

BRIEFING PAPER

MINING RISKS INVOLVING THE ENVIRONMENTAL REGULATOR IN MADAGASCAR: URGENT NEED FOR REMEDY

Mining company Rio Tinto/QMM's fiscal and regulatory relationship with the Office Nationale pour l'Environnement (ONE) in Madagascar raises issues of transparency, accountability, potential conflicts of interest and risks to the natural environment and to the health of local people.

1. Context: Rio Tinto/QMM violation of the environmental "buffer zone" in Mandena

In March 2019, following two years of research and enquiry by the Andrew Lees Trust (ALT UK),¹ Rio Tinto admitted in response to a report commissioned by ALT UK that its QMM mineral sands operation at its Mandena site, in Anosy region, southern Madagascar, had breached an environmental "buffer zone" by as much as 90 metres in places.² The company also admitted in the same response that QMM had used its mine tailings to create a "berm" or dam structure that entered the adjacent lake where local people fish and draw their drinking water.

The QMM buffer zone violation is of concern because:

- It broke agreements with the Malagasy government to respect a 50 metre buffer zone.
- Mine operations entered a lake (*domaine publique*) without authorisation.
- Waterways and lakes next to the mine became exposed to potentially toxic mine tailings and wastewaters from the mining basin, including concentrated radionuclide content generated by the ilmenite extraction process.

Rio Tinto/QMM had denied the buffer breach for almost two years, and publicly cited the Malagasy environmental regulator, the Office Nationale pour l'Environnement (ONE), in response to concerns about the breach, including to Rio Tinto shareholders and the general public. Rio Tinto/QMM claimed it was "compliant" with its government-authorised Social and Environmental Management Plan (SEMP) and, specifically, that the ONE had concluded that QMM's buffer zone works presented "no significant concerns" (25 September 2018) and that the impact of the breach was "negligible" (23 March 2019).³

The ONE did not issue any regulatory actions in respect of the QMM buffer breach, as would be expected.

¹ See all related research documents, reports and articles at <http://andrewleestrust.org/andrew.htm> (French versions available) and <https://theecologist.org/2019/apr/09/rio-tinto-admits-buffer-breach>

² See Annex 1, Rio Tinto response to the Emerman report, 23 March 2019.

³ "Compliant" with the SEMP and ONE's inspection finding of "no significant concerns" were communicated by QMM in a letter dated 25 September 2018 to ALT UK (see Annex 2). The status of QMM's compliance, as substantiated by the ONE, was verbally communicated at a meeting between Rio Tinto and ALT UK on 27 September 2018. The impact of the breach as "negligible" was cited in Rio Tinto's response to the Emerman report, 23 March 2019 (Annex 1) and publicly to shareholders at the Rio Tinto 2019 AGM (London, April 2019). See <http://londonminingnetwork.org/2019/04/not-the-whole-truth-the-rio-tinto-agm-10-april-2019/?highlight=Rio%20Tinto%202019>

2. QMM payments to the ONE for environmental monitoring, evaluation and SEMP assessments

The ONE carries out the environmental monitoring and evaluation of the QMM mine. Under the MECIE Decree,⁴ QMM is permitted to make financial contributions to the ONE to support the latter's monitoring and evaluation activity. In March 2019, ALT UK and Publish What You Pay (PWYP) coalitions in Madagascar and the UK requested details of Rio Tinto/QMM payments to the ONE for the periods leading up to assessment and approval of the mine's 2014-18 Social and Environmental Management Plan (SEMP).⁵ Rio Tinto provided this information, together with budgets and schedules of work from the ONE. This showed that QMM is paying between US \$30,000-\$40,000 per year to the ONE for what appears to be a regular suite of environmental monitoring services.⁶ For the 2017-18 budgetary periods, the activity and budget look much the same.

