LEPL National Environmental Agency

With this letter, we share the Social Justice Centre's perspective on the additional documents supplied to the Agency by the RMG Gold[1] company in letter #4903 dated September 15, 2022, on the environmental impact assessment report for open pit mineral extraction (Mushevani 2 gold-copper deposit).

In addition, we include the environmental expert Mamuka Ghilava's analysis of the same document as an attachment.

The need to convene additional public hearings

Firstly we would like to note that adjustments (clarifications) made to the Environmental Impact Assessment (EIA) report by RMG (hence "Company") in response to comments from the National Environment Agency (hence "Agency") should be regarded as a significant alteration to the report's initial content. Thus, the measures prescribed by Georgian law, more specifically the "Environmental Assessment Code," regarding submitting the EIA report, including the public assessment of the amended report, should be carried out again. The additional document clarifies important issues such as the project's no-action (zero) alternative, the impact on habitats, flora, and fauna in the project area, the cleaning and use of quarry waters, the reclamation of the fertile soil layer, and other key issues. Furthermore, the addition of 59 pages to the original report, not to mention the appendices, cannot be deemed a minor change; thus, providing the population with complete information on the project's characteristics and impacts necessitates a re-evaluation of the report.

The signing of a memorandum between the company and a segment of the local population

In response to remarks expressed by the Agency in letter #21/4232 dated August 8, 2022, regarding the need for further consultation with "the community in the area of influence," the company (page 49 of the company's submission) once again references the "memorandum" signed with a small portion of the community. We observe that the content of the "memorandum" and the manner in which it was concluded with the "working group" are exceedingly problematic due to the following circumstances:

- In the non-technical summary of the EIA report that the company submitted to the Agency, it is stated that "the implementation of the project will not have an adverse effect on land ownership and usage." Furthermore, neither physical nor economic resettlement hazards exist." However, the first article of the "memorandum" signed by the company and five village residents (members of the "working group") claims that the parcel of property located one kilometer from the village of Mushevan is "very rarely and only occasionally used by a subset of the local population (families) and is not the primary pasture of Mushevani." Unfortunately, the document does not identify how many family "units" occupy the property in question; yet, it is evident that the company contradicts itself when it states in the EIA report that there will be no economic resettlement as a result of the

[1] We would like to note that RMG Copper is the author of the statement on environmental decision-making and the company carrying out the proposed activities. Despite the existing association between the organizations, we feel that, as RMG Gold is a separate legal entity, the operator of the intended activity should have provided the agency with further information to ensure legal correctness.

project. The company's use of traditionally owned (even unregistered and informal) land for extractive purposes is a typical example of economic resettlement, frequently cited as a problematic practice in international human rights instruments. The text of the memorandum confirms the importance of the noted land for the rural population; the company promises to gradually utilize the landfill (which should be built on the mentioned land) two years after signing the agreement.

- According to the "memorandum," the community agrees to give up employing some pastures, and the company, in exchange, declares its willingness to build the water supply project as part of its corporate social responsibility. In reality, the company's use of traditional village land is subject to remuneration and cannot be the subject of goodwill or corporate social responsibility. The latter, per international practice, is often seen as an additional effort made by the company and includes measures that help to improve the community's standard of living but does not, of course, involve compensation for a specific land parcel. In this case, the company frames the payment of certain expenditures as a goodwill gesture, even though it is obligated by law to do so in exchange for pasture land.
- With the signing of the aforementioned "memorandum," a practice observed in other places, in which a company treats the members of a certain "working group" as official representatives of the entire rural community, reappeared. (they are the parties to the "memorandum," they are given the right to decide, How will three hundred thousand GEL intended for the village be spent). At the same time, it is known that the signing of the agreement was not preceded by a democratic and inclusive process of electing representatives of the village to express its best interests. Legal principles necessitating sufficient consultation with project-affected communities and a genuine effort to get their permission would be directly violated if the National Environment Agency viewed this type of problematic approach as sufficient means for ensuring community participation (see below for more on participation standards).
- Following paragraph 2.2 of the "Memorandum," the company commits to spending two hundred thousand GEL within five years on small infrastructure projects in the village. Paragraph 2.3 specifies that an additional 300,000 GEL will be allocated over five years to various projects "per the working group's recommendations." Therefore, it is entirely unclear how the projects outlined in the "memorandum" will be chosen, and there is no assurance that these initiatives will address the community's current needs.
- Also unclear is the portion of the memorandum in which the signatories affirm that the project implementation will not substantially impact them. We should note that the section of the "Memorandum" in question does not identify the scope of mining activities, and even if it did, the population would be unable to predict in advance how the activity, which has not yet begun, will affect them. Consequently, basing the agreement of the parties on such an assumption creates an incomprehensible legal situation and once again confirms that this type of agreement signed by companies with the population without appropriate legal, technical, and expert support is highly problematic and that the state must play a more active role in development projects, including in the process of distributing the benefits to the local population as a result of mining activities.[2] Moreover, suppose there is an attempt to distribute benefits; in that case, it should not take the form of delivering public services,

