

U.S. Comments on the IFC's Sustainability Framework Suggested Changes to December 2010 Draft

Submitted March 4, 2011

Sustainability Policy

- **Climate change.** We recommend that the IFC incorporate the following approaches in the paragraph on climate change:
 - The IFC will implement some form of carbon accounting (carbon metrics) in the IFC's investment criteria. (Alternatively, confirm that if this is included in the World Bank Group's energy strategy, this will also apply to the IFC.)
 - The IFC will move to reduce the carbon footprint of its portfolio (for example by taking on a carbon target).
 - With respect to coal-powered energy projects, the IFC will pursue an approach consistent with the USG's coal policy (<http://www.treasury.gov/resource-center/international/development-banks/Pages/guidance.aspx>).
 - That the IFC will explore developing financial products that take into account environmental considerations.

- **Financial intermediaries.**
 - Per IFC statement at the March 3 consultation, we recommend that paragraph 33, bullet 4, be clarified to explicitly include medium-risk projects. This could be done by extending the requirement to apply the Performance Standards to "medium and high risk projects" or "projects with more than minimal risk." We would welcome clarification that this applies to project finance and large corporate loans.
 - We recommend that an FI environmental and social management system incorporate, not "be aligned with," the principles of PS1. "Aligned with" is unclear (paragraph 33, bullet 1).
 - The phrase "IFC requirements," in paragraphs 33 and 34, is unclear. We recommend clarifying "IFC requirements in paragraph 33."
 - With respect to FI supervision (para 44), we recommend that the text state that the IFC "will" review the FI's process and results of the FI's due diligence (not "may" review).
 - Broad Community Support. The sustainability policy requires the IFC to confirm BCS in certain cases (significant potential adverse impact on affected communities or potential adverse impact on Indigenous Peoples). We recommend a parallel requirement that the FI (or IFC) confirm BCS, when these same circumstances arise in an FI subproject.

- **Categorization.** We recommend that the cutoff between category FI-1 and FI-2 be that FI-1 include where any business activities with diverse, irreversible or unprecedented social or environmental risks and/or potential impacts are anticipated.

- **Extractive Industries.** We recommend:

- Deleting paragraph 50. Best practice is contract disclosure (subject to redaction of confidential material).
- Stating that the provisions of paragraphs 48-51 also apply to FI subprojects financing or investing in extractive industry activities. (Requiring FI subproject clients to disclose contracts and revenue information would be conceptually similar to the existing requirement that FI subproject clients disclose EIAs.)
- Clarifying that the scope of paragraphs 49-50 includes principal contracts for exploration, when it sets out the key terms and conditions under which a resource will be exploited.
- Clarifying the terms “multiple corporate purposes” and “principal investment.”
- Clarifying further, at an appropriate time and place, the phrase “commercially sensitive information.”

Performance Standards

- **PS1-Human rights.** We support the IFC’s efforts to assist the private sector in fulfilling its responsibility to respect human rights. We recommend that it be clear in PS1, as it is in the Sustainability Policy, that the ESIA includes human rights where relevant. We also recommend that footnote 11 not be limited to high-risk circumstances, but simply state that a client may choose to use a human rights impact assessment to help further identify risks and impacts. In the Sustainability Policy’s Footnote 2, we recommend that the IFC remove “dimensions” following human rights (to be consistent with other references to human rights throughout the document). In paragraph 11, fourth line, we recommend that “means” be changed to “includes” to avoid the limiting of the issue.
- **PS1-Mitigation hierarchy.** We recommend that the mitigation hierarchy be made clearer in the Objectives section and paragraph 13: “to adopt a mitigation hierarchy to anticipate and avoid impacts; where avoidance is not possible, to minimize impacts; and, in general, only where avoiding or minimizing to an acceptable level are not technically and/or financially feasible, to compensate for and/or offset impacts.” The current language in both places suggests that avoidance is the preferred option, but makes no obvious distinction in preference between “minimize” and “compensate/offset.” Minimizing impacts should be preferable to compensating/offsetting.
- **PS1-Significant impacts/footnote 9.** Footnote 9 could be read as stating that that certain issues will be assessed only if they are significant. We recommend deleting footnote 9 or recasting it to say, “if reasonably expected to be material.” The rationale for singling out these topics is unclear; if the footnote remains, it would be helpful to reference their cross-cutting nature or other rationale.
- **PS1-Indirect impacts.** We recommend that PS1 (and elsewhere as needed) state explicitly that the scope of impacts to be assessed includes indirect impacts.
- **PS1-Alternatives analysis.** We recommend that PS1 require that the impact assessment include an analysis of alternatives that is fit for purpose.

