

November 30, 2010

Submitted via electronic mail

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Re: Request for Compliance Review and Problem-Solving Related to Cerro de Oro Hydroelectric Project

Dear Dr. Aden:

The undersigned community members from the towns of Paso Canoa and Santa Ursula, located in Tuxtepec, Oaxaca, Mexico (“Complainants”), submit this request for Compliance Review and Problem-solving regarding the human rights and environmental harm caused by the Overseas Private Investment Corporation (“OPIC”)-supported Cerro de Oro Hydroelectric Project (the “Project”) and its clients, Conduit Capital Partners (“Conduit”) and Electricidad del Oriente and COMEXHIDRO (collectively “Project sponsors”).¹

Complainants are members of the communities neighboring the Cerro de Oro Hydroelectric Project, the Santo Domingo River, and its tributaries. Located in an area with Mexico’s poorest and most vulnerable populations, the Project is threatening Complainants’ way of life and very survival by destroying their access to clean and safe water; devastating income-generating fishing areas; eroding and encroaching on land used for agriculture and livestock; contaminating and spoiling fragile ecosystems; and disrupting local and indigenous leadership, infrastructure, housing, and culture. Women, indigenous persons, and poor Complainants disproportionately bear the brunt of these impacts. Although Complainants fear for their communities’ health and safety, they have been repeatedly denied their right to informed

¹ The Complainants are represented by Mexico-based Fundar, Centro de Análisis e Investigación AC, Proyecto de Transparencia en Instituciones Financieras Internacionales; Servicios para una Educación Alternativa A.C. (EDUCA); Coalición Internacional para el Hábitat, Oficina para América Latina (HIC-AL); and U.S.-based Accountability Counsel; and the Environmental Defender Law Center. In addition, the communities have been assisted in the preparation of this complaint by Brian Cochran and Andrew Villacastin, interns with Berkeley Law’s International Human Rights Law Clinic working under the supervision of associate director and assistant clinical professor Roxanna Altholz. Together, these organizations form the Working Group, whose contact information is attached as Exhibit 1. Please also see the Complainants’ Representation Letter submitted with this Complaint.

participation in the Project. Project sponsors compelled Complainants into negotiations without disclosing basic and essential information about Project impacts and reached agreements that do not adequately compensate the harms caused to Complainants' lands or livelihoods. Indeed, Project sponsors have refused to recognize or consult the majority of affected Complainants and broken promises to undertake community development projects.

Project sponsors already have commenced construction activities that harm the Complainants without the requisite permits. To prevent irreparable damage, Complainants request that the OPIC Office of Accountability urgently initiate a Compliance Review and simultaneously a Problem-solving process. This request is public and the Complainants do not request confidentiality. Complainants reserve the right to join additional community members to this complaint.

I. Introduction

Project sponsors have consistently disregarded OPIC policies and procedures, as well as other applicable law and regulations.

OPIC is financing the Project through the Latin Power III Fund,² managed by Conduit and implemented locally by Electricidad. OPIC screened the Project as Category A because “it could have impacts that are diverse and irreversible.”³ According to OPIC, the Project was listed on its website for a 60-day public comment period, from October 22, 2009 to December 21, 2009.⁴ On March 8, 2010, OPIC notified the Mexican government about the Project and applicable international standards and guidelines.⁵

The Project will convert the Cerro de Oro Dam, originally constructed to manage the flow of the Santo Domingo River and prevent flooding, into a hydroelectric dam.⁶ Specifically, the Project entails the construction of a water intake and conduction tunnel, powerhouse, voltage elevation substation, tailrace channel, and transmission lines connecting the proposed substation to another existing substation in Benito Juarez Sebastopol, Tuxtepec.⁷ Construction of the

² Letter from Mary Boomgard, Acting Vice President for Investment Policy, Overseas Private Investment Corporation, to Georgina Kessel Martinez, Secretaria de Energia (Mar. 8, 2010) [hereinafter Host Country Notification], *available at* https://www2.opic.gov/environasp/eia/cerro/eia_cerro.asp.

³ OPIC, Cerro de Oro Initial Project Summary (date not provided), *available at* https://www2.opic.gov/environasp/EIA/cerro/CDO_Initial_Project_Summary.pdf. Special OPIC policies apply to Category A projects, discussed in the “Overseas Private Investment Corporation” section, *infra*.