[2] The absence of standard "Community Development Agreements (CDA)" between mine operators and affected communities in Georgia is identified as an issue in Georgia's mineral sector strategy, which was authorized by a government decree on 9 December 2019. Furthermore, there are no defined guarantees regarding the allocation of mineral extraction benefits" (p. 11).

as in this case, but should instead improve the earnings and quality of life of the population beyond the fulfillment of their basic needs.

- The legal status of the "memorandum" and the meaning of the signatures of the villagers, who, according to the "memorandum's" text, are not signatories to the agreement, is not specified.
- According to their statements, the terms of the "memorandum" were not quite clear to some of the locals. From this perspective, it is significant that although the "Memorandum" contains certain promises about how the company should conduct its activities, nowhere in the "Memorandum" does it state that the population agrees to the operation of the "Mushevani 2" mine or that the company receives the approval of the people in exchange for spending one million GEL. The first article of the "Memorandum" opens with the text: "Because in the project territory and the area envisioned for the waste rock dump..... a meadow is fixed." However, nowhere in the "Memorandum" is the scope of the project defined. This text's ambiguity suggests that the company intends to deceive the public. We suspect that the company takes advantage of the vulnerability of the villages and their lack of access to basic services such as drinking water, which is the responsibility of the state to provide.
- The "memorandum" calls for the provision of water to 100 families, but, according to our information, more families live in the village. Therefore, it is unclear on what basis the households will be selected, which will be supplied with water, and which will remain without water, while the entire village will be negatively affected by the project. There is a possibility that the company will only provide water to its supporters, leaving families opposed to the project without access to the resource. If this is the case, it is highly problematic for the state to permit such a discriminatory approach. We hope that in the case of a water supply project implemented by the company, the relevant agencies will ensure that water is supplied to the entire village in a reasonable and fair order that has nothing to do with the loyalty of specific families to the company.
- Although the document in question is titled "memorandum," the term "agreement" appears numerous times throughout the text. The memorandum is typically regarded as a non-binding document, and it is a common practice in Georgia for government agencies to sign memorandums of cooperation with relevant institutions of another state when they do not wish to give the partnership the status of an international agreement (agreement has the mandatory obligation to implement). The simultaneous use of the terms "memorandum" and "agreement" in the text of this document gives the impression that the company is deliberately attempting to create ambiguity: on the one hand, it recognizes that it is not entirely in a clear legal relationship and does not bind itself, and on the other hand, the legal company is attempting to tie the hands and feet of the population, who do not understand the nuances implied by "memorandum" to create an impression of commitment and to neutralize resistance.
- It is also interesting that a portion of the company's obligations outlined in the "memorandum" is defined by environmental legislation and that the company is already responsible for, for example, ensuring compliance with the established norms for atmospheric air and water. Furthermore, it is unclear how the non-damage of residential houses and cultural heritage can be the subject of the memorandum in question when it is evident that the company does not have the authority to do so in the first place.

