

ACCOUNTABILITY COUNSEL

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Via Electronic Mail

Dr. Lawrence Spinelli, Acting President
Ms. Mary Boomgard, Director, Environmental Affairs Office of Investment Policy
Overseas Private Investment Corporation
1100 New York Avenue, N.W.
Washington, DC 20527
Email: eia@opic.gov

Re: Comments on the OPIC Draft Environmental & Social Policy Statement

Dear Dr. Spinelli and Ms. Boomgard:

Accountability Counsel is pleased to provide the following comments regarding reform of OPIC's Environmental and Social Policy. We provide these comments in order to strengthen OPIC as a potential standard-setter among public financial institutions for progressive climate policies. The Draft Environmental and Social Policy ("the Draft" or "the Policy") has the prospect of providing an alternative model to the IFC Performance Standards; however, to reach that potential, significant improvements, as outlined below, are still needed. We provide our concerns below according to the corresponding sections of the Policy statement.

Introduction

Although OPIC is currently drafting a human rights policy in response to H.R. 3288, which requires OPIC to develop standards that meet international workers rights and human rights, there is a need to integrate human rights issues into the Environmental and Social Policy. For example, in addition to requiring assessment of general environmental and social requirements in evaluating prospective OPIC projects, there should also be assessment of human rights impacts.

In addition, according to Section 1.2, the "Policy Statement adopts, as a benchmark for the environmental and social review process, the International Finance Corporation's (IFC) Performance Standards on Social and Environmental Sustainability and Industry Sector Guidelines." However, the IFC guidelines are currently being revisited through the 2010 IFC review process; until we see the final outcome of the process, it is unsound to link the OPIC Policy with IFC standards.

Screening and Categorization

This Draft draws a clear boundary around project facilities to determine which impacts must be addressed and which communities must be consulted. Through the detailed and specific categorization of projects, with proper implementation and monitoring, communities could

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benefit from inclusion in a categorized area. However, this method of categorization also creates a risk of excluding affected communities, for example, those living downstream from a project. The Policy should also take into account the cumulative impacts of OPIC investments.

Section 2.10, which outlines the application of standards to financial intermediaries, produces a contradiction and distinction between Category D financial intermediary and sub-projects, and Categories A through C. However, according to Section 7079 of H.R. 3288, OPIC is obliged to issue policies “ that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation”.

Environmental and Social Action Plan

Section 3.1 of the Draft identifies processes that are normally included in Environmental and Social Management Systems, including environmental and social action plan, monitoring and reporting performances. However, the public disclosure of these processes (environmental and social action plan, monitoring and reporting) should be explicitly required.

Environmental and social impact assessment is essential to outlining the potential risks and impacts associated with a project. The topics examined during an assessment review outlined in section 3.4, however, do not capture many of the root causes of conflict that projects can bring. OPIC should also assess the potential for discrimination in the project, existing potential sources of community conflict, and whether affected communities have access to recourse for any harm caused.

According to section 3.9, environmental and social action plans are required prior to project implementation. This requirement should be extended to the period afterwards as well, to account for changes such as action plans that are revised and non-Greenfield projects that are already implemented.

Environmental and Social Standards

Section 4 allows OPIC to select what standards it will apply on an *ad hoc* basis. As a result, the standards could vary for each separate project, leaving the communities affected by OPIC projects uncertain of whether the projects are in compliance with OPIC requirements. There needs to be a consistent application of international standards, so that affected communities can be equally supported and feel protected by OPIC.

Particularly, section 4.7 states “where host country requirements differ significantly from the international standards identified under Section 5.1 and 5.2 of this Policy, OPIC will assess the project against the more rigorous and protective standard.” It is unclear who makes the decision regarding which standard is more rigorous. It is also unclear whose perspective is taken in determining which standard is more protective. Clarification and refinement are required to ensure that there is a fair assessment of standards.

Public Consultation and Disclosure

The Draft Policy requires consultation on Category A projects, but excludes those communities harmed by Category B, C and D projects. Not only should there be a strong

community engagement in all projects equally, but also, requiring consultation on only Category A projects can create problems if OPIC miscategorizes a project and later corrects the categorization. By that time, it will be too far into the project cycle to return to consultations.

