

Safeguards Policy Review Team
The World Bank
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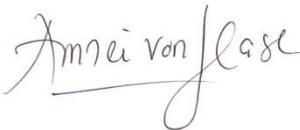
8 February 2016

Dear World Bank Safeguards Review Team,

As part of the current consultation, we would like to submit the following set of comments on World Bank's second draft of the revised Safeguard Policies. The submission is on behalf of Forest Trends, the Wildlife Conservation Society, and a number of members¹ of the Business and Biodiversity Offsets Programme (BBOP).

We hope that you find our comments and suggestions useful in reviewing and further revising the draft Safeguard Policies. We are ready to discuss any of the issues raised if that would be helpful.

Yours sincerely,



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¹ This submission is made on behalf of the **BBOP Secretariat** (Forest Trends and Wildlife Conservation Society) and the following **BBOP Advisory Group members**: deVilliers Brownlie Associates; eCountability Ltd.; The Environment Bank; EcoDecision; ECW Energy Ltd.; Fauna and Flora International (FFI); Resource Environmental Solutions, LLC; and the Zoological Society of London (ZSL); as well as the following individuals in their personal capacities and as members of the **BBOP Executive Committee**: Michael Jenkins, Preston Hardison, Sophie Le Penne, Jessica Nordin, and Ernani Pilla.

Please note that this submission may not have been read by the entire BBOP Advisory Group (http://bbop.forest-trends.org/pages/advisory_group), who may not share the opinions expressed here.

Documents reviewed:

We reviewed and focus mainly on the following parts of the ESS Framework (dated 30 July 2014):

- **ESS6** (Environmental and Social Standard 6. Biodiversity Conservation and Sustainable Management of Living Natural Resources) and
- **ESS1** (Environmental and Social Standard 1. Assessment and Management of Environmental and Social Risks and Impacts).

In addition, we also looked at:

- World Bank **Environmental and Social Policy**
- **Information Note (IN):** Environmental and Social Risk Classification

The following is a summary of our comments:

The first section relates mostly to the Policy, Overview and ESS1 while the second section deals with ESS6 specifically. Please note that many of our earlier comments (dated 26 February 2015) on the first draft of the Safeguards still apply – kindly also refer to these.

General comments and focus on Policy, Overview and ESS1

1. Reference to the mitigation hierarchy (MH henceforth), 'mitigation', 'mitigate' is still not consistent throughout, although the MH is properly defined / worded in ESS1 under the objectives. (e.g. in the 'Vision', #5 states '*avoid OR mitigate*'; similarly in the 'Policy' #2 refers to '*designed to avoid, minimize, reduce or mitigate*'; in the Policy #18 and other instances; and in ESS1 under the Objectives, incorrect use of terms in c) 'Once risks and impacts have been minimized or reduced, mitigate;'; ESS1 #13 and #15 need to be reviewed, ESS1 #37, ESS! Annex 1, f: ESMP, g: ESMF etc.). In all cases reference to the mitigation hierarchy should be changed to reflect an accurate and consistent definition of the mitigation hierarchy (please also see our comments from 26-2-2015, e.g. point 2). While ESS1 #25 does set out the MH somewhat more accurately, stronger and clearer wording is needed– e.g. see definition in IFC's PS and in particular in PS6².

² PS1: 'To adopt a mitigation hierarchy to anticipate and avoid, or where avoidance is not possible, minimize⁵ and, where residual impacts remain, compensate/offset for risks and impacts to workers, Affected Communities, and the environment.' (⁵ Acceptable options to minimize will vary and include: abate, rectify, repair, and/or restore impacts, as appropriate. The risk and impact mitigation hierarchy is further discussed and specified in the context of Performance Standards 2 through 8, where relevant.)

PS6: #7. 'As a matter of priority, the client should seek to avoid impacts on biodiversity and ecosystem services. When avoidance of impacts is not possible, measures to minimize impacts and restore biodiversity and ecosystem services should be implemented'.

#10. 'For the protection and conservation of biodiversity, the mitigation hierarchy includes biodiversity offsets, which may be considered only after appropriate avoidance, minimization, and restoration measures have been applied.² A biodiversity offset should be designed and implemented to achieve measurable conservation outcomes³ that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity; however, a net gain is required in critical habitats'.

