



## **Comments on the ADB's Draft Safeguard Policy Statement**

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Submitted by:

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Thank you for this opportunity to comment on the draft ADB safeguard policies. These draft policies are very weak and will not adequately protect the rights of communities affected by ADB-funded projects. These draft policies weaken existing policies. It is critical that the ADB redraft the safeguard policies and publish a new draft for public comment.

These comments do not include all the problems with the draft policy. There are many more problems that have been identified by other individuals and organizations, and others that have not yet been written down.

The problems with the current draft include:

- Affected communities must be guaranteed that both the Bank and the borrower/client are required to comply with both the ADB safeguard policies (including all related documents) and domestic laws and regulations. The current draft does not adequately protect the rights of affected communities.
- Affected communities must have a means of enforcing the policies if either the Bank or the borrower/client do not comply with the policies. The current draft does not adequately ensure that the ADB is responsible for compliance by Bank staff and the borrower/client which would allow for enforcement of the policies through the Accountability Mechanism.
- Many important provisions of the documents are inconsistent which will make it difficult for Bank staff and borrowers/clients to implement, and difficult for affected communities to enforce.
- The ADB should not adopt the Country Safeguard System (CSS) approach at this point in time. As ADB staff are well aware, World Bank staff have been testing a similar system. There is not enough information to demonstrate that the system adequately protects the rights of affected communities. Changing to the CSS will substantially reduce the safeguards for affected communities.
- Many provisions in the draft policy, including many critical provisions, are not mandatory which makes them meaningless.

Below I included detailed comments about specific concerns with the draft policy.

## **I. Concerns Related to the SPS -- General Requirements**

The following includes comments related to the general provisions.

### ***A. Clarity***

The first issue listed under key policy issues and considerations, is improving clarity, consistency, and coherence. The draft Safeguard Policy Statement (SPS) and related documents do not provide any clarity, consistency and coherence. Instead, these documents add another layer of complexity to the safeguard policies and are inconsistent.

Under the draft policies projects must comply with the SPS general requirements (SPS General Requirements), the SPS objectives, scope, and policy principles for each area (environment, Indigenous Peoples, and involuntary resettlement) (SPS Objectives), and the safeguard requirements for borrowers/clients (Safeguard Requirements). Furthermore, there is little consistency between these three documents. It would be best if all the policies, objectives, and requirements could be found in one, consistent document for each policy area. The Bank could meet its objective of clarifying whether the Bank or the borrower/client is responsible for carrying out each task simply by stating which party is responsible in each section.

## ***B. Accountability***

The policies are meaningless if they are not clear and mandatory. The draft policies include many vague provisions and many discretionary provisions.

The link between the SPS and the Safeguard Requirements is not clear from this draft document. Both documents must be mandatory and enforceable through the ADB Accountability Mechanism. The ADB must not finance projects that do not meet all of the requirements in the SPS General Requirements, SPS Objectives, and the Safeguard Requirements. The SPS states that the “ADB assumes responsibility to review, monitor, and supervise projects throughout the project cycle against the standards embodied in the safeguard policy statement.” SPS, sec. A (para 38). This must also incorporate the Safeguard Requirements to ensure that the ADB also takes responsibility for ensuring the borrower/client responsibilities are adequately carried out. Section D of the SPS (paras.60-62) describes the roles and responsibilities of the ADB and the borrower/client. The ADB must be responsible for ensuring that the borrower/client complies with all documents related to the safeguard policies or there is no accountability for the client/borrower.

Several provisions of the SPS related to roles and responsibilities raise serious concerns about lack of accountability. The SPS states that “[i]f a borrower/client fails to comply with legal agreement on safeguard requirements . . . ADB *may* exercise legal remedies . . . which are available under the legal agreements.” SPS, sec. D(1) (para. 61). The ADB must be required to pursue legal remedies if it attempts to bring the borrower/client into compliance fail. The SPS reaffirms that the ADB is not compelled to use legal remedies in stating that “[r]esorting to legal remedies in the event of noncompliance is not automatic or mandatory.” *Id.* Legal remedies must be automatic and mandatory in order to give any meaning to the safeguard policies. The policies must include specific remedies for non-compliance such as suspending financing and canceling projects.

Further, the SPS describes the borrower/client’s roles and obligations as meeting the ADB policy objectives and complying with host country laws. SPS, sec. D(2) (para. 62). These obligations become meaningless if the ADB is not required to enforce them. If the ADB is not required to enforce them, then affected communities will have no recourse if the borrower/client does not comply with the ADB policies. The safeguard policies are

designed to protect affected communities – they will fail if the affected communities cannot require the ADB to ensure borrower/clients are complying with the policies.

