

**American University Washington College of Law
Program on International and Comparative Environmental Law**

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Ms. Mary Boomgard
Director, Environmental Affairs
US Overseas Private Investment Corporation (OPIC)
1100 New York Avenue, NW
Washington, D.C. 20527

Re: Comments on OPIC's Draft Environmental and Social Policy

Dear Ms. Boomgard:

Thank you for the opportunity to comment on the Draft Environmental and Social Policy Statement. We are pleased that the Overseas Private Investment Corporation (OPIC) has decided to strengthen its Environmental and Social Policy (ESP) and that it has committed to implementing and enforcing the Policy in the future. Recent experience showing that OPIC largely failed to apply its policy consistently is of great concern and we look forward to the agency taking additional steps to ensure that environmental and social concerns are integrated into its decision making and consistently communicated to its clients.

Through this Policy, OPIC has the opportunity provide progressive leadership in mainstreaming environmental and social concerns in internationally financed projects. OPIC has already demonstrated leadership in addressing climate change by setting targets and timetables for reducing greenhouse gas (GHG) emissions and setting targets and timetables for this. OPIC can continue this leadership by strengthening its financing for renewable energy projects (and projects that incorporate renewable energy technology) and committing to phasing out the financing of fossil fuel projects. More generally, the draft Policy embodies many positive standards and is an improvement over the existing approach. Below we have concentrated on several areas where the OPIC Policy can be strengthened further to help combat the negative effects of climate change, protect and promote human rights, including the rights of indigenous, and generally reduce the negative environmental and social impacts of development projects.

Section 1: Introduction

The OPIC policy should state more clearly that OPIC will give all clients the ESP and that all clients will be held responsible for ensuring that their projects meet the applicable

standards found in the ESP as well as the policies relating to worker and human rights. Compliance with the ESP and related requirements should be made an explicit condition in all OPIC financial instruments, and a client's failure to comply with the ESP and related requirements should be a material breach of any agreement between OPIC and the client.

1.1 Statement of Purpose and Scope

Footnote 1 makes reference to separate OPIC policies on worker rights and human rights. These policies should be closely integrated with the ESP. For example, Environmental and Social Impact Assessments (ESIA) should include a component on human rights issues (i.e. a human rights impact assessment) to ensure that proposed projects are not undermining human rights. Like an ESIA, a human rights impact assessment should include an analysis of the project, its benefits, an analysis of potential human rights impacts, an analysis of alternatives, and ways to avoid negative human rights consequences.

1.2-1.3: Source of Policy

OPIC uses the International Finance Corporation's (IFC's) Performance Standards as a benchmark, which is appropriate. IFC is currently reviewing these standards, however, and OPIC should avoid any such backsliding by ensuring that any weakening in IFC's standards do not allow for a weakening of OPIC's standards.

Section 2: Screening and Categorization

2.0 Screening

The scope of the project is too narrowly defined, particularly with respect to supply chain impacts. Certain types of projects necessarily require significant expansion in supply chains. (The recent "Wilmar" case at the IFC regarding investments in a palm oil trading facility is a good example). Such a project's scope should include inherent expansion of activities in the supply chain. This should not be limited as in the draft to "raw material inputs" from "ecologically sensitive areas". Any identifiable expansion of materials or resource development that is inherent to the project's success should be considered part of the project's scope.

2.6 Impacts

OPIC should be clear that both direct and indirect impacts of a project should be considered as should impacts inside and outside of the project's boundaries as well as transboundary and global impacts.

OPIC should also consider the cumulative impacts of this project and any associated or similar projects. Thus, for example, if the OPIC-financed project is the first of a series of linked hydro-electric dams planned for a particular river basin, then the OPIC ESIA should consider all cumulative impacts from all of the planned dams. Moreover, the

contribution of an OPIC-financed project should be considered in light of cumulative impacts of similar kinds occurring in the region.

In paragraph 2.5, when citing examples of ecological and social values and sensitive locations, the phrase “but are not limited to” should be added. For example, “Examples of ecological values include but are not limited to biodiversity and watershed or coastal protections.” This is consistent with the listing of examples in the paragraphs describing Category B, C, and D projects.

2.10 Category D Projects

OPIC has created a separate category, Category D, for projects implemented by financial intermediaries. It appears that OPIC intends to screen, assess and monitor the subprojects funded by financial intermediaries in the same way that it evaluates its Category A, B, and C projects. (see para. 3.23 as well). Nonetheless, OPIC states that it will screen, assess and provide consent to sub-projects “at the time and in the manner described in the agreement with the financial intermediary”. (paras. 2.10 and 3.23). This provides potentially confusing standards in that the agreement with the financial intermediary may be different than the requirements found in the ESP. This does not provide assurances that OPIC will meet the requirements of HR 3288, which calls for a policy “that shall be consistently applied to all projects, funds and subprojects supported by the corporation.” We recommend that this paragraph be clarified to assert that notwithstanding anything in the financial intermediary agreement, OPIC will apply the ESP fully to all sub-projects.

Section 3: Environmental and Social Management System

3.1. We support OPIC’s requirement that Applicant’s to have an Environmental and Social Management Plan that meets requirements laid out by OPIC and the IFC Performance Standards. Further, we agree with OPIC that community engagement is important in having an effective Environmental and Social Management Plan. To that end, OPIC should require Applicants to disclose their Environmental and Social Management Plan and System to the communities, and require consultation with the community about this plan, rather than merely noting that community engagement “normally involves” these things. Further, OPIC should require that there be a grievance mechanism at least in Category A projects.

3.4. With respect to environmental issues, OPIC should explicitly identify impacts on biological diversity, including rare and endangered plants and animals and their habitat, among the potential impacts.

With respect to social issues, OPIC’s assessment should include the potential for disparate impacts according to gender, potential sources of community conflict, impacts on the very poor, and human rights-related impacts.

3.8 Disclosure of the ESAP

The ESAP is the fundamental document that ensures the proposed project will meet the applicable environmental and social standards. OPIC cannot provide its final approval until the ESAP is prepared and reviewed by OPIC. Moreover, public disclosure of the ESAP must happen during the planning phase of the project, not during the project implementation phase so that any concerns with the ESAP can be vetted while there is time still to alter the project's design, operations or mitigation steps. *Thus, the ESAP must be disclosed and consultation allowed prior to OPIC's final decision of support.*

3.14. Dams

We support OPIC's reliance on the World Commission on Dams.

3.15 Forestry Projects

We support OPIC's ban on commercial forestry projects involving extraction of timber from critical forest areas and critical natural habitats. We believe this should be extended however to explicitly cover all primary forests. In addition, the OPIC policy should prohibit clearing of critical forest areas, critical habitat or primary forests by non-forestry such as projects in the extractive sector or dams situated in or affecting these forest types.

Section 4: Environmental and Social Standards

We support OPIC's search for appropriate international standards to use as project-specific standards and guidelines. OPIC should require that all project-specific standards and guidelines applied to a specific project are identified and disclosed publicly early in the environmental assessment process. Any material deviation allowed from these standards should be explicitly identified and disclosed as part of the ESIA. All mitigation steps to bring the project into compliance should be included as part of the ESAP and subject to disclosure and consultation with the community. Para.4.3. should be amended to clarify that disclosure of any material deviations from applicable standards and the action steps should all be disclosed as part of the ESIA and ESAP.

Section 5: Public Consultation and Disclosure

We agree with OPIC that community engagement during project development helps avoid delays in implementation, and that this engagement should be "inclusive, culturally appropriate and meet the needs of disadvantaged and vulnerable groups." However, OPIC should be clearer that for Category A projects, consultations must be held with the community on the draft ESAP and any material deviations that will be allowed from the project-specific standards, all of which should be part of the draft ESIA. Similarly the ESAP and any material deviations should be included in the material that is translated pursuant to para. 5.3.

5.11. We understand that the final ESAP or Remediation Plan may not be available for public disclosure and consultation but a draft ESAP and Remediation Plan should be.

5.14. Category B, C and D projects. OPIC should require disclosure and consultation with affected communities for Category B, C, and D projects to the extent there are any potential impacts on the community. The scale and scope of the consultation should be reflective of the potential risks. Most importantly, the decision to categorize a project as B, C or D should be made public as soon as it is made and should be subject to public consultation.

OPIC also should enhance its requirements regarding the nature of the consultations to ensure that they are meaningful. We support OPIC's requirement that "environmental and social information should be made available to the project affected people in a language, format, and medium that is accessible" and facilitates the "free expression of opinions." However, while OPIC requires these steps and notes the importance of consultation, it does not provide any minimum rules or requirements about the nature of this consultation. Paragraph 5.5, offers references to further guidance on how to conduct meaningful public consultation, but does not require Project Applicants to follow any of these standards. As written, OPIC only requires some form of consultation, which seemingly could be one-way informational briefings. OPIC should require that consultations find suitable methods for facilitating oral or written comments from affected communities. OPIC should also require its clients to demonstrate that the communities' comments were heard and taken into consideration. Comments do not have to be accepted, but they should be considered.

5.12. Audits. We support OPIC's requirement that Category A project Applicants conduct and certify that a third-party audit has occurred. Additionally, OPIC should require the disclosure of the full audit, rather than just a summary as stated in paragraph 5.12.

Section 6: Conditions and Compliance

6.2. We fully support the statement that OPIC requires compliance of all conditions, covenants and representations "regardless of whether or not the Applicant has a controlling interest in the project". This has been a recurring problem at the IFC. OPIC may have to take additional steps to ensure it has leverage to ensure that the project complies with OPIC conditions. At the very least, OPIC must be satisfied that all project participants know about OPIC standards and have agreed to meet them.

6.3 OPIC requires clients to prepare and submit an annual environmental and social report that summarizes the environmental and social performance of the project to show that it's in compliance with its agreement with OPIC. OPIC's current policy requires an independent third-party audit if clients do not submit their annual report. This omission from the current policy appears to violate HR 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.”

Section 7: Monitoring

OPIC should commit to the requirement that its staff or independent consultants conduct on-site monitoring of all Category A and B projects during the construction phase of the project. Additionally, OPIC should require programmed intervals of on-site monitoring by OPIC staff or third-party auditors. Monitoring is a key part of ensuring compliance with the environmental and social standards, and relying solely on the client to monitor its own project is not reliable.

Additionally, OPIC must require disclosure of all monitoring documents. Further, OPIC should require the disclosure of complete third-party audits, and not just their summaries as stated in paragraph 7.6.

Section 8: Climate Change and Renewable Energy

Greenhouse Gas Emissions Threshold: OPIC currently sets a schedule for reductions in greenhouse gas emissions in its active portfolio for those projects that emit more than 100,000 tons of CO₂-eq. per year. OPIC should adopt a best practice threshold, as determined by the U.S. Environmental Protection Agency, of 25,000 tons of CO₂-eq. per year (see www.epa.gov/climatechange/emissions/ghgrulemaking.html).

OPIC’s draft policy includes accounting for project direct emissions. However, OPIC should adopt best practices and expand greenhouse gas emissions accounting to include indirect emissions, such as downstream or lifecycle emissions, which for fossil fuel extraction, refining and transportation projects will include the emissions that result from the ultimate combustion of the fossil fuel made possible by OPIC support. This can help OPIC make decisions on whether or not to approve projects based on total lifecycle emissions, which in some instances (e.g., liquid natural gas schemes) are far greater than direct project emissions may imply.

8.5. Further, paragraph 8.5 provides that projects involving “renewable energy or ‘clean energy technology’ are assigned a greenhouse gas emission level of zero for the purposes of this policy.” The definition of “clean energy technology” creates a potential loophole that would allow OPIC to assign fossil fuel projects that are more efficient than the norm in a host country a value of zero emissions, thus allowing OPIC to support projects with significantly greater GHG emissions than the agreed targets in paragraph 8.1. We urge that paragraph 8.5 be re-written to clarify that emissions from all projects otherwise meeting OPIC’s climate change policy thresholds still be counted towards the total portfolio emissions cap and reduction schedules. In general, OPIC should also commit to phase-out its funding of fossil fuel projects, which is consistent with the commitment made by President Obama and other world leaders at the 2009 G-20 meeting held in Pittsburgh.

Appendix B: Categorical Prohibitions

We would add the following to the list of Categorical Prohibitions in Appendix B:

In Paragraph III. Production or trade in any persistent organic pollutant banned under the Stockholm Convention on Persistent Organic Pollutants;

Projects that cause the involuntary resettlement of any indigenous peoples from their traditional lands or that take place or adversely affect their traditional lands, without their free, prior informed consent.

Projects that would adversely affect a wetlands of international importance as listed under the Ramsar Convention

Projects that would be inconsistent with Nationally Appropriate Mitigation Actions the country has agreed to under the Copenhagen Accord.

Extractive Industry Projects that do not publicly disclose all royalty or other payments made to the host country government.

Thank you in advance for consideration of these comments.

Respectfully submitted,

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