⁴ *See* OPIC, Environmental and Social Documents (date not provided), <http://www.opic.gov/doing-business/investment/environment/documents>.

⁵ *See* Host Country Notification, *supra* note 2.

⁶ PEREZ CORIA SAMUEL GENARO, ELECTRICIDAD DE ORIENTE, S. DE R.L. DE C.V., PARTICULAR METHOD ENVIRONMENTAL IMPACT REPORT OF THE CERRO DE ORO HYDROELECTRIC PROJECT 4 (2007), *available at* https://www2.opic.gov/environasp/eia/cerro/eia_cerro.asp. [hereinafter EIA].

⁷ *See id.* at 5, 17-18, 22-23.

infrastructure will involve the use of heavy machinery and explosives to clear land and prepare the project site.⁸

The Project also requires fundamental changes to local waterways. Project operators will close the Cerro de Oro Dam's doors to divert water from the Dam's reservoir through an intake tunnel to the newly constructed hydroelectric powerhouse.⁹ The discharged water will enter La Sal Creek and reunite with the Santo Domingo River two kilometers downstream of the Cerro de Oro Dam. To increase capacity, Project companies are dredging and widening the La Sal Creek.¹⁰

Upon completion of the Project, the Dam will generate up to 10.8 MW of electrical power.¹¹ Project investors plan to sell the energy produced to private buyers via the Mexican national grid maintained by the Federal Electricity Commission ("CFE").¹² *The energy generated by the Cerro de Oro Dam will not benefit the general public, nor will it benefit the affected communities.*

Complainants assert the following OPIC policy violations:

- Project sponsors failed to adequately disclose information about the Project and its environmental and health impacts to the vast majority of affected people;
- Project sponsors did not sufficiently consult with affected people about the Project and associated impacts;
- Project sponsors have not adequately identified and/or mitigated adverse social and environmental impacts, or complied with impact reporting requirements;
- Project sponsors have not adequately compensated communities for land acquisition and livelihood impacts;
- Project sponsors have overstated Project benefits, minimized impacts, and failed to fulfill promises to undertake community development projects;

⁸ *Id.* at 13.

⁹ *See id.* at 17.

¹⁰ *See* ELECTRICIDAD DE ORIENTE, S. DE R.L. DE C.V., MODIFICACIONES AL PROYECTO HIDROELÉCTRICO CERRO DE ORO 11-12 (2009), available at https://www2.opic.gov/vironasp/eia/cerro/eia_cerro.asp [hereinafter "REQUEST FOR PROJECT MODIFICATIONS"].

¹¹ EIA, *supra* note 6, at 5. 10.8 MW is the "design potency" of the Project. OPIC's Host Country Notification refers to an "18.5 MW" hydroelectric power capacity. It is unclear whether this increased amount indicates a design change, or is a typographical error. Although documents provide different estimates of the Cerro de Oro Dam's hydroelectric potential, we use the estimate that reflects the generator's capacity.

¹² *See* COMISIÓN REGULADORA DE ENERGÍA, RESOLUCIÓN POR LA QUE LA COMISIÓN REGULADORA DE ENERGÍA OTORGA A ELECTRICIDAD DE ORIENTE, S. DE R.L. DE C.V., PERMISO PARA GENERAR ENERGÍA ELÉCTRICA, BAJO LA MODALIDAD DE AUTOABASTECIMIENTO, RES/263/2009 (Mex. 2009) (authorizing Electricidad to produce energy for the following partners and up to the following amounts: Plásticos Envolveres (1.50 MW); Envases Universales de México (3 MW); and Envases Innovativos (11 MW)).

- Project sponsors have failed to comply with Mexican national and local laws related to land acquisition and environmental impacts;
- Project sponsors have not complied with requirements related to indigenous peoples, in particular their right to free, previous, and informed consultation; and
- Project sponsors have not established an adequate and effective grievance mechanism.

Many who live in the vicinity of the Cerro de Oro Dam were affected by the Dam's construction in 1970's and 1980s, a project funded by the World Bank that forcibly displaced 26,000 indigenous Chinanteco people.¹³ The Project is taking advantage of this troubled legacy and the environmental damage it caused.¹⁴ Those who remained in or returned to the area despite the disastrous impacts of the Dam's construction now face devastation for a second time.