Affected communities must be guaranteed that both the Bank and the borrower/client are required to comply with both the ADB safeguard policies (including all related documents) and domestic laws and regulations.

### ***C. Information Disclosure***

Projects with a financial intermediary should not be exempt from the disclosure requirements of the Information Disclosure policy found at paragraph 45.

### ***D. Public Comment Period***

One of the most dramatic changes from the existing policies is the elimination of the 120-day period for public comment. This is a critical weakening of the policies. The draft policies do not include a specific time frame for public comment or consultations. It is critical that the ADB ensures that citizens will have adequate time to review documents and participate meaningfully in decisions that impact them.

### ***E. Environment Categorization***

Category A. The proposed description of a category A project is similar to that used by the World Bank except that the World Bank specifically includes impacts to indigenous peoples, natural habitats, cultural property, and projects requiring involuntary resettlement. WB OP 4.01, para. 8(a), fn. 10. The draft ADB SPS describes category A projects as those impacting “human populations, biodiversity, or natural resources.” SPS, para. 42. This may be interpreted as a limitation – it is unclear whether a project with likely impacts to cultural resources would be classified as a category A project. The description of category A projects should be expanded to ensure that impacts to other resources, such as cultural resources and the climate, will be included.

Category FI. The draft ADB SPS states that projects involving investments of ADB funds through a financial intermediary (FI) requires an environmental and social management system. The draft SPS includes no other information about FI project compliance with ADB policies. In comparison, the World Bank EA policy requires FIs screen proposed subprojects and ensure that appropriate EAs are carried out for subprojects. Under WB policies, the FI is responsible for ensuring the subprojects comply with bank policies and domestic laws. WB OP 4.01, para. 10. The WB policies also include stronger EA requirements for FI projects (WB OP 4.01, para. 11).

## ***F. Inconsistencies in Projects Covered***

There are inconsistencies between the description of projects covered by the SPS and the Safeguard Requirements for each of the three safeguard policy areas. It is important to remove inconsistencies to make sure the policies are clear and unambiguous. The policies should cover all projects with significant ADB involvement. The policies should consistently refer to projects that are “ADB-funded or ADB-administered.”

The Safeguard Policy Statement says that the “policies apply to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means, such as equity and/or guarantee (hereafter broadly referred to as projects).” SPS sec. B(2) [included as sec. V, para. 40].

### **1. Environment**

Section A, para. 2, of the Environment Safeguard Requirements (Environment Requirements) only states that the requirements apply to “ADB-financed projects.” In the following section, the Environmental Requirements state that the requirements apply “to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means (such as equity and/or guarantee).” This inconsistency should be cleared up. This could be done by deleting “to ADB-financed projects” from the end of the first line of section A(2).

### **2. Involuntary Resettlement**

Section A, para. 2, of the Involuntary Resettlement Safeguard Requirements (IR Requirements) states that the requirements apply to “projects supported by the ADB.” The following section states that the requirements apply “to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means (such as equity and/or guarantee).” Section B, para 3. Interestingly, the very next sentence adds that the IR Requirements “also cover actions conducted in anticipation of ADB projects.”

### **3. Indigenous Peoples**

Section A, para. 2, of the Indigenous Peoples Safeguard Requirements (IP Requirements) only states that the requirements apply to “ADB-financed projects.” The following section states that the requirements apply “to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means (such as equity and/or guarantee).” Section B, para 3. Similar to the IR Requirements, the very next sentence adds that the IP Requirements “also cover actions conducted in anticipation of ADB projects.”

Which projects are covered by the Policy and Requirements? ADB-financed projects? ADB-funded projects? ADB-administered projects funded by a loan or grant? ADB-administered projects without ADB financing? ADB-supported projects? This should be made very clear and language should be used consistently throughout the Policy and Requirements. I encourage the Bank to adopt the broadest language – ensuring that all ADB-financed and ADB-administered projects are covered by the Policy and Requirements.

## **II. Concerns Related to the Environmental Safeguard Policy and Safeguard Requirements**

There are many problems with the Environmental Safeguard Policy and Safeguard Requirements.

### ***A. Alternatives to Consider***

The Policy states that alternatives to “the project, project design and components” must be considered. Policy Principles, sec. 3. The Requirements state alternatives to the “proposed project site, technology, design, and operation” must be considered. Environmental Requirements, Annex 1(F). These can be interpreted to mean different things. For example, if a country wanted to build a dam to produce electricity, it could be argued that the assessment only need to consider alternative sites and technology for dams under the language found in the Requirements, while the language found in the Policy argues for considering feasible alternatives for producing electricity such as a wind power project.