- In the Introduction and Objectives of ESS1, the importance of firstly avoiding and then designing other mitigation measures – which may include management - should be made explicit rather than making reference just to ‘managing’ impacts : i.e. in #1 (Currently the following is stated: ‘ESS1 sets out the Borrower’s responsibilities for assessing, managing and monitoring environmental and social risks and impacts’) and objectives (‘To identify, evaluate and manage the environment and social risks and impacts.’)
- Offsets and compensation within the MH, in ESS1 (e.g. #25), are qualified as applying only ‘when technically and financially feasible’. This formulation is not acceptable, as clearly noted in our previous set of comments (point 4). It also appears inconsistent with ESS6 (where such qualifiers are not provided) and creates uncertainty as to how the requirements under ESS6 and ESS1 are to be applied (e.g. what if CR habitat is affected, requiring Net Gain as per ESS6, but this is deemed ‘financially not feasible’ under ESS1?).

Furthermore, no limits are set or commitments and provisos made to qualify the applicability of the phrase ‘when technically and financially feasible’ in ESS1: this means it could theoretically be applied in any/most instances, even in relation to projects that are deemed to be of very high/substantial risk from a biodiversity perspective. Also, no further steps are set out regarding what happens if compensation/ offsetting is deemed ‘not feasible’ (i.e. does the project simply go ahead without providing any form of compensation?). These issues need to be addressed in a revised version of the Safeguards.

2. Oversight and disclosure: Where exceptions are made to following the ESS (e.g. see Policy #19 and #14), independent oversight/ review and public disclosure should be explicitly required.
3. The way that sub-projects are addressed (see Section D #35-38 in the Policy) still does not seem satisfactory, as noted in our previous comments (point 6. It is hard to understand what might qualify as a ‘sub-project’ and this could be a potential loop-hole for unacceptable projects (and thus a risk to the Bank if these are not identified early on). The safeguards for sub-projects should be strengthened, including that at least sub-projects with a ‘substantial risk’ label should be subject to the ESS (e.g. under ESS1 #29) and treated like high risk sub-projects and other projects.
 - How often sub-projects would be re-assessed in terms of the risk they pose is not clear (Policy #38, ESS1 # 31). Would this only happen once a risk becomes apparent and it may well be too late to prevent irreversible damage? When and how this is to be done must be clarified!
 - For FI subprojects, it is not clear when the ESS would apply. The only explanation given is ‘If the risk profile of a FI subproject increases significantly’, and this is unclear (#43).
4. The provisions and risk classification of projects does not seem to have changed significantly since the earlier version of the safeguards, hence our concerns previously noted still apply (e.g. see point 6 in our previous comments).
5. It is important to require consideration of impacts and risks and to require action beyond the ‘project-level’ that incorporates the landscape level (i.e. broader geographic space and perspective). The Policy (e.g. #5 and #9) narrowly refers to ‘project-level’. The spatial scope of the ESA assessment (ESS1 # 21) is not defined but should explicitly encompass at least the scope of the potential direct, indirect and cumulative impacts of a project.
6. Regarding timeframes, the assessment of and responsibility for risks and impacts should not be limited to the ‘project lifecycle’ (ESS1 #3, 21) but should relate to the duration of impacts associated with the project.