According to Project documents, the Project will impact four *ejidos*: Los Reyes, San Rafael, Santa Ursula, and Sebastapol.¹⁵ Project representatives met with the *ejidatarios* from Santa Ursula on December 9, 2007; Los Reyes on February 12, 2009; Sebastapol on April 26, 2009; and San Rafael on June 27, 2009.¹⁶ Project sponsors failed to consult additional communities impacted by the Project, including the residents of Paso Canoa or individuals who reside within the Project area but are not members of an *ejido*. Non-*ejidatarios* comprise the vast majority of the local population.

Finally, the Project sponsors have consistently misled affected communities, investors, and the Mexican government. Project sponsors failed to disclose and disseminate essential Project information to affected communities, including the Complainants. Project sponsors refused to recognize the vast majority of affected individuals, and to those who were contacted,

¹³ ALICIA BARABAS, LA PRESA CERRO DE ORO Y EL INGENIERO EL GRAN DIOS: RELOCALIZACION ETNOCIDIO CHINANTECO EN MEXICO 40 (1990) (“[L]a presa Cerro de Oro . . . desalojó a 26,000 chinantecos del territorio que habitaban desde milenios.”).

¹⁴ EIA, *supra* note 6, at 5 (“The project . . . will use a dam that is already established and areas already affected.”).

¹⁵ Historically, an *ejido*, is an agricultural land grant made by the Mexican government to allow peasants to use federally owned property to establish farming cooperatives. Members of the *ejidos*, referred to as *ejidatarios*, are entitled to use and work the land to their benefit, but have limited title to the land. Until the early 1990s, the *ejidatarios* were not allowed to sell, lease, subdivide, mortgage or encumber the land. A constitutional amendment now provides a legal process to transform *ejido* land to *dominio pleno* or *privado* (full dominion or private land). An *ejidatario* is entitled to vote at *ejido* assemblies.

¹⁶ See APPENDIX G: NOTIFICATIONS OF MEETINGS AND MEETING MINUTES (2009), available at https://www2.opic.gov/environasp/eia/cerro/eia_cerro.asp [hereinafter *EJIDO MEETING MINUTES*]. Subsequent meetings between company representatives and *ejidatarios* have taken place in Santa Ursula and Los Reyes, but these records were not included in the URS report. Interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010). Interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010). Recordings of interviews are on file with Accountability Counsel and available upon OPIC's request.

the Project sponsors overstated the Project's benefits,¹⁷ minimized the Project's impacts,¹⁸ and made empty promises to entice community acquiescence.¹⁹

Having reached agreements with a small fraction of affected individuals, the Project sponsors falsely reported broad support by local communities.²⁰ In addition, Project documents falsely claim that affected communities have been adequately consulted and compensated for land acquisition,²¹ a grievance mechanism has been established,²² and the Project will have "zero" impact on collective plots used by local residents.²³ Project sponsors have misled the

¹⁷ *EJIDO MEETING MINUTES*, *supra* note 16, at 7 (in meeting with Santa Ursula, project engineer stated that the Project "proporcione el servicio de energia electrica a aquella poblaciones que son polos de desarrollo tanto en el estado de Oaxaca como en otras entidades de la Republica").

¹⁸ *See* interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

¹⁹ *See, e.g.*, interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

²⁰ EIA, *supra* note 6, at 113 ("[The Project] is well accepted by the residents of the surroundings of the federal zone. Such residents regard it as a great opportunity for the creation of new temporary jobs during the construction process and afterwards, during the operation stage, they consider it will be an additional energy source where new job-offering industries will be established."). In fact, the overwhelming majority of local stakeholders opposes the Project and sees no benefit in it to themselves. *See* interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Monto, Santa Ursula Resident (Oct. 26, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro (Oct. 26, 2010).