- **PS1-Associated facility.** We recommend rephrasing the text to reflect the principle that an associated facility is new third-party facility/expansion/use essential for the project to function, eliminating the test “if the project did not exist.” This test is unnecessary, and may be too black-and-white for situations where it is difficult to evaluate causality. We recommend that “facilities ... constructed or expanded” also include an increased operational tempo (more activity, although not an outright expansion), which is also evidence of a connection. In this case, the ESIA should consider the impact of the increased use.
- **PS1-Cumulative impact.** We recommend that the cumulative impact analysis include “other developments that will impact on the same resource,” not “other developments of the same type.” The purpose of a cumulative impact analysis is to look at cumulative impacts of the full range of different activities on a given resource/receptor. Looking only at impacts of projects that are of the same type as the project under consideration is too limited and does not achieve this purpose.
- **PS1-Post-closure.** We recommend clarification in an appropriate place that “closure” in the project cycle includes post-closure activities.
- **PS1-Consent**—We can support a requirement that the consent of indigenous peoples be obtained in certain circumstances. However, we do not believe that the requirement should be imposed by defining “FPIC” (a term that PS7, para 4, notes has no universally accepted definition) to mean “consent.” Rather, we strongly believe that the policy and PSs should simply and directly require consent where consent is appropriate over and above Informed Consultation.
- **PS1 - Supply chains.** Per IFC statement at the March 3 consultation, we recommend clarifying that the supply chain requirement applies to supply chain issues beyond PS2 and PS6. This could be achieved thus: “...will also consider those risks and impacts associated with supply chains. This will include but not be limited to the supply chain issues defined in” PS 2 and PS6.
- **PS2-Labor and Working Conditions.** See separate comments below.
- **PS6- Biodiversity Conservation and Sustainable Management of Living Natural Resources.** See separate comments below.
- **PS7-** See PS1.

Access to Information Policy

- **Para 30.b.iii** – Financial intermediaries. We recommend disclosure of the key measures identified to strengthen the FI’s environmental and social management system (ESMS), in addition to the key measures identified to mitigate the risks and impacts.

- **Para 31** - Broad community support. We recommend that the language be tweaked to clarify that the reporting will be not only on process but also on the substance contributing to the decision (consistent with the protections in paragraph 11 of the policy).
- Suggested Chapeau to Section 3 - We recommend the following language, to insert as chapeau to Section 3, before Section E begins:

“The IFC has established a presumption in favor of disclosure of information, as described in paragraph 8. As such, the information described below is not an exclusive list of information that might potentially be disclosed under this policy. Rather, it elaborates the procedures governing disclosure of certain documents the Corporation's experience has shown are frequently subject of public interest.”

- We recommend addition to this policy at an appropriate place two key disclosure requirements pertaining to GHGs:
 - That the IFC will disclose on a project basis the GHG emissions reported to it by clients.
 - That in two years the IFC will begin to disclose GHG emissions on a portfolio basis. (The intent of this recommendation is to make tangible in the policy the statement on page 14 of the December CODE paper that within two years, the IFC will be in a position to disclose summary statistics that can provide an overview of its portfolio.)

PS6-Biodiversity

(As sent previously and distributed in hard copy at March 2, 2011 meeting)

1. We recommend stating in an appropriate place(s) that:
 - a. “The IFC will not support any project that would convert or degrade high conservation value natural forest (primary or secondary) or high conservation critical habitat, whether within the project or affected by the project.”
 - b. “The IFC will not support industrial monocultural land use, including industrial timber plantations, in high conservation value primary and secondary forest areas.” (Note: With respect to timber plantations, this is a concern not only for oil palm but also other types of plantations.)
2. We recommend that the same protections be extended to client project activities that directly *affect* critical habitat as apply to client project activities *in* critical habitat. (Paras 16-19.)
3. We recommend that offsets for modified and natural habitat meet the BBOP *Principles on Biodiversity Offsets*, at a minimum. (Perhaps “in accordance with internationally recognized guidelines,” with a footnote “Such as BBOP’s *Principles*.”) (Paras 10 and 15)
4. We recommend that offset banking not be an option. (Para 15)
5. We recommend that several qualifiers be dropped:
 - a. Para 6: “significant” (so that line 2 reads, “...and identify any residual impacts”)
 - b. Para 6: “relevant” threats to biodiversity
 - c. Para 16: “significant” from the definition of critical habitat used throughout the paragraph;
6. We recommend that ecosystem services analysis and avoidance/mitigation not be limited to those ecosystem services of priority to Affected Communities or of priority to the project, but encompass all ecosystem services. (Paras 6 and 24-25)
7. We recommend clarifying in paragraph 6 that the risks and impacts identification process referred to is “the risks and impacts identification process required by Performance Standard 1,” in order to be clear that the requirements of PS1 apply with respect to scope and content of the risks and impacts identification process. (Para 6)

Proposed Text on PS6

Below is (i) proposed text to address U.S. concerns about critical habitat and offsets and (ii) additional priority comments related to PS6. Inclusion of the reference to independent, internationally recognized experts is a top priority.