7. A glossary or other guidance material is needed to define and explain terms such as ‘sustainable development’, ‘material’ (e.g. risk), ‘maximising development gains’, ‘offsets’, and ‘compensation’. As noted above, the term ‘mitigation’ should be defined and used consistently, distinguished from ‘minimisation’ of impacts and explained in relation to ‘management’.
8. ESS1, Section B on ESA, #35: From a biodiversity and ecosystem services perspective the aspects covered here are rather limited (*‘impacts on threatened or depleted migratory species and their habitats’*). The wording should be improved, e.g. by referring to biodiversity and ecosystem services specifically, to ensure that ecological processes and other aspects of biodiversity are included.
9. Roles and responsibilities must be set out in the ESCP (e.g. ESS1 # 40—43, which speaks about tools and measures but not about responsibilities)
10. Regarding ESS1, Annex 1:
 - ESS1 Annex 1, b: Environmental and Social Audit: The term ‘audit’ is incorrect here. An audit (done by an independent party) is not so much part of assessment (as in ESA) but rather should be part of Monitoring and Evaluation to check performance against a commitment, plan, set of actions (e.g. as set out in the ESCP). An audit is not done as part of an ESA.
 - ESS1 Annex 1, h) and i) refer to Regional and Sectoral ESIA, which are very useful tools, especially to consider risks and impacts more broadly (i.e. beyond the project-level). However, it is not clear when these are to be applied!
 - ESS1 Annex 1, j. 7.
 - e. Regarding the following ‘If the least-impact alternative is not preferred, this should be fully justified’: This is not adequate. Instead, the ESS should specify under what conditions other alternatives (‘not least impact’) would be acceptable.
 - f. include ESS6 here
 - ESS1 Annex 1, with reference to ESIA:
 - (C) **Project description** ... this should include a section on planning and strategic context
 - (D) Baseline data... *‘Identifies and estimates the extent and quality of available data, key data gaps, and uncertainties associated with predictions;’* should also set out the assumptions made
 - (F) **Mitigation measures...** This section should:
 - Explicitly reflect the different steps of the MH,
 - Explain by whom the ‘acceptability of residual impacts’ is to be judged – acceptable to whom?, and
 - explain what should happen if mitigation is not feasible.
 - (G) **Analysis of alternatives** ... what baseline/counterfactual is to be used for the ‘without-project’ situation?
 - ESS1 Annex 1, with reference to ESMP:
 - (A) **Mitigation:** Here, clear performance targets and required outcomes within explicit timeframes must be specified, not just actions and measures.
11. ESS1 Annex 2, with reference to the ESCP:
 - The content and implementation of the ESCP are outlined, but the details regarding monitoring and evaluation of performance against this ESCP are missing from this Annex.

Comments relating to ESS6:

By comparison with the Policy, Overview and ESS1, ESS6 does seem much improved, and many of our comments from the previous round of consultations appear to have been taken into account. This includes clearer terminology and better consistency with other safeguards such as IFC's PS6.

However, we would like to point out the following issues:

1. Guidance notes will be required, as previously mentioned in our comments. (Is #8 in the initial Overview of the ESS intended as a reference that those materials are being planned?).
2. The wording of #6 ('This ESS addresses how the Borrower can sustainably manage and mitigate impacts *on biodiversity and ecosystem services throughout the project's lifecycle*') should be adjusted in line with earlier comments on the mitigation hierarchy and project life-cycle. That is, instead of '*manage and mitigate*' the terminology of the MH should be applied, including '*anticipate and avoid ...*' and instead of project lifecycle, reference should be made to the duration of project impacts.
3. Cumulative impacts need to be included (# 11). Currently, consideration of direct and indirect impacts only is required in # 11 with regards to the ESA, although cumulative impacts are mentioned in ESS1 (e.g. #21).
4. ESS6 is said to apply to all projects with impacts on biodiversity (# 8). Yet, it is not clear whether this overrides the project classification into the different risk categories, how the risk levels relate to the applicability of ESS6, and how ESS6 # 8 and #7 interact. Lack of clarity on this scope of application is a significant weakness with the present draft.
5. #11 should be somewhat rephrased to include:
 - '*...as a priority, anticipate and avoid adverse impacts...*' instead of simply '*will avoid*'
 - '*to assist in the development of measures in accordance with the mitigation hierarchy*' instead of '*development of a mitigation hierarchy*'
 - '*to verify the design and implementation of mitigation measures*' and
 - Mention of a Biodiversity Action Plan as well as a BMP.
6. In #13 and elsewhere (e.g. #18) reference is made to good international practice. Examples of good international practice relevant to the mitigation hierarchy should be listed in an Appendix or in Guidance Notes. This should include the relevant materials published by the Business and Biodiversity Offsets Programme, BBOP including the Standard, Handbook and Resource Papers, and by members of BBOP (e.g. Birdlife has published a report focused on the Avoidance of impacts, IUCN is currently developing a policy on biodiversity offsets, which is supported by a number of technical and policy input documents, and by other groups such the Cross-Sector Biodiversity Initiative (CSBI), which has published on the mitigation hierarchy, and possibly others..
7. In #15, what constitutes a 'precautionary approach' should be explained in more detail to ensure rigorous and appropriate application in practice.
8. We are pleased to see that the following provision has been included to prevent unacceptable projects and impacts from occurring (#18): '*Certain adverse residual impacts cannot be offset, particularly if the affected area is unique and irreplaceable from a biodiversity standpoint. In such cases, the Borrower will not undertake the project unless it is redesigned to avoid the need for such offset, and to meet the requirements of this ESS*'.