²¹ In fact, Project investors disingenuously imply that they have consulted all affected community members. *See, e.g.*, EUGENIA SANGINÉS & ABDUL MUNÍZ, URS CORPORATION MÉXICO, S. DE R.L. DE C.V., FINAL REPORT ENVIRONMENTAL COMPLIANCE REVIEW EL CERRO DE ORO HYDROELECTRIC PROJECT 25 (2009) [hereinafter URS] ("The Project owner and investors have been in direct communication with affected communities in order to disclose the Project activities"). Complainants are not fully aware of the Project's anticipated impacts and have not received Project documents explaining those impacts. *See, e.g.*, interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010). Furthermore, the vast majority of affected individuals have not been consulted by Project sponsors. *See* interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

²² URS, *supra* note 21, at 25. Project sponsors have not established an office for the purpose of hearing community complaints. Complainants that have tried to voice concerns to Project representatives have been turned away. *See* interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

²³ EIA, *supra* note 6, at 113. In reality, the Santo Domingo River, La Sal Creek, and lands in the federal zone are used extensively by local residents for recreation, bathing, fishing, agricultural activities and raising livestock. *See* interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra

Mexican and U.S. governments about compliance with national law and policies. For example, Project sponsors started Project construction without a forestry permit, a violation of Mexican environmental law.²⁴

At the same time, OPIC violated applicable agency policies by ignoring abuses—such as lack of disclosure, the failure to consult vulnerable communities, inadequate assessment and mitigation of environmental and social impacts—perpetrated by Project sponsors that are evident on the face of Project documents.²⁵ For example, although Project sponsors acknowledged that indigenous people will be impacted by the Project,²⁶ OPIC did not require Project sponsors to develop an Indigenous Peoples Development Plan, or other comparable plan.

II. Current and Likely Impacts of the Cerro de Oro Hydroelectric Project

Complainants are deeply concerned about the Project's social and environmental impacts. Project sponsors have ignored the majority of individuals affected by the Project, choosing instead to conduct closed-door meetings with a select few, only for the purpose of land and easement acquisition. Project sponsors have failed to sufficiently disclose Project information to the Complainants and to identify and mitigate serious Project impacts on the Complainants' livelihoods, health, well-being, and environment. Moreover, Project sponsors have ignored disproportionate impacts on vulnerable groups, including poor and indigenous Complainants.

A. Lack of Information Disclosure and Consultation

Project sponsors failed to disclose relevant Project information and have failed to consult with Complainants. Project sponsors have not provided Complainants with copies of Project documents or established a grievance mechanism to address community concerns.

with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Tomasa Ronquillo Hernandez and Severiana Lorenzo Antonia, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

²⁴ Interview by Komala Ramachandra with Eduardo E. González Hernández, Director of the Environmental Impact and Risk, SEMARNAT, Mexico City, Mexico (Nov. 5, 2010).

²⁵ For example, the Project sponsors claim that the concerns of affected individuals had been heard and addressed, but not recorded. *See* URS, *supra* note 21 at 25. IFC PS 1 ¶ 26 requires projects to record community concerns. *See* INT'L FIN. CORP. PERFORMANCE STANDARDS ON SOC. & ENVTL. SUSTAINABILITY, Performance Standard [hereinafter IFC PS] 1: Soc. and Envtl. Assessment and Mgmt. Sys. ¶ 26 (2006), *available at* [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf). Additionally, Project sponsors acknowledge that Project activities will take place within the community of Paso Canoa. *See* EIA, *supra* note 6, at 6, 11, 15, 46, 68, 117, 157. Several Project maps also directly contradict claims that the Project will not affect Paso Canoa community members. Moreover, Project sponsors fail to provide a record of any consultations with this community, undermining the claim that they have adequately consulted affected communities.

²⁶ EIA, *supra* note 6, at 111; URS, *supra* note 21, at 32.

Consequently, the Complainants have been prevented from informed participation in the Project design, assessment, and construction stages. Complainants express grave concerns about the Project's impacts.

Paso Canoa, a town of approximately 1,800 residents, is described in Project documents as one of the communities "closest to the [P]roject site."²⁷ The community is located along the Santo Domingo River near the Cerro de Oro Dam curtain.²⁸ Paso Canoa Complainants use the Santo Domingo River as a water source for animals and irrigation as well as a source of food.²⁹ Project sponsors did not disclose Project information or consult with this community prior to the beginning of construction.³⁰ Project sponsors did, however, request that community residents sign a standalone agreement that instructed them not to seek assistance from "outside" organizations.³¹ Paso Canoa Complainants anticipate that the Project will have serious and long-term impacts on, for example, their livelihoods, health, well-being, and environment.³² Complainants fear the Project will deteriorate soil quality, destroy access to water, cause land erosion, and increase economic insecurity.³³ The majority of Paso Canoa Complainants want Project construction to cease.