Breakdown of activities and cumulative impact of the project

Regarding "Green Alternative's" remark to the company about the harmful practice of ignoring the cumulative impact of the project and breaking down the activities, the company notes that "it is not derived from the legislation that the license area or the mining area within the license area should be evaluated to determine if the planned activity (mineral extraction) requires an EIA or screening procedures.

The company bases its assumptions on the entry in the first annex of the "Environmental Assessment Code," which states that open-pit mining of minerals is subject to the EIA procedure when the mining site's surface area exceeds 25 hectares. In response to the company's interpretation, we should highlight that this record does not imply that the impact assessment should not be applied to the whole license area when the mining area covered by the license exceeds 25 hectares. In other words, even if the law specifies that the minimum mining area subject to EIA is 25 hectares, this does not offer a foundation for dividing activities. In actuality, the related provision of the Code establishes just the minimum threshold value for the area and makes no distinction between the whole area of the license, the mining area, and the directly planned mining area.

In other words, this issue is in no respect governed by the Environmental Assessment Code's Annex. Instead, Article 10 of the Code mandates that the EIA report include an assessment of the activity's cumulative impact. In this regard, it is important to refer to subsection "D.E" of Article 10, which mandates that the cumulative impact assessment must include "cumulative impacts with other current or planned activities." When it is evident that the area covered by the license is considerably bigger than the activity submitted to the EIA, the record is directly relevant to the case at hand. Since the license is provided for a significantly greater area, the company indicates that it is conceivable to expand the extraction area in this instance. In this regard, the company notes that when reserves are established for the remainder of the area (if this occurs), it will be necessary to "re-do the procedure prescribed within the Environmental Assessment Code, at which time the company will re-examine the planned and ongoing activities."

Nonetheless, the company's logic disregards the fact that the cumulative impact should be examined for the initial activity, i.e., when making an environmental decision on the Mushevan 2 deposit. As part of the activity's cost-benefit analysis, the project's cost, including the environmental "cost," should be assessed by considering the cumulative impact. In addition, the population should be informed from the outset of the project's cumulative effects and allowed to voice their opinion based on this information.

Impact of extractive activities on the rights of local communities and agriculture

In addition to significant environmental repercussions, the implementation of this type of development project and the exploitation of rural areas as a result of mining are related to the possibility of human rights violations, such as economic resettlement, which denies the community access to important resources. In the 2019 United Nations Declaration[3] on the Rights of Peasants, the particular connection of the rural population with land, water, and nature, in general, is recognized, and the role of farmers and rural people in cultivating agricultural goods and ensuring

[3] See: United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, 2019, A/RES/73/165.

food security is underlined. Noting that the population of the village of Mushevani is actively engaged in agricultural activities, and taking into account climate change and the current state of the world, the state should try to promote the development of agriculture instead of the unsustainable extractive industry when making decisions. From this perspective, the fact that, as a result of "RMG's" activities, soil contamination[4] is detected in several villages, and the residents claim that the crops planted there are either lethal or do not grow at all is problematic. Article 2 of the aforementioned declaration stipulates that state agencies must negotiate and cooperate with the rural community in good faith and respond appropriately to their views before making decisions that affect the rural population. The existing power imbalance must be considered to ensure free, effective, real, and informed participation.

Unfortunately, the discussion of the EIA report or scoping report in the village, which takes the form of a presentation, does not assure this type of genuine involvement and instead takes the form of obligation fulfillment, which is one of the issues cited by the UN special rapporteur. [5]

We should note that the formal nature of the EIA procedure in Georgia is burdened by the fact that the issuance of the license for the use of minerals precedes the passage of the procedures stipulated by the environmental assessment code. As a result, the company that conducted the preliminary study has a certain expectation that the environmental decision will be favorable. In the present case, the independence of the employees of the decision-making body is also threatened by the fact that RMG practically incites "threats" when it states in the document submitted to the agency that "without putting the mine into operation (carrying out the planned activities), it will be impossible to commence mining and to ensure the continuous operation, which will have a negative impact on the employed personnel, the social and economic indicators of the region and the country."