However, two issues remain: first, the phrase *'to avoid the need for such offset'* (in bold above) should be reworded to say 'to avoid such (unacceptable) residual impacts from occurring'. Secondly, to give more strength to this requirement, there is now a need to spell out, e.g. in Guidance Notes, more precisely what those situations are in which such limits apply and how it may relate to the identification of project risk levels.

9. In #18, what is understood by *'additional'* must be defined. This is a complex concept, for which clear guidance notes are needed!
10. In #18, net gain is defined in a footnote: *'Net gains are additional conservation outcomes that can be achieved for the biodiversity values for which the critical habitat was designated. Net gains may be achieved through the development of a biodiversity offset and/or, in instances where the Borrower could meet the requirements of paragraph 24 of this ESS without a biodiversity offset, through the implementation of programs in situ (on-the-ground) to enhance habitat, and protect and conserve biodiversity.'*

Two points of clarity are needed here: firstly, the term 'additional' should be explained as it has two distinct meanings: in relation to an offset, it means 'over and above what would happen anyway'; more broadly speaking, 'additional' is used to refer to supplementary measures which are usually understood to be actions and outcomes that do not aim to address the residual negative impacts, but which are implemented in addition to actions designed to achieve NNL or a Net Gain for affected biodiversity. Secondly, the second part of the paragraph would benefit from examples of instances in which the requirements of paragraph 24 could be met without a biodiversity offset.

11. The full MH should be applied in all habitats and situations, where impacts are predicted to be significant, including in modified habitat (see #20, which only refers to minimisation).
12. The definition of Natural Habitat should be revised to ensure that areas with relatively impoverished species composition that are somewhat degraded are not automatically relegated to the Modified Habitat category. That is, largely unspoiled areas that play an important role at landscape, biotope, community or species level, and/ or in providing valued ecosystem services, as well as areas recently disturbed or transformed but with high potential for restoration, that have strategic conservation value, should be included as Natural Habitat. The current definition refers to an area's 'primary ecological functions and species composition' not having been 'essentially modified'; the scope of this definition is open to wide interpretation.
13. A Biodiversity Management Plan should be a requirement under the provisions on Natural habitat as well as those on Critical Habitat.
14. With respect to requirements relating to Critical Habitat (#23-26) the following comments apply:
#24:
 - 24. (c) should specify direct and indirect adverse impacts
 - 24. (d) How 'net gains' are to be determined and delivered needs to be further explained (e.g. in Guidance Notes). The delivery of net gain should also be time-bound rather than open ended, given the risks involved in affecting critical habitat. In addition, a qualifier should be added to the delivery of 'net gains', i.e. *'The project is designed to deliver, beyond reasonable doubt....'*
 - 24. (f) Why are 'new or renewed forestry or agricultural plantations' singled out, when the relevant requirement should be triggered by any project or set of impacts?
 - 24. (h) A *'robust and appropriately designed, long-term biodiversity monitoring and evaluation program'* must assess the implementation and performance of the relevant mitigation measures as well as the outcomes for biodiversity.

#25.

- The following must be assessed using independent review/ oversight by qualified specialists: '*Where a Borrower has satisfied the conditions set out in paragraph 24,...*'

#26.

- '*The Borrower will demonstrate through an assessment...*' should also include the phrase 'beyond reasonable doubt'
- *A Biodiversity offset implementation and management plan should be a requirement.*
- Independent review should be required in terms of the assessment mentioned in this provision.

15. As noted in our previous comments (see ESS6 comments, Point 5), the links between Critical, Natural, Modified habitat and the designation of different impact and risk categories (high, substantial, moderate and low risk) must be made explicit. This is still missing.

16. The effective implementation of offsets requires that a number of important arrangements are put into place (including management, financing, etc.). As noted in our previous comments (under Point 9 in our General comments), projects thus need to develop and put into place appropriate financial guarantees to ensure that offsets are adequately financed to deliver the necessary long-term conservation outcomes. The revision of the ESS framework offers an opportunity to ensure that financial requirements for offset design and implementation are taken into account early in the project cycle and thus included in the financial planning for the project. This will include creating financial plans and establishing the necessary guarantees that will ensure long-term financing of the offset. This provision needs to be addressed in the revised ESS.