²⁷ *Id.* at 68.

²⁸ Interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010).

²⁹ *Id.* See also interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellanedal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

³⁰ See interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellanedal, Paso Canoa Resident Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Tomasa Ronquillo Hernandez and Severiana Lorenzo Antonia, Paso Canoa Residents, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Manuel Neco, Paso Canoa Resident Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

³¹ Interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

³² See Interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellanedal, Paso Canoa Resident Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Tomasa Ronquillo Hernandez and Severiana Lorenzo Antonia, Paso Canoa Residents, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Manuel Neco, Paso Canoa Resident Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

³³ See interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico, Oct. 25, 2010; interview by Komala Ramachandra with Claudia Barrera Avellanedal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

Santa Ursula is a rural community with a large indigenous Chinanteco population,³⁴ located on the banks of the Santo Domingo River and La Sal Creek. Project transmission lines and supporting towers will traverse this community. On December 9, 2007, Project representatives met with Santa Ursula *ejidatarios*. The December 9, 2007 meeting is Project sponsors' sole effort to consult with *ejido* representatives about the Project. At subsequent meetings, Project sponsors focused only on reaching compensation agreements.³⁵ Only 24 of the 82 *ejidatarios* attended the 2007 meeting.³⁶ Project sponsors have made no attempt to inform or consult with non-*ejidatario* Complainants, the vast majority of Santa Ursula's one thousand residents.³⁷

The permissions granted to the Project Sponsors during the December 9, 2007 *ejido* assembly (*acta de asamblea*) also violate Mexican law, namely the Agrarian Law, which governs land acquisition for *ejidos*. The law requires a quorum of half plus one members to modify collectively owned and administered *ejido* plots.³⁸ In addition, the law requires the meeting regarding modification of collectively owned and administered parcels be announced one month prior to the assembly.³⁹ However, the meeting was announced on November 30, 2007, and held on December 9, 2007.

At the 2007 meeting, Project representatives misled Complainants about the Project's risks and adverse impacts.⁴⁰ Project representatives did not share or distribute documents essential to understanding the risks and impacts associated with the Project, such as the Project's Environmental Impact Statement.⁴¹ Project representatives stated that the Project would have a minimal impact, and did not fully disclose plans to alter and redirect the La Sal Creek. Project representatives also misrepresented the size and proximity of transmission towers that would be

³⁴ Approximately 60% of Santa Ursula's 1,000 inhabitants are indigenous.

³⁵ See interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010).

³⁶ *EJIDO MEETING MINUTES*, *supra* note 16.

³⁷ See interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico, (Oct. 29, 2010); interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010).

³⁸ Ley Agraria [Land Law], art. 23, 26 (XIV) (Mex. 1992).

³⁹ Ley Agraria [Land Law], art. 25 (Mex. 1992).

⁴⁰ See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico, (Oct. 29, 2010).

⁴¹ Although the EIA states that copies of the Project's EIS Authorization and EIS Executive Summary were to be submitted to the municipality in Tuxtepec, Complainants have not received a copy of this material and were not informed about how to obtain this information. See EIA, *supra* note 6, at 47. See also interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010).

located near the community.⁴² Project representatives implied that the Project involved single post towers, and promised that transmission lines would be laid at least 100 meters from the populated areas.⁴³ Under current Project plans, transmission towers will consist of a large metal structure that requires a 30 meter diameter foundation and transmission lines will be laid adjacent to occupied homes.⁴⁴

Notably, the Project sponsors expanded the scope of the Project in September 2009 to significantly increase the length of the transmission line, among other changes.⁴⁵ These modifications were enacted long after the meeting with Santa Ursula *ejido* representatives, but Project sponsors did not inform Complainants of the changes or consult with affected residents.⁴⁶

Furthermore, as part of negotiations Project representatives made verbal commitments to community members that have gone unfulfilled, including promises to build a deep water well, construct a new road, pave existing roads, and construct a meeting area.⁴⁷ Project representatives also required Santa Ursula residents to sign an agreement to not seek any support from outside “organizations.”⁴⁸ This provision attempts to limit affected individuals’ right to obtain counsel, advice, or assistance with regard to the Project.

Although Project sponsors held meetings with *ejidatarios* from Santa Ursula, no attempt has been made to communicate with, let alone consult, individuals outside the *ejido* system. Members of the *ejidos* are entitled to use and work designated lands to their benefit. Key decisions about the distribution and management of the land are made communally, and only *ejidatarios* are entitled to vote at *ejido* assemblies. Non-*ejidatarios*, who live and depend on the

⁴² See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview with Rudolfo Pineda, *Ejido* President, and Lidia Cruz Joaquin, municipal leader, Sebastapol, Tuxtepec, Oaxaca, Mexico (Oct. 28, 2010).

⁴³ See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview with Rudolfo Pineda, *Ejido* President, and Lidia Cruz Joaquin, municipal leader, Sebastapol, Tuxtepec, Oaxaca, Mexico (Oct. 28, 2010).

⁴⁴ See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁴⁵ The new plans for the project increase the length of transmission lines and number of support towers. Most importantly for Santa Ursula, however, is the diversion of the La Sal Creek as it approaches the Santo Domingo River. The rehabilitation of the *brazo muerto*, and subsequent drying of what is currently the La Sal Creek’s last 500m, will occur adjacent to community land. REQUEST FOR PROJECT MODIFICATIONS, *supra* note 10.

⁴⁶ See *id.*

⁴⁷ See interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010).

⁴⁸ Interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

land, do not have formal property rights and have no say at *ejido* assemblies. Only 82 of Santa Ursula's approximately one thousand residents are *ejidatarios*.⁴⁹ Non-*ejidatario* Complainants from Santa Ursula have expressed concern that the *ejido* decision-making process does not adequately represent their interests.⁵⁰ Project sponsors did not invite non-*ejidatarios* to attend the December 9, 2007 meeting, and have not met with non-*ejidatario* Complainants.

Lastly, Complainants do not have access to a grievance mechanism. Although Project sponsors claim to have established a "Project office" to consider grievances,⁵¹ Project sponsors have not informed Complainants of the office's location or specified how it can be used. Project sponsors did not mention the grievance mechanism during the December 9, 2007, meeting with Santa Ursula *ejidatarios* or any other meetings with affected communities. Consequently, Complainants have been unable to register their concerns through a local grievance mechanism and have not been able to use the office to obtain Project information.

B. Livelihood Impacts

Complainants, predominantly farmers and day laborers, use land located in and adjacent to the Project site for agricultural and livestock activities.⁵² They harvest fruits, rubber, sugarcane, and other natural products from the area's forests, trees, and plantations. Complainants rely on the Santo Domingo River and the La Sal Creek to water their crops and provide drinking water for their livestock. In addition, they fish in these waters to supplement their diets and income.⁵³

Complainants fear that construction activities, the diversion of the Santo Domingo River, and the expansion of the La Sal Creek will contaminate potable water sources, degrade the

⁴⁹ *EJIDO MEETING MINUTES*, *supra* note 16. See also interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010).

⁵⁰ Interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁵¹ See URS, *supra* note 21, at 25.

⁵² See interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico, (Oct. 25, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Claudia Barrera Avellanedal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁵³ See interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

biodiversity of aquatic environments, erode agricultural lands, alter water ecology, decrease fishing yields, and increase toxicity in aquatic life.⁵⁴ Complainants also fear that the Project will threaten access to adequate amounts of water suitable for the communities' diverse livelihood needs by drastically affecting water flow, degrading water quality, and increasing water temperature.⁵⁵ Complainants were not informed of or consulted with regarding these potential Project impacts and have not been compensated for any loss to livelihood.

C. Environmental Impacts

Complainants recognize the economical, social, and cultural value of the environment and natural resources located within and adjacent to the Project area. Complainants rely on water from the La Sal Creek and the Santo Domingo River for drinking water and other needs, including fishing, bathing, irrigation, and livestock. The waters also support a diverse aquatic ecosystem important to area residents, including an array of fish, turtles, insects, and birds. Furthermore, the Cerro de Oro Dam lies within and adjacent to *Áreas de Importancia para la Conservación de la Aves* (Areas of Importance for the Conservation of Birds, "AICA").⁵⁶ The Project site is found within areas where numerous species are threatened, endangered or vulnerable and declining in number.⁵⁷

Project sponsors estimate that 40 cubic meters of land will be cleared near the Cerro de Oro Dam for infrastructure construction.⁵⁸ Once the land is cleared, Project sponsors plan to construct a central hydroelectric facility, which contains an intake structure, conduction tunnel, pressure pipeline, engine building, and outlet channel.⁵⁹ Next to the engine building, Project sponsors will construct an electric substation that will connect through 13.08km of transmission lines to a substation in Benito Juárez Sebastapol.⁶⁰ Any tall trees, including rubber trees, that

⁵⁴ See interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁵⁵ See interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁵⁶ URS, *supra* note 21, at 30.

⁵⁷ *Id.*

⁵⁸ EIA, *supra* note 6, at 12-14.

⁵⁹ *Id.* at 23-26.

⁶⁰ REQUEST FOR MODIFICATIONS, *supra* note 10, at 16.

obstruct the transmission lines, will be removed.⁶¹ The Project will clear land to construct approximately 30 transmission towers to support the transmission lines at regular intervals.⁶²

Transmission lines will traverse the Santa Ursula community.⁶³ Complainants must also contend with construction traffic on existing roads and an influx of workers and equipment associated with the Project. Site preparation and other construction activities, including the clearing of land and the use of explosives, have already begun.⁶⁴ For example, trees were removed from the property of a Santa Ursula resident without permission or compensation. Workers and equipment make heavy and regular use of a bridge located in Paso Canoa.⁶⁵

The Project will divert water away from the Santo Domingo River for a 2 kilometer stretch to power the hydroelectric turbines located southwest of the Cerro de Oro Dam and discharge this water into the La Sal Creek. The Project is expanding a currently dry arm of the La Sal Creek to channel discharged water into the Santo Domingo River. Complainants fear that the change in water flow of the Santo Domingo River and the La Sal Creek will fundamentally degrade water quality and destroy essential riparian and aquatic environments.⁶⁶ Complainants anticipate that that the Project will endanger, and even destroy, populations of fish, turtles, insects, and other animals in and around the La Sal Creek.⁶⁷

Construction activities have already caused significant damage to the La Sal Creek. Project contractors are currently using the creek as a dumping site for Project generated waste materials. The original construction of the Cerro de Oro Dam irrevocably altered the Santa

⁶¹ URS, *supra* note 21, at 38.

⁶² REQUEST FOR MODIFICATIONS, *supra* note 10, at 6, 16.

⁶³ See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010).

⁶⁴ See Interview by Komala Ramachandra with Eduardo E. González Hernández, Director of the Environmental Impact and Risk, SEMARNAT, Mexico City, Mexico (Nov. 5, 2010).

⁶⁵ Interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁶⁶ See interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁶⁷ See interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

Domingo and destroyed neighboring communities and their way of life. This history and the significance of the La Sal Creek and Santo Domingo River for diverse community needs, heightens Complainants' concerns.

Project representatives failed to inform Complainants of adverse environmental risks. For example, Complainants were not informed of risks to birds and bat species posed by the Project.⁶⁸ Nor have Project sponsors explained the effects of environmental and magnetic field ("EMF") exposure resulting from the Project's generation and transmission of electricity to Complainants. Complainants are concerned about adverse health effects from exposure to EMF generated by the transmission lines that will pass through and near their communities.⁶⁹

D. Community Health and Safety Impacts

Complainants are concerned that the Project will adversely impact community health and well-being. As mentioned, the La Sal Creek and Santo Domingo River are important sources of water and food. Complainants fear that these waterways will be degraded, if not destroyed by Project plans to process the water to generate electrical power,⁷⁰ expose water sources to EMF emissions, lower water levels, and alter water flows.⁷¹

Project sponsors are using explosives in close proximity to the Dam curtain, Complainants' homes, and fragile ecosystems. Complainants located downstream of the Cerro de Oro Dