

# **MINERALS COUNCIL SOUTH AFRICA COMMENTS ON THE DRAFT GLOBAL TAILINGS STANDARDS**

## **1. Introduction**

The Minerals Council South Africa is a mining industry employer organization that facilitate interaction among mining employers to examine policy issues and other matters of mutual concern to formulate desirable industry standpoints. The Minerals Council South Africa also acts as a principal advocate for mining in South Africa to government and other policy formulating institutions both locally and abroad, communicating major policies endorsed by its members. Thus, the Minerals Council South Africa expresses its appreciation to the Expert Panel, the International Council on Mining and Metals (ICMM), the United Nations Environment Programme (UNEP) and the Principles for Responsible Investment (PRI) for the opportunity to comment on the Global Tailings Standard dated November 2019.

## **2. Overall impression of the Standards**

The standards are well written, but require serious reconsideration of some of the formulations especially in respect of:

- Augmenting the concept of sustainability as an important subtheme where possible throughout the document (sustainability being a well-developed international cornerstone in protecting the interest of society, the environment and economy in concert with each other;
- Harmonization of standards globally, country and mine corporation specifically acknowledging the sovereignty of the latter two;
- Extending the base of mine accountability to co-accountability to be shared by Operators and local communities to the extent of responsible participation by the latter.

The Terms of Reference of the authoring committee, as set by the co-conveners, is not clear at this stage in respect of whether the Standard is to be developed from first principles or to be preceded by a critical review of current standards. Understanding the exact brief of the authoring committee will assist in contextualising further comments.

The mining sector in South Africa is expansively governed by comprehensive legislation supported by an extensive institutional framework in respect of tailings safety and the protection of society and their environment. Thus, with the development of the Standard, South Africa will have to evaluate conclusively the ability of the Standard to improve on the management and governance of Tailings Dams in South Africa.

The comments distinguish between generic and text specific and they inherently reflect risks to the South African mining industry from Minerals Council perspective. At this stage the Minerals Council presents a broad overview and some of the comments overlap somewhat with each other.

## **3. Generic Comments on the draft Standards**

### **3.1 The role of the State**

On Page 3 of the Standard in the section “The Role of the State” it is stated that “Not all States currently have the capacity to carry out these tasks.” For this reason, we suggest that the documents are supported by appropriate guidelines training text and practical exposure at the mines to contribute towards successful implementation in order to assist countries with capacity constraints.

### **3.2 Sovereignty**

On page 3 of Standard the sovereignty of states is acknowledged in statements such as “The Standard is not intended to displace or pre-empt any requirements of applicable law, and where conflicting applicable law shall prevail”.

On page 4 it is further stated that “Investors can limit their financial support to only those projects that follow strict standards for tailings facility management such as **the Standard proposed here.**”

In only stating “*such as the Standards proposed here*” without specifically referring to equivalent Standards of a specific country as a pre-qualification for investability, State sovereignty and excellent standards developed by mining corporates are unjustifiably discredited especially in countries like South Africa with strict legal requirements for managing tailings.

### **3.3 Standards Harmonization**

The principles contained in the draft Standards is comparable with the already existing Standards e.g. IRMA Standard for Responsible Mining and Safety Guidelines and Good Practices for Tailings Management Facilities already exist. To avoid duplication, the draft Standard should be harmonized with these standards and the significance of these documents relevant to each other be clarified.

### **3.4 Endorsement**

*On page ii of the draft Standard it is mentioned “It will also require ongoing engagement with the three co-conveners – UNEP, ICMM and PRI – who have not endorsed the current consultation draft.”*

It is submitted that in first obtaining endorsement from the co-conveners will significantly add to the procedural credibility to the consultation process.

### **3.5 Real Solutions**

The Minerals Council is not clear what specific issue(s) is the standard trying to address. In the absence of understanding the root causes of disasters and the lack thereof of specific detail of what the standard is trying remedy, it is very difficult to evaluate (especially from a non-technical perspective), whether the Standard will be capable of achieving any specific objectives or whether it is only intended to provide general guiding principles. The standard lacks details on the root causes of the recent disasters, thus it is also not apparent whether the issues lie with the standard per se (specifically around the design of tailings facilities) or whether the issues revolve more around the implementation aspects of the existing standards.

The Minerals Council South Africa believes it is of key importance for the Standard to identify and understand the root causes of failures of tailings. This will assist in ensuring that the Standards provides effective (doing the right things) and efficient (doing things right) solutions reduce the probability of tailings dam failures. A plethora of tailings standards already exists both globally and nationally. The question could be asked whether the Standard presents more of the same or offers real solutions based on new innovation. To answer this question a cause and effect assessment of the many catastrophic tailing failures referenced in the Standard should assist in identifying the true cause of these failures and the extent to which such causes relate to inadequate standards or the enforcement thereof. Therefore, until such an assessment is done it will be difficult to come up with a good standard that will solve the real problems.

### **3.6 Unlocking the Potential**

The Minerals Council strongly believes that the Standard should unlock potential rather than inhibiting progressive mining and innovation to a certain degree. To be successful in this respect a question of relevance is to what extent the Standard innovatively improves on

current similar standards instead of adding to bureaucratic burden. A critical assessment of comparable standards some of which exists in South Africa and developed by for example Anglo American Group Technical Standards on TSFs identifying gaps and resolving the same could prove to be procedurally highly efficient and effective in this regard.

### **3.7 Enforcement**

Given that the ICMM is an international industry association, the standard should therefore also be assessed in line with country specific competition laws and global anti-trust provisions as it could create barriers to entry or have an exclusionary effect on certain market participants. In this regard it is important to understand if collective determination of standards cannot give rise to significant competition concerns if the result of the joint effort create barriers to entry or prevent competitors from entering or expanding in the market. If the result of the standard setting substantially prevents or lessens competition in the market, then it is very likely that it will fall foul of South African competition law provisions. It is therefore important to understand at this earliest stage of standard development, what mechanism will put be in place to mitigate the risk of potential anti-trust liabilities.

Global legal enforcement of the standards is not supported, as such these standards should be regarded as guiding principles that countries should adopt in their National legislation which should then be enforced by individual countries. If enforcement at an international level is sought therefore, the detail on the true implications to mining corporates and governments must be clarified at the earliest possible stage in the development of the Standard. The phenomenon of indirect global enforcement instruments emerges in the Standard e.g. financiers and insurers that may insist on compliance to Standards (potentially becoming indirect “enforcement agents”), prior to financiers and insurers investing. The Minerals Council submit that many country specific guidelines and legislation exist and many of these are worthy of consideration and have been developed by leading countries in respect of Tailings safety and management.

The Minerals Council believes that although the standard will not be legally enforceable unless it is adopted into South African domestic law, non-compliance with the standard may attract significant legal risks for mining companies, especially from a reputational perspective. The indirect enforcement instruments (i.e. global insurers and financiers) requiring compliance with the standard before investing in South Africa will not only have a potential significant adverse impact on future investment, but could also prevent mining companies or specific categories of mining companies from actively participating in the extraction of the countries mineral resources. Therefore, Minerals Council South Africa does not support application of enforcement mechanism of the standards, however, if this should be applied then clear enforcement mechanism should be stipulated in the standard.

Requirement 4.3 on page 10 of the standard only talks to existing tailings to comply with requirements 4.1 & 4.2. Throughout the standards there is no distinction between meeting the requirements of the standard for the new and existing tailings. It is therefore submitted that such a distinction be clearly stipulated in the standard. It should also be acknowledged that the retrospective application and enforcement of the standards to existing tailings could be a challenge, hence it is of Minerals Council’s view that these standards should be applicable only to new facilities.

### **3.8 Zero tolerance**

Zero tolerance to human fatality and environment presents a strong element of relativity and even emotions. Relativity is country and case specific and hence unavoidably opens the debate of national priorities. South Africa with its serious crime statistics is not the exception. Advocating zero tolerance in respect of tailings failure may dilute the technical (standards) focus of the STANDARD and reveal a form of insensitivity (not deliberately) to realities in some countries and how these relates to their national priorities.

If the statement of intent was “zero hazards” rather than “zero harm”, an entirely different thought process should take place. Hazards are identifiable, measurable and hence controllable whereas zero harm is an outcome based on the implementation of engineering and management criteria and not a Standard per se. Zero tolerance is an enforcement policy and relates to the rule of law and not to technical standard-setting.

### **3.9 The role of local communities**

The role of other stakeholders as discussed on page 4 of Standard.

Such roles are normally underpinned by local legislation especially as has changed in constitutions and bills of rights. The Standard ideally should highlight this relevance between law and stakeholder roles and further indicate that the local rules for community involvement will apply, thus a common but differentiated approach according to country specific situation is important.

Experience has shown that stakeholder roles are many a time misconstrued (not always in the *bona fide* interest of mines) unfortunately by participating communities. A statement such as “These stakeholders can best protect this interest if they are given a meaningful role in key decisions that affect them as proposed in this Standard”, should be anchored in stakeholder accountability such as Codes of Conduct and Terms of References for failing this, a phrase like “meaningful roles” remains open for misinterpretation even to the detriment of mining. This need to be reconsidered limiting the role of communities to non-management issues such as planning, public participation, emergency preparedness and during awareness creation not extending it to the management of tailings. Minerals Council South Africa has observed in many instances whereby communities have not acted in the best interest of neither the mining companies nor the environment.

### **3.10 Legal Principles**

Legal principles are a critical ingredient to establish a level playing field for participating role players. It is acknowledged that the Standard has global application. It is however suggested that universal legal principles are introduced to further anchor the document. Such legal principles can then be considered by individual states for adoption as appropriate and in accordance with the national legal requirements.

### **3.11 Operator**

The Standard compels Operators to use specified measures to prevent the catastrophic failure of tailings facilities and to implement best practices in the planning, design, construction, operation, maintenance, monitoring, and closure of tailings facilities.

In the Standard, ‘Operator’ means any person, corporation, partnership, owner, affiliate, subsidiary, joint venture, or other entity, including any State agency, that operates, or controls a tailings facility.

This definition excludes co-accountability of the Operator together with a mine. It is suggested that the current definition of Operator is enriched to include elements of accountability and acting as a Responsible Person. This will assist towards appointments that provides for correct skill sets to proactively protect the mine’s interest in respect of tailings failures. This may further assist in reducing risk relating to States in instances of inadequate skill sets.

### **3.12 Best Practices**

The Standard recognizes that there is no one “best practice” that can be viewed as applying to every tailing facility. In-stead, there are a range of “best practices” that can apply to safely manage tailing facilities.

It is proposed that best practices developed by States or mining corporates especially where these followed the necessary public participation processes, can be fully adopted as best practices to safely manage tailing facilities.

### **3.13 Closure**

The Standards could assist in increasing successful mine closures in its subsequent refinements. This is of specific relevance where States are reluctant to issue closure certificates due to the transfer of environmental liability from a mining company to the State.

### **3.14 Cooperation**

The safety and stability of tailings dams require a high level of cooperation between government, design units, construction units, and supervision units. This cooperation should be embedded in the Standard and include procedures and Minimum Requirements for tailings dam applications and their approval. It is suggested that the Standard presents Minimum Requirements (high level) for the contents of approved authorisations.

### **3.15 Accountability**

It is the Minerals Council's view that accountability is governed by State law and falls within the ambit of judicial independence. Furthermore explaining the context in which the word "anticipates" is used will clarify the separation of powers in respect of judicial processes executed by a national government (as opposed to international imposition) and the legal domain within which the Expert Panel foresee the Standards will functionally exist and be made mandatory. Accountability in the realms of globalism opens the matter of transnational courts and human rights regimes.

## **4. Text specific Comments**

**4.1 PRINCIPLE 4:** *Design, construct, operate and manage the tailings facility on the presumption that the consequence of failure classification is 'Extreme', unless this pre-sumption can be rebutted.*

The motivation behind this principle is understood, however, unfortunately presents an overly extreme form of precaution. The question should be asked whether the conventional precautionary principle does not suffice for use in the Standards.

The presumption that the consequence of failure classifies as extreme may introduce procedural inefficiencies. The reason for this is the focus of specialist studies to disprove the possibility of extreme failure versus specialist studies to determine and mitigate real risks.

### **4.2 REQUIREMENT 4.2**

*The decision to rebut the requirement to design for 'Extreme' Consequence Classification, shall be taken by the Accountable Executive or the Board of Directors (the 'Board'), with input from an independent senior technical reviewer or the ITRB. The Accountable Executive or Board shall give written reasons for their decision.*

This requirement pre-emptively anchors accountability within the mining corporate structure. Accountability however needs to be defined in more detail to include co-accountability to spread responsibility and avert suspended decision and delays due to the implied scale of personal risk of mining executives.

### **4.3 REQUIREMENT 4.3**

*Existing facilities shall comply with Requirements 4.1 and 4.2. Where the required upgrade is not feasible, the Board, or senior management (as appropriate based on the Operator's*

*organizational structure), with input from the ITRB, shall approve the implementation of measures to reduce the risks of a potential failure to the greatest extent possible.*

It of Minerals Council's view that this requirement introduces the aspect of retroactivity and retrospectivity when tailings failure occurs. The legal implications of this to the mining industry can be extreme and must first be well researched prior to adoption.

Concomitant herewith the use of the term "feasible" requiring thorough definition within the Standard. In defining this term its relevance with Best Practical Environmental Option and Sustainability, needs to be clarified and specifically accounting for the interest of society where environmental protection sometimes is detrimental in respect of their job security.

**4.4 PRINCIPLE 5:** Develop a robust design that integrates the knowledge base and minimizes the risk of failure for all stages of the *tailing's facility lifecycle*.

#### **4.4.1 REQUIREMENT 5.4**

*The standard state that "Address all credible failure modes of the structure, its foundation, abutments, reservoir (tailings deposit and pond), reservoir rim and appurtenant structures to minimize risk. Risk assessments must be used to inform the design."*

It is suggested that principles both for the development and for the verification of risk models is introduced to ensure the integrity of modelling instruments and hence their findings. Where skills for either the development or the regulatory approval of these models or their findings are inadequate, alternatives on best practice approaches should be considered for adoption in the Standard.

## **5. Conclusion**

The Minerals Council South Africa supports the dedicated pursuance of solutions to the phenomenon ongoing tailings failures and further accept that a "*Comments and Response*" document will be made available to all commenting participants.