Participation of ethnic minority communities in the decision-making process

Georgia, as a signatory country, is obliged to abide by the Aarhus Convention on "Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters," which states that, for the public to participate in the decision-making process effectively, it must be informed at an early stage of deliberation (Article 6).

In addition to the general obstacles to participation, the case at hand has additional dimensions; as the company itself notes in the Environmental Impact Assessment report, the project area is predominantly populated by ethnic Azerbaijanis; this circumstance must be taken into account when planning and implementing the participation mechanisms mandated by law.

The company indicates in the supplied document that "Both the scoping and EIA reports for the village of Mushevani were done in accordance with the legal requirements. The company notified the rural community regarding the EIA report review within the legal timeframes. We posted the information in the community center and the Ministry's website. At the discussion of the village's

[4] See the scientific report "Lead as a carcinogenic threat to the environment and human life" published by the Scientific Research Center of Agriculture on July 13, 2018, which states that, for instance, in the village of Balichi "the concentration of lead in the soil is significantly higher than the maximum allowable concentration [established by Georgian law]." (p. 20) and that "the Bolnisi and Dmanis regions have a strong propensity for lead levels to rise due to RMG's mining activity" (p. 15).

[5] Report of the Special Rapporteur on the human rights of internally displaced persons, 18 July, 2022, A/77/182, According to the report, consultation often has a "tick-the-box" feel and does not represent a real effort to involve the affected community in the process", para. 48.

EIA report, a significant portion of Mushevan's population was present. "During the public discussion, the company provided the interpreter.

According to the information provided by the residents, only 70 out of 600 villagers (approximate data) attended the public discussion, and the mentioned notice was only posted in Georgian. Furthermore, according to the locals, a single interpreter at the discussion was insufficient to ensure the complete transfer of information. In addition, the community did not receive either an environmental assessment report translated into the minority language or a non-technical summary of the report. We were likewise unable to locate an Azerbaijani translation on the Ministry's website. Given the language barrier, it is logical that this conduct be regarded as a flagrant breach of the Aarhus Convention and international laws governing the rights of minorities.

The Framework Convention of the Council of Europe on National Minorities (to which Georgia is also a party) directly obliges states to consider the special conditions of the representatives of the minority to promote equality in the political and economic life of the country (Article 4). In this case, the company should have considered the language issue first. In this situation, those affected by the project received only verbal information and could not clarify or validate the points of interest and concern outlined in the written documentation.

Notably, Article 15 of the aforementioned Framework Convention stipulates that governments create suitable conditions for the participation of minorities in public life, especially when specific issues directly impact them (Article 15). Therefore, the planned mining project of the Mushevan deposit, which will fundamentally alter their living environment, must be regarded as such an issue. The Republic of Georgia must recognize that the formal and general EIA procedure, which does not even account for the language barrier of the locals and does not provide translations of key documents into the language of the minority, cannot be deemed acceptable.

It is significant that the Advisory Council operating within the Council of Europe, which assesses the implementation of the Framework Convention on National Minorities, singles out as problematic the planned hydroelectric power plants in the Pankisi valley without the effective participation of the local community in the document prepared in 2019 on Georgia, and also recommends that effective consultation with national minorities be held for large-scale infrastructure projects.[6]

Given the foregoing, the company's conclusion in the aforementioned document that "there is no need for more engagement with the community at this stage" seems unclear. The authorized administrative body, the National Environment Agency, came to the opposite conclusion and asked the company to give documentation verifying communication with the indicated community (letter from the agency dated August 8, 2022). We believe that such blatant disregard for the explicit instruction of the competent agency should not go unanswered; it is not permissible to make a favorable environmental decision in the absence of compliance with the agency's notice, especially when it concerns such a critical issue as communication with the affected population.

Sincerely,

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[6] Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Georgia, March 7, 2019, ACFC/OP/III (2019) 002, 135