Proposed revisions are highlighted in yellow, underlined, and bold.

Para 3

IFC recognizes that the human-valued services provided by ecosystems are often underpinned by biodiversity, and that impacts on ~~Biological Diversity to conserve biological diversity and promote use~~ biodiversity can often adversely impact on the delivery of ~~renewable natural resources in a sustainable manner.~~ ecosystem services. This Performance Standard addresses how clients can ~~avoid, reduce, restore, and offset mitigate impacts on and~~ **avoid, reduce, restore, and mitigate impacts on and** sustainably manage biodiversity and ecosystem services ~~arising from their operations as well as sustainably manage renewable natural resources and ecosystem services.~~ throughout the project's lifecycle.

Para 6

~~5.6.~~ ...The risks and impacts identification process should consider direct and indirect project-related impacts on biodiversity and ecosystem services and identify ~~residual impacts.~~ any **significant** residual impacts. This process will consider **relevant** threats to biodiversity and ecosystem services, ~~especially focusing~~ on habitat loss, degradation and fragmentation, invasive alien species, overexploitation, ~~hydrological changes,~~ nutrient loading, ~~and~~ pollution, ~~and climate change.~~ It will also take into account the differing values attached to biodiversity and ecosystem services by ~~Affected Communities in addition to others.~~ For biodiversity, where appropriate, this process will also take into account values **held** by other stakeholders. Where paragraphs 13–20 are applicable, clients should consider project-related impacts across the potentially affected landscape or seascape.

Para 7

7. ...Given the complexity in predicting project impacts on biodiversity and ecosystem services over the long term, the client **must** ~~[should]~~ implement ~~[mitigation and monitoring]~~ measures **to avoid, reduce, restore, and mitigate** impacts through ~~adaptive management~~ **throughout the project's lifecycle.** When avoidance of impacts is not possible, measures to minimize impacts and restore biodiversity and ecosystem services should be defined. For the protection and conservation of biodiversity, the

mitigation hierarchy includes biodiversity offsets **only on an exceptional basis, as discussed below.**

Para 10

10. For the protection and conservation of biodiversity, the mitigation hierarchy **may** include biodiversity offsets **only on an exceptional basis when all other options have been exhausted, as determined by independent, internationally recognized experts.** A biodiversity offset **must** [should] be designed and implemented to achieve measurable conservation outcomes that can reasonably be expected to result in no **[net]** loss and preferably a net gain of biodiversity; a net gain is required in critical habitats. The design of a biodiversity offset must adhere to the “like-for-like or better” principle and must be carried out in alignment with best available information and current practices. When a client is considering the development of an offset as part of the mitigation strategy, **independent, internationally recognized experts** with knowledge in offset design and implementation should be involved. **Biodiversity offsets for impacts in critical habitat will not be allowed as part of the mitigation hierarchy for impacts in critical habitat except in those cases where, in addition to the requirements above:**

- **The proposed offset has been developed in close consultation with independent, internationally recognized experts;**
- **The project area is already degraded by other activities, and further degradation is likely regardless of the proposed IFC-financed project ; and**
- **The IFC has the opportunity to work with the client to sustain and improve the viability of the species.**

Para 17

17. The IFC will not support any project activities in areas of critical habitat, with exceptions to be determined on a case-by-case basis in consultation with internationally recognized biodiversity experts. In such cases, it must be credibly demonstrated that the project will result in positive gains for biodiversity in the critical habitat, and the client must demonstrate the following:

~~[unless the following requirements are met it could be demonstrated that there will be net positive gains of those biodiversity values for which the critical habitat was designated.]~~ The client must demonstrate the following through their mitigation strategy:]

- ~~There are no~~ The project does not lead to **[measurable]** adverse impacts on ~~the ability of the~~ those biodiversity values for which the critical habitat ~~to support the established population of species described in paragraph 9 or the functions of the critical habitat described in paragraph 9~~ was designated, and on the ecological processes supporting those biodiversity values;

- ~~There is no~~The project does not lead to a **[net]** reduction in the global and/or national/regional population of any ~~recognized critically endangered~~ Critically Endangered or ~~endangered~~ Endangered species over a reasonable period of time; and,
- A robust, appropriately designed, and **implemented** long-term biodiversity monitoring program is integrated into the client's management program.