Section 5.6 assumes that all information falls under “confidential business information”. Rather than that assumption, best practices requires that there be a “presumption of disclosure”.

Given that OPIC has a development mandate, public participation throughout the decision-making process is crucial. Although the proposed Policy requires community consultations, the standards are not robust enough to ensure that communities actually have a voice in decision-making. As a result, project sponsors might claim compliance with consultation requirements through one-way informational briefings after a project has already begun. The Policy does not ensure that consultations occur *before* key decision are made, and does not require the client to demonstrate to communities how it responded to their concerns. There must be equal participation upstream in the decision-making process.

Additionally, the Policy should ensure that projects do not go forward unless affected communities have demonstrated their free, prior and informed consent in a culturally appropriate manner.

Along with participation and consent, OPIC should also not rely so extensively and almost exclusively on information from clients to determine if clients are in compliance with the Policy. This presents a conflict of interest. Rather, more emphasis should be placed on OPIC’s own site visits and independent due diligence based on a third party verification. This third party verification should be based on information from other than project sponsors prior to project approval and during the monitoring phase.

Section 5.12 calls for the “auditor certification and a publicly releasable summary of audit findings”. However, OPIC previously committed to disclosing the audit, not just a summary.

Conditions and Compliance

OPIC must clarify its own project duties and responsibilities more clearly. For example, OPIC commits to follow the IFC Performance Standards (which apply to clients), but does not have an internal sustainability policy like IFC (which applies to the IFC). This weakens OPIC accountability and the ability of the Office of Accountability to review OPIC compliance with its own policies. A clarification of OPIC’s role is needed whereby policy provisions spell out OPIC compliance requirements.

In addition, Section 6.3 instructs clients to prepare and submit to OPIC an annual environmental and social report summarizing the environmental and social performance of the project over the preceding year to demonstrate compliance with OPIC agreement conditions. Omitted from this is a provision in OPIC’s current policy which stipulates that project clients that do not comply with this requirement will have to conduct an independent third party audit. This omission violates H.R. 3288 that states that OPIC’s revised environmental and social policy shall be “no less rigorous than the environmental and social guidelines that the Corporation has made publicly available.”

Monitoring

OPIC's current Environmental Policy states that OPIC "endeavors to monitor all Category A projects on-site at least once during the first three years of project commitment, and more frequently depending on the environmental sensitivity of the project." In contrast, OPIC's Draft Policy is more vague, stating that "OPIC conducts on-site monitoring of projects for environmental and social performance. Projects selected for monitoring in a given year are prioritized based on environmental and social risk." This creates a contradiction between section 7 and H.R. 3288, which states that OPIC's revised environmental and social policy shall be "no less rigorous than the environmental and social guidelines that the Corporation has made publicly available as of June 3, 2009." Moreover, OPIC should commit to conducting its own site monitoring of Category A and B projects by staff or independent consultants during the construction phase of projects (when negative environmental and social impacts can be at their highest) and at regular intervals throughout OPIC's participation in the project.

In addition to the description of the monitoring requirements, all monitoring reports must be publicly disclosed.

Climate Change and Renewable Energy

OPIC currently accounts for direct emission in its active portfolio for those projects that emit more than 100,000 tonnes of CO₂-eq. per year. Best practice required that OPIC also account for indirect emissions across the life cycle of projects. According to the US Environmental Protection Agency, the best practice threshold is 25,000 tonnes of CO₂-eq. per year.

The Draft Policy provides incentives to pursue renewable and energy efficiency technologies. The financial incentives for small and medium sized enterprises to integrate these approaches into its projects should be extended to other agencies and partners. OPIC should be encouraged to engage in more creative partnerships.

We appreciate the opportunity to comment on the Draft Policy.¹ We look forward to continuing engagement with OPIC on this important policy revision.

Sincerely,



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¹ Please note that these comments are submitted via email and not the OPIC Online Comment Form because the Comment Form page is currently displaying a non-responsive server message.