The alternative review is limited to “financially and technically feasible alternatives.” Policy Principles, sec. 3; and Environmental Requirements, Annex 1. This may mean that project proponents only need to consider the least-cost alternative. A more costly project (and thus perhaps not “financially feasible” in the eyes of the project proponent) may have less impact on the environment and thus be worth the extra costs. The wording of the alternatives section may mean that such an alternative would not be considered under the current draft.

### ***B. Analysis of Alternatives***

The outline of the EA Report includes one section that reviews the impacts of the proposed project and another section that reviews the impacts of the alternatives. Environmental Requirements, Annex 1 (E) and (F). These should be integrated to ensure that the assessment enables citizens to easily compare the impacts of the chosen project and the alternatives considered. The outline of the EA requires assessment of the suitability of the alternatives to local conditions and several other requirements not

included in the assessment of the chosen project. If the alternatives analysis is intended to cover the chosen project as well as the rejected alternatives, this should be made clear.

### ***C. Compliance with Domestic and International Law***

The draft Requirements require comparing the environmental impacts and risks with applicable laws and regulations of the jurisdiction in which the project operates that pertain to environmental matters, including those laws implementing host country obligations under international law. While this is a good addition to the Bank's policies, it does not go far enough. The Policy or Requirements should explicitly require that projects comply with domestic and international law (in addition to complying with Bank policies).

The background information states that the ADB wants to harmonize its safeguard policies with those of other multilateral financial institutions. The World Bank Environmental Assessment policy goes much further in requiring compliance with domestic and international environmental law. The policy states that an environmental assessment (EA) "takes into account . . . the country's overall policy framework, national legislation, and institutional capabilities related to the environment and social aspects; and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA." World Bank, OP 4.01, para. 3.

### ***D. Impact of Projects on Climate***

I commend the Bank for specifically stating that environmental assessments will consider the impact of a project on the climate. Policy Statement, environmental Objectives, para. 3; Environment Requirements, para. 5. The Policy should go further though and require reductions in greenhouse gas emissions from projects that will have such emissions.

### ***E. Area of Influence***

It is not clear whether the EA would need to consider the cumulative impact of the proposed project and another project in the area that is planned or existing, but not under the control of the borrower. Environment Requirements, para. 6. If two dams are simultaneously proposed by different developers in the same region, the EAs for the dams should consider the impact of the other dam.

## ***F. Degree of Assessment Required***

The Requirements allow for full-scale environmental impact assessments or briefer reviews, but does not include guidelines for determining which is appropriate. Environment Requirements, para. 7.

While not perfect, the World Bank includes some guidelines to determine the breadth of assessment that is required for each proposed project. World Bank, OP 4.01 paras. 7-8 (including footnotes).

## ***G. Consultation and Information Disclosure***

The Policy Statement Environmental Safeguard Objectives require consultation with “affected people,” the Environmental Requirements require consultation with “affected people” and “local” NGOs, and the outline of the EA Report requires a description of consultation with “key stakeholders.” These three documents need to use consistent language to ensure broad consultation.

The Environmental Requirements require consultation with “affected people” and “local” NGOs. Who will determine who is affected and how narrowly to interpret local? Environmental Requirements, para. 12. Note that these provisions then state that views of the affected people will be taken into consideration. Does that mean that the Bank does not need to consider the views of the local NGOs?

The outline of the EA Report limits the description of participation to “key” stakeholders. Who will decide which stakeholders are key? Environmental Requirements, Annex 1 (G).

The language about who must be informed and consulted must be uniform to ensure there are no ambiguities and allow for broad consultation. The World Bank states that “project-affected groups and local nongovernmental organizations” must be consulted. World Bank, OP 4.01, para. 14. Adopting the World Bank’s language could still leave questions about how to interpret “affected” and “local.” The World Bank’s language also uses affected “groups” rather than “people.” Individuals should be encouraged to participate. The World Bank does not limit participation to “key” stakeholders. The ADB should use affected people and local NGOs (and drop the key stakeholder language). The ADB policy could be strengthened by stating that in-country people or groups that request information (regardless of whether they are affected or local) will receive the same information that is provided to the affected people. This would limit the borrower’s obligation to actively informing and consulting a reasonably defined local population, but would allow other people or groups to “opt-in” to the disclosure and consultation process.

It is good that the Requirements specifically state that the EA reports (draft, final, and updated) and environmental monitoring reports must be made available. Environmental Requirements, para. 14. However, this paragraph states that they must be disclosed to “key stakeholders.” Again, this is too limited.