Additional comments on PS6

- **High Conservation Value** - We recommend stating in an appropriate place(s) that:
Note: This comment has already been provided but we are repeating it here in light of its importance and close relationship to our critical habitat concerns above and plantation concerns below.
 - a. “The IFC will not support any project that would convert or degrade high conservation value natural forest (primary or secondary) or high conservation critical habitat, whether within the project or affected by the project.”
 - b. “The IFC will not support industrial monocultural land use, including industrial timber plantations, in high conservation value primary and secondary forest areas.” (Note: With respect to timber plantations, this is a concern not only for oil palm but also other types of plantations.)
- **Supply chains** - We recommend that the client be required to assess potentially significant environmental and social supply chain impacts whether or not the client can reasonably exercise control over them. Assessment of impacts is critical to a risk assessment and should inform the IFC’s decision, whether or not the client is in a position to address the risks.
- **Natural and plantation forests and freshwater and marine systems** - We recommend reinstating the previous text on natural and plantation forests and freshwater and marine systems, revised to reflect the additional point on monocultural land use above. The previous language addresses where to locate plantations and refers to internationally-accepted standards for both plantations and freshwater and marine systems.

PS2 - Labor and Working Conditions

Scope of Application Issues

Paragraph 4: “The scope of application of this Performance Standard depends on the type of relationship between the client and the worker. It applies to workers directly engaged by the client, engaged through third parties to perform work ~~on the client’s premises~~ directly related to core functions ~~essential to~~ of the project for more than a minimal a substantial duration, as well as workers in the ~~primary~~ supply chain.⁴”

- Limiting the application to “third parties [working] *on the client’s premises*” is a very restrictive application for employees who may be considered indirect hires of the firm. We think it likely that many subcontracted employees (e.g., employed by agencies under direct contract with the firm) work off-premises. Labor stakeholders have brought to our attention a particular IFC project where under- age children were hired as indirect employees off-premise. **We strongly recommend deleting “on the client’s premises.”**
- The provision should refer to “core functions.” The proposed text suggests that there are non-essential core functions which might not be included.
- “*Substantial* duration” is ambiguous and maybe be invoked by IFC clients to unduly narrow the application of the standard even in potentially egregious situations of short- to medium-term duration.

Footnote 4, replace existing footnote with suggested new language: “4. ‘Supply chain’ shall mean suppliers that provide goods or materials for the core business function of ongoing operations.”

- The rationale for substituting this language is: (1) We are concerned that the current language related to “*primary*” suppliers relies on ambiguous terms; (2) it is not clear how secondary or tertiary, etc., suppliers could be consistently or rigorously distinguished from primary suppliers, and (3) we’d like to bring this concept closer to the language on due diligence used in other forums, especially under the OECD Guidelines. As reflected in that language, we think the emphasis should be on “heightened risks and adverse impacts” throughout the supply chain that the client could reasonably address. See paras. 27 and 28.

Paragraph 6: As with paragraph 4, we recommend deleting “on the client’s premises” and “essential.”

Paragraph 11: This paragraph presumes that migrant workers perform similar work to non-migrant workers, and that terms and conditions may therefore be compared. This may not be the

case. In situations where there are comparators, DOL suggests the insertion of “the same or” before “substantially equivalent” to clarify that migrant workers should work under the same terms and conditions of work as non-migrant workers where possible.

Protecting the Work Force

Paragraph 21: Suggest revisions.

~~“The client will not employ children—The client may not employ any children under age 18 in any manner that is economically exploitative, or is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. [Insert footnote 11 here instead of below.] The client will identify the presence of all persons under the age of 18—, and their work will be subject to an appropriate risk assessment and regular monitoring of health, working conditions, and hours of work. Where national laws have provisions for the employment of minors, the client will follow those laws applicable to the client, but where national laws are less protective than the above standards with respect to working age and working conditions, the above standards should be followed. Children under the age of 18 will not be employed in hazardous work. All work of persons under the age of 18 will be subject to an appropriate risk assessment and regular monitoring of health, working conditions, and hours of wo”~~

Occupational Health and Safety

Paragraph 23. Please see insertion below.

The client will provide workers with a safe and healthy work environment, taking into account inherent risks in its particular sector and specific classes of hazards in the client’s work areas, including physical, chemical, biological, and radiological hazards, and specific hazards for women. The client will take steps to prevent accidents, injury, and disease arising from, associated with, or occurring in the course of work by minimizing, as far as reasonably practicable, the causes of hazards. In a manner consistent with good international industry practice, (as reflected in various internationally recognized sources including the World Bank Group Environmental, Health and Safety Guidelines), the client will address areas that include the (i) identification of potential hazards to workers, particularly those that may be life-threatening or may cause serious harm; (ii) provision of preventive and protective measures, including modification, substitution, or elimination of hazardous conditions or substances; (iii) training of workers; (iv) documentation and reporting of occupational accidents, diseases, and incidents; and (v) emergency prevention, preparedness, and response arrangements. For additional information related to emergency preparedness and response refer to Performance Standard 1.

Workers Engaged by Third Parties

Paragraphs 24 through 26: Same comments as raised in Paragraph 4 and 6 with respect to terminology (“on the client’s premises,” “essential” and “for a substantial duration.”).

Supply Chains

Paragraphs 27 and 28: What we understand from these paragraphs is that in relation to *child labor, forced labor, and safety issues*, clients are responsible for taking appropriate steps to remedy problems found in their supply chains. The implication, thus, is that in relation to *health issues, freedom of association, collective bargaining, non-discrimination and equal opportunity, and the other labor issues* discussed in PS2, the client is not responsible for any monitoring or remediation efforts outside of the company’s own workers and those engaged by third parties, and only when third party workers are employed on the premises.

- If this interpretation is not correct, then the text should be altered to clarify this issue.

Paragraphs 27 and 28: We recommend adding to the list of covered issues a high risk of “significant adverse health effects,” in addition to a high risk of child labor or forced labor.

GUIDANCE NOTE for PS 2

Child Labor Issues

Paragraph G59: Footnote 12 seems strangely placed. Its content, clarifying the international instruments that underlie the concept of child labor, is good, but doesn’t have much relation to the content of paragraph G59, which discusses national laws. But it would make more sense to place this footnote in the PS itself, modifying paragraph 21.

Paragraph G62 states that “*Clients should set a corporate minimum work age that at a minimum complies with national law and Performance Standard 2...*”

Paragraph G62 also states, “*In countries or sectors where there is a risk of child labor, clients should review and retain copies of verifiable documentation concerning the age and employment profile of all people under 18 working in the business.*”

- Suggest striking this sentence. PS2 actually makes this a requirement for all clients, not just in certain countries. If not struck, then PS2 and the Guidance Note should be made consistent.

Para 63. We recommend deleting the definition of human trafficking. It is wrong and, in any case, any discussion of trafficking issues fits better under the Forced Labor heading (and is already discussed there – a correct definition of trafficking is provided in paragraph 22, footnote 12 of the PS2).

Forced Labor Issues

Paragraph G65 seems to make an exception for “*limitations on freedom of movement which are not necessary for the operation of the business.*” Although such limitations are sometimes necessary, such as for workers onboard ships, this ambiguous phrase leaves a large loophole which could allow for egregious forced labor practices to occur.

Paragraph G66: Note that ILO Convention 29 is on “Forced Labor,” not on “Forced or Compulsory Labor.”

Paragraph G68 neglects to provide companies guidance on referral of forced labor cases to the appropriate authorities. Forced labor in company supply chains is often related to criminal activity.

Paragraphs G69 – G71 provide good detail about physical coercion of employees, but gloss over psychological coercion, which is a very significant element of forced labor. At a minimum, the following edit is strongly encouraged in paragraph G69: “*Clients need to avoid any type of physical or psychological coercion of workers...*”

In addition, the references to migrant workers’ vulnerability in paragraph G72 are important but redundant – this does not need to be stated twice.

Scope of Application Issues

Paragraph G92: “*It is a good practice for the client to address labor issues (particularly those specified in PS2) in its supply chain...*” but the PS2 (paragraphs 27 and 28) actually mandates that companies take appropriate steps to remedy certain types of labor issues (child labor, forced labor, safety). Clients should be clearly directed that such remediation is mandatory, not “a good practice.” The language here should be modified so as not to call into question the mandatory requirements.

Why does paragraph G94 apply to child and forced labor, but not to safety issues?

Paragraph G95 provides guidance on remedying child labor situations which is somewhat redundant with paragraph G61, and in some places, somewhat contradictory. It does not seem necessary to provide remediation guidance in 2 separate places – perhaps one paragraph could just cross-reference the other.