and investigation to independently identify affected Indigenous Peoples and interview them. It is also particularly crucial for the Assurance Provider to conduct due diligence in this manner to gather information that may not be identified through other methods and to inform the risk-based approach to the assurance process. Affected Indigenous Peoples' experiences are crucial to understanding the Facility's assessment across performance areas.

b. The facility's outreach role and the lack of a comprehensive approach to safeguard Indigenous Peoples pose safety concerns and limits the integrity of the assurance process

The Facility is responsible for notifying rights holders, including Indigenous Peoples, about an upcoming site visit and is encouraged to conduct outreach to invite rights holders to engage with the Assurance Provider which further places the Facility in a role of influence over the interview process. Given the extensively cited violence, intimidation, and threats Indigenous Peoples experience by the mining industry, the Facility's role in notifying Indigenous communities and, if it chooses to do so, encouraging outreach risks deterring Indigenous communities from engaging with the Assurance Provider in low-trust environments and poses safety concerns for Indigenous Peoples. This may limit Indigenous Peoples' input into the assurance process and exclude vital information from the assurance assessment. It may also expose Indigenous Peoples to a higher risk of retaliation and violence from the Facility or other actors with a vested interest in the assurance process outcome. This concern is exacerbated by the inadequate safeguards to protect rights holders from retaliation. Indeed, CMSI lacks a comprehensive approach to ensure the safety of affected Indigenous Peoples during the assurance process. To address this, we recommend that CMSI adopt a zero-tolerance policy against intimidation, reprisals, and retaliation as part of the assurance process. Clear tactics, co-developed with Indigenous Peoples, should be outlined to develop this policy and enforce implementation.

Furthermore, the facility's outreach approach is not mandated to align with international Indigenous Peoples' rights standards, as enshrined in UNDRIP and ILO 169. In regards to the outreach undertaken by the facility, CMSI states, "The information and communication approach will be suitable for each stakeholder and rights holder group, including in terms of language, format and consistency with agreed communication and engagement protocols (where they exist)." While we recognize the intention to include suitable communication materials to engage rights holders, there is not sufficient guidance on engagement with Indigenous communities. Indigenous Peoples maintain a right to conduct consultations through Indigenous Peoples' representative institutions as enshrined in Article 19 of the UNDRIP. The proposed assurance process does not require the Facility to undertake engagement in alignment with this right and Indigenous Peoples' self-determined protocols. Engagement protocols that fall short of the minimum standards of the UNDRIP do not ensure the meaningful participation of Indigenous Peoples and may result in interviews that do not adequately represent the Indigenous communities' perspectives.

c. Inadequate safeguards against conflicts of interest between Assurance Provider and Facility

Potential conflicts of interest between the Facility and the Assurance Provider are not adequately safeguarded against. While the assurance report will disclose potential conflicts of interest between the Assurance Provider and the Facility within the scope of the assessment, CMSI does not explicitly prohibit the Assurance Provider and Facility to enter into contracts, consultations, or work following the Assurance Provider's services to the Facility. This may influence the Assurance Provider to give a favorable outcome to the Facility in hopes of securing future partnerships or contracts. This concern is heightened given the Facility appears to directly pay the Assurance Provider, which increases Facility leverage and Facility oversight. As discussed above, the proposed structure also allows opportunities for the facility's influence over the assurance process which further compounds this concern.

While the Facility's selection of an Assurance Provider from a registry of accredited Assurance Providers maintained by the Secretariat puts a constraint on the Facility in terms of Assurance Provider selection, the Facility's ability to choose the Assurance Provider given the influence it may exert over such Assurance Provider, as we outlined above, is concerning and risks compromising the credibility of the standard. This would be better

safeguarded if affected Indigenous Peoples, workers, and other stakeholders/rights holders nominated and selected Assurance Providers, which would increase the standards' trust and accountability and also provide a more equitable decision-making structure.

COMMENT:

For section 6. Public Grievance Mechanism, we recommend that the assurance process define clear timelines for facilities to respond, progress and conclude grievances.

QUESTION 1

From your perspective, does the Assurance process meet your expectations of a robust, credible, replicable and transparent approach?

Response: 1: Significantly below

Document:
Standard

QUESTION 1

Does the scope, content, and narrative style of the consolidated standard meet your individual expectations and the collective industry expectation for responsible production practices?

Response: 1: Significantly below

QUESTION 2

Do the requirements meet your expectations for being sufficiently clear to support consistent and practical implementation and to achieve necessary performance improvement?

Response: 1: Significantly below

QUESTION 3

From your perspective, does the three-level performance structure (Foundational, Good, Leading) of the Consolidated Standard meet your expectations for providing an effective on ramp and clear articulation of good practice and effective path to continuous improvement?

Response: 1: Significantly below

Document:
Claims

QUESTION 1

We would value perspectives on a few additional questions related to threshold of performance associated with achievement claims. Please click here/ see page 11 of Reporting and Claims Policy.

Response: No Response