It is good that the Requirements include providing relevant information in a “form, manner and language(s) accessible to the affected people.” Environmental Requirements, para. 12. Note that the Policy Statement Environmental Safeguard Objectives state that draft EAs (only) must be available to “affected communities” and “key stakeholders.” Policy Statement Environmental Safeguard Objectives, para. 6. This is weak.

The Outline of the EA Report includes two sections [(G) and (H)(iii)] on consultation and information disclosure. Is there a reason to have both sections? Perhaps they should be combined.

### ***H. Impact on Habitats, Protected Areas, and Natural Resources***

It is good that the Policy Statement Environmental Safeguard Policy Principles include specific substantive standards to apply in paragraphs 8-10. The Environmental Requirements add more substantive standards in paragraphs 18-33. All of these standards should be strengthened.

### ***I. Grievance Redress Mechanism***

Both the Policy Statement Environmental Safeguard Policy Principles and the Environmental Requirements require establishment of a grievance mechanism. However, the language about the mechanism is not consistent. The Principles require a mechanism for “affected communities concerns and grievances about the project’s environmental performance.” Environmental Policy Principles, para 5. The Environmental Requirements state that a mechanism must be established “[I]f ongoing risks to or adverse impacts on affected people are anticipated.” These documents apply different standards for establishing a mechanism. The mechanism must be created for each project. How does this mechanism work in relation to the ADB’s Accountability Mechanism? The section in the Environmental Requirements includes good language about ensuring the grievance mechanism must be available at no cost to the affected people and that it does not impede access to domestic remedies. However, there needs to be more information about how it relates to the ADB’s Accountability Mechanism to determine whether it is going to be redundant and require affected people to jump through another hoop, or to see if it is intended to be a simpler, speedier process. It is impossible to evaluate the grievance mechanism since there are no details about it.

### **III. Concerns Related to Involuntary Resettlement Safeguard Policy and Safeguard Requirements**

There are also many problems with the Involuntary Resettlement Safeguard Policy and Safeguard Requirements.

#### ***A. 'Address' Impacts Related to Parks***

Although the draft Involuntary Resettlement Safeguard Objective covers several types of involuntary resettlement, the Objectives specifically state that a policy principle is to “[a]dress the potential economic and social impacts of the project that are caused by involuntary restriction of access to legally designated parks and protected areas.” Resettlement Objectives, para. 5. Why is this type of resettlement addressed differently than other types? This could imply that other the potential economic and social impacts of other types of resettlement do not need to be addressed.

#### ***B. Screening Projects***

The Requirements state that “each project proposed for ADB financing” will be “screened *as early as possible*.” Resettlement Requirements, sec. B, para. 10 (emphasis added). In addition, “applicable government policies, institutional and legal frameworks for land acquisition, compensation, relocation, and rehabilitation” will be screened “[a]s *early as possible*” to verify whether “they satisfy the policy principles.” *Id.* at sec. B, para.11 (emphasis added). The Policy simply states that projects must be screened “*early*.” Resettlement Objectives, sec. 1 (emphasis added). This is another inconsistency that could lead to an interpretation that these two phrases have different meanings. The language used should be consistent.

#### ***C. Consultation and Information Disclosure***

The Resettlement Objectives state that “free, prior, informed consultation” shall be carried out “with all affected people, host communities, and local NGOs.” Resettlement Objectives, sec. 2. The next few lines state that “affected people” must be informed of their rights and options and must participate in planning and implementation of resettlement plans, and in monitoring and evaluation of such plans. *Id.* In addition to having free, prior, informed consultation, host communities and local NGOs should also be informed of their rights and options, participate in planning and implementation of resettlement plans, and monitor and evaluate such plans. The Requirements include similar distinctions between affected peoples and NGOs and host communities.

The Policy states the draft resettlement plans should be disclosed to “affected people and other key stakeholders.” Final resettlement plans will also be disclosed to “affected people and the public.” Resettlement Objectives, sec. 6. This is another inconsistency.

Also note that it is critical to include host communities in planning and implementation of resettlement plans since they will be impacted and need to be fully involved in the planning to make sure the resettlement will be successful.

The Requirements state “[t]he borrower/client will submit to ADB and disclose the following resettlement planning documents to key stakeholders:

- (i) a draft RP endorsed by the borrower/client before appraisal;
- (ii) a revised RP endorsed by the borrower/client after finalizing the plan;
- (iii) new RPs or addendums, if any;
- (iv) resettlement due diligence reports and corrective action plans, if any, and
- (v) monitoring reports.”

Section C para. 21.

The Outline Resettlement Framework also describes consultation.

These three policy documents must be consistent and must allow for broad consultation and information disclosure.

#### ***D. Grievance Redress Mechanism***

The Resettlement Objectives call for establishing “a local, independent grievance redress mechanism.” Resettlement Objectives, sec. 2. The Resettlement Requirements are more detailed and state that they apply to “affected people.” Resettlement Requirements, sec. C, para. 24. The Resettlement Requirements do not state that the mechanism should be local and independent.

The mechanism must be created for each project. How does this mechanism work in relation to the ADB’s Accountability Mechanism? The section in the Resettlement Requirements includes good language about ensuring the grievance mechanism is available at no cost to the affected people and that it does not impede access to domestic remedies. However, there needs to be more information about how it relates to the ADB’s Accountability Mechanism to determine whether it is going to be redundant and require affected people to jump through another hoop, or to see if it is intended to be a simpler, speedier process. It is impossible to evaluate the grievance mechanism since there are no details about it.

#### ***E. Project Completion Report***

The Resettlement Objectives require preparation of a “project completion report that assesses the outcome of resettlement.” Resettlement Objectives, sec. 9. The Resettlement Requirements, however, make this report discretionary (“as necessary”). Resettlement Requirements, sec. C, para. 28.

### ***F. Alternatives***

The Resettlement Objectives require avoiding involuntary resettlement by “assessing project alternatives and alternative project designs.” The Resettlement Requirements state that “feasible alternative project alternatives” must be identified. Resettlement Requirements, sec. C, para.10. This is another inconsistency which will make the policies difficult to implement and enforce.

## **IV. Concerns Related to Indigenous Peoples Safeguard Policy and Safeguard Requirements**

There are also many problems with the Indigenous Peoples Safeguard Policy and Safeguard Requirements.

### ***A. Scoping***

The Requirements state that screening will be conducted “*as early as possible.*” Indigenous Peoples Requirements, sec. C, para. 12 (emphasis added). The Policy simply states that projects must be screened “*early.*” Indigenous Peoples Objectives, sec. 1 (emphasis added). This is another inconsistency that could lead to an interpretation that these two phrases have different meanings. The language used should be consistent.

### ***B. Consultation***

Again, the Policy and Requirements have inconsistent language and do not require broad enough consultation. The Policy requires consultation with “affected communities” (IP Objectives, sec. 2) while the Requirements require consultation with “affected Indigenous Peoples” (IP Requirements, sec. C, para. 8). These sections need to have consistent language and include indigenous peoples’ organizations.

### ***C. Community Support***

Both the Policy and the Requirements require “ascertaining” broad support from the affected indigenous communities. It is not clear whether the intent is to require support or just determine whether there is support. Unfortunately the Requirements may imply the latter interpretation. The Requirements state that where there are disagreements between the borrower/client and the indigenous peoples about the project, the borrower/client should engage in good faith negotiations to resolve the differences. IP Requirements, sec. C, para. 11. Nothing says concretely that the project shall not be carried out if there is not support from the indigenous peoples affected by the project.

### ***D. Commercial Development of Cultural Resources***

The Policy allows for commercial development of cultural resources and knowledge of Indigenous Peoples with “prior agreement.” This is not enough. The policy must be very specific about how the agreement must be reached to ensure the commercial development has community support, and the Policy must ensure that the Indigenous Peoples get just benefits from the commercial development of the resources and knowledge. The Policy must also ensure that this process includes free, prior, and informed consent. The Requirements include this (para. 49), but the ADB is not currently responsible for ensuring the Requirements are complied with, therefore all critical requirements must be in the Policy itself.

### ***E. Grievance Redress Mechanism***

The Policy requires “culturally-appropriate grievance procedures” as part of the Indigenous Peoples Plan (IPP). IP Objectives, sec. 7. The Requirements include a grievance mechanism “if ongoing risks to or adverse impacts on affected communities are anticipated.” IP Requirements, sec. C, para. 22. Do these two provisions refer to the same grievance mechanism? Again, these provisions lack the required detail to evaluate their effectiveness and there is no information about how the grievance mechanisms relate to each other or to the ADB’s accountability mechanism.

### ***F. Legal Title to Land***

Both the Policy and Requirements include action plans for the legal recognition of customary rights to land in certain circumstances. The Requirements state that this legal recognition may include “conversion of customary usage rights to communal and/or individual ownership rights.” IP Requirements, sec. E, para. 45. Converting rights to land from communal use or ownership to individual ownership can have major, unintended consequences. The affected communities must be responsible for deciding if, and how, their lands will be titled after they have been well informed about the possible ramifications.