The lack of an increase in Rio Tinto/QMM financial contributions to the ONE indicates that no additional studies were undertaken and no expert inputs were requested or contracted by the ONE for the buffer zone inspection in 2018. There is no evidence that the ONE undertook its analysis with due diligence before concluding that the QMM's buffer zone works presented "no significant concerns", which enabled the company to claim it was "compliant" with its government-authorized SEMP.

Key issues of concern

1. What technical studies and surveys did the government environmental regulator, the ONE, undertake in 2018 to determine the compliance of the buffer zone with QMM's 2014-18 SEMP? In particular, based on what technical evidence did the ONE assess and conclude that the breach presented "no significant concerns" and that the impact of the breach was "negligible"?
2. How was the ONE able to pay for and execute the necessary technical studies to ascertain the "compliance" of the buffer zone and the "negligible" impacts of the breach without significant additional financial contribution from Rio Tinto/QMM during 2017-18.⁷
3. Where are the relevant ONE reports/documents that recorded the inspection and assessments of the QMM works, which Rio Tinto has cited?
4. Why has the ONE not agreed to Rio Tinto/QMM sharing the 2018 inspection report, why are the 2018 and 2019 ONE documents related to the buffer zone assessments/evaluations not available on request, and why will the company not share reports from the relevant ONE monitoring and evaluation activity that it has financed?
5. Given the elevated levels of uranium in water close to the mine's discharge points, **as high as 50 times World Health Organisation safe drinking water guidance in some places**,⁸ and given that Rio Tinto/QMM has admitted that it has insufficient data on ingestion pathways (i.e. water),⁹ how did the ONE independently conclude that the impact of the QMM mine breach into Lake Besaroy has been "negligible"?
6. What data or evidence does the ONE have that can establish how much of the elevated uranium levels are attributable to natural "background levels" of radiation (claimed by Rio Tinto to be pre-existing in

⁴ MECIE: Mise en compatibilité des investissements avec l'environnement. See http://eitimadagascar.org/wp-content/uploads/2014/06/decret_2004_167_guichet_unique_ONE1.pdf

⁵ See Annex 3, Letter from PWYP/ALT UK to RT, 13 March 2019.

⁶ See Annex 4, Rio Tinto response to PWYP/ALT UK requests for payment details between QMM and the ONE, 23 March 2019; and attached the ONE contracts, schedules and budgets.

⁷ Rio Tinto HQ employed an external expert at a cost of approximately US \$60,000 to analyse the QMM buffer zone works against the ordinary high water level as per the requirements of the SEMP. Rio Tinto's commissioned 2018 report (by Ozius) and ALT UK's 2018 study by Dr Emerman both demonstrated a clear breach of the 50 metre buffer zone limit.

⁸ See <http://www.andrewleestrust.org/blog/wp-content/uploads/2019/04/ALT-UK-Summary-of-the-Radioactivity-review-of-the-QMM-mine-2019-English-version-.pdf>

⁹ Addendum, Rio Tinto comments, Swanson review, 2019, pages 59, 61. Access at: <http://www.andrewleestrust.org/blog/wp-content/uploads/2019/07/ALT-UK-Radioactivity-Review-of-the-QMM-mine-2019-by-Dr-S-Swanson-1.pdf>

Anosy due to the nature of the mineral sands)¹⁰ and how much has resulted from the extraction process and operational activity of the QMM mine?

3. Lack of credibility and failure of transparency

It would be reasonable to expect substantial additional payments to have been made by QMM to the ONE in 2018 to enable the regulator to undertake an objective, scientifically rigorous and credible assessment of the buffer zone area and the impacts of the breach, i.e. for engaging specialist assistance from hydrology and radioactivity experts.¹¹

The lack of additional payments by QMM to the ONE during 2018 indicates that the buffer zone analysis provided by the ONE in 2018 was not founded on sound technical know-how. The inability to produce relevant technical studies, and the apparent failure of the ONE to refer to those studies that had been undertaken, i.e. Ozius 2018, and Emerman 2018, raises questions about the ONE's methodology, competence and objectivity.

Moreover, since potential threats and risks to the health of the local environment and to local communities arise – or at the very least are publicly perceived as arising – from QMM operations, especially with regard to water quality and radioactivity,¹² it would be reasonable to expect the regulator ONE's evaluation to include full and inclusive public consultation with local communities as part of the process. There is insufficient evidence of adequate consultations being undertaken.¹³

A workshop took place in Fort Dauphin between 9 and 10 May 2019, in which PWYP Madagascar participated as members of the multi-stakeholder group (MSG) of EITI Madagascar with representatives of the ONE, local authorities, QMM and local civil society. QMM, ONE and several other participants were absent during part of the workshop to attend a formal presentation by the ONE of its evaluation reports about QMM. PWYP Madagascar and other civil society organisations present at the workshop were not invited to this event. Local civil society representatives said they were not sufficiently consulted and did not understand on what basis QMM and the ONE had chosen members of the environmental monitoring committee, nor why their reports are not available for everyone. There is concern that the ONE and QMM may not want everyone to be aware of what is going on in these assessments.

If the ONE has not carried out adequate substantive studies or satisfactory public consultations with affected communities, its reports should not form the basis of Rio Tinto/QMM's assertions to communities, to shareholders and to the public. If the ONE has carried out such studies and consultations, the resulting reports should be fully publicly accessible.¹⁴

¹⁰ Ibid., page 63; claim repeated by Rio Tinto at company AGM, London, April 2019; see also footnote 3 above.

¹¹ See footnote 7 above.

¹² Media coverage and local civil society action relating to water quality in the lake/waters adjacent to the QMM mine are matters of public record. See

<https://www.facebook.com/plugins/video.php?href=https%3A%2F%2Fwww.facebook.com%2Fvaovao.koloty%2Fvideos%2F391208184984339%2F> and requests for drinking water cited at <http://www.andrewleestrust.org/blog/wp-content/uploads/2019/04/Anosy-Civil-Society-Platform-2019-.pdf>. Local concerns about radioactivity have precipitated meetings and media coverage at local level: see <https://youtu.be/ry4McEDLEAc> and <http://www.midi-madagasikara.mg/societe/2018/09/08/region-anosy-hausse-de-la-concentration-de-la-radioactivite-observee/>. The ONE has recorded public concerns about health impacts of radioactivity from the QMM mine: see page 16 of the ONE's "Grille de Suivi" included with Annex 7.

¹³ See Annex 3, footnote 6, referring to public complaints made by Deputy Hatrefindrazana Jerry to the Minister of the Environment in August 2018 during the Minister's visit to Fort Dauphin (capital of Anosy region) that citizens, like him, are being excluded from so-called "consultations" by the ONE, which are seen as meetings by invitation only, and to a highly selective audience.

¹⁴ Additional to inspection reports on the buffer breach, ALT UK has requested but been unable to obtain from Rio Tinto/QMM any separate environmental impact assessment (EIA) conducted for the QMM project changes (e.g. for the reduced 50 metre buffer zone) with mandatory public consultation, as would be required under Malagasy law; nor evidence of any detailed "risk assessments" promised under the authorised SEMP (especially for groundwater impacts).

4. Governance and accountability

Rio Tinto/QMM has received repeated requests in writing and verbally since mid-2018 to provide the ONE reports that judge the QMM buffer zone works to be “compliant” and the impact of the breach “negligible”, including in a joint letter from ALT UK and PWYP coalitions.¹⁵ ALT UK also sent a letter to the ONE requesting the 2018 report via the Malagasy Minister of the Environment, but no reply or copy of the report was forthcoming.¹⁶

Rio Tinto and the ONE continue to claim that the ONE reports are in the public domain but fail to provide copies or a link to an online portal where the documents can be accessed.¹⁷ In reality, access to the ONE reports is restricted to personal inspection of a hard copy at the ONE offices in Fort Dauphin and Antananarivo (Madagascar’s capital city, also known as Tana) and is therefore constrained.¹⁸

Key issues of concern

1. How can the fiscal and governance relationship between extractive companies working in Madagascar, such as Rio Tinto/QMM, and the ONE, as promoted under the MECIE Decree, stand up to scrutiny and prevent conflicts of interest if the ONE’s evaluations, paid for by companies, are not shared openly and on request?
2. How can Malagasy citizens and civil society be satisfied that the relationship between the ONE and extractive companies such as QMM is sufficiently transparent if the regulator’s reports and evaluations are not fully open to public consultation as part of the process or validated with robust, transparent evidence and documentation when requested?
3. How can conflicts of interest be prevented when the same companies from which the ONE receives regular financial support then call on the regulator to assess their environmental violations?
4. Should extractive companies refer to the ONE’s evaluations of their operations (in this case of “no significant concerns” and with “negligible” impact) if they are not required to produce the documentary evidence from the ONE in answer to public enquiry?
5. How is good governance served if, when laws and national agreements are broken and the health of the environment – and potentially of communities – is compromised, there are no sanctions, penalties or other actions from the regulator?
6. Without openness and transparency, how can the processes and relationship between QMM and the ONE meet best practice requirements and act as an exemplar for the extractive sector in Madagascar?
7. How can current arrangements under the MECIE Decree be considered adequate to ensure transparency and accountability in the extractive sector in Madagascar as the extractive sector appears likely to expand across the island with multiple players of lesser standing and experience than Rio Tinto/QMM?¹⁹

5. Conclusions and recommendations

Rio Tinto is an international leader in the mining sector. Yet Rio Tinto/QMM’s relationship with the ONE

¹⁵ Letters, emails and phone calls from ALT UK since July 2018; joint letters from ALT UK with PWYP Madagascar and PWYP UK, follow-up emails and a face-to-face meeting with PWYP UK in 2019. See Annexes 5 and 6.

¹⁶ The request was sent on 14 October 2018, a month ahead of the national elections of November 2018, which were followed by a change of administration.

¹⁷ See Annex 7, Rio Tinto letter of response to PWYP/ALT UK, 17 June 2019.

¹⁸ At the ONE offices in Fort Dauphin and Tana, access to documents has to be negotiated. It is reported that in some instances researchers have had to sign multiple forms to gain permission for access to documents; then they may be watched and not allowed to copy or scan any of the ONE reports. This indicates restricted access by permission only, not what would usually be considered as “in the public domain”.

¹⁹ On the potential expansion of oil and mining in Madagascar, see: <https://www.chathamhouse.org/event/future-madagascars-extractive-industries#>; <https://eiti.org/madagascar>; <http://documents.worldbank.org/curated/en/597931507236878125/pdf/IL-FRESDATA-EXT-P158889-10-05-2017-1507236869090.pdf>; <https://www.amisdelaterre.org/IMG/pdf/madagascareldoradooilmining-foefrance.pdf>

highlights serious risks of conflict of interest, compromised good governance and the undermining of a healthy environment with potential serious consequences for mining-affected communities.

The Malagasy Government needs urgently to address the governance and accountability gaps and failings described above, both for the immediate present and for the future if the extractive sector expands across the country. An adequate response to the situation requires constructive and inclusive dialogue with all stakeholders – including local communities and civil society. This needs to lead to appropriate action to ensure that governance, environmental and human rights harms and risks are remedied and avoided in future. The entire process needs to model improved practice, transparency and public accountability for all actors in the sector

Annexes 1-7 in the zip file provided separately and downloadable [here](#)²⁰ contain the most relevant recent documents; further documentation, if required, can be requested from info@andrewleestrust.org.

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²⁰ <https://bit.ly/2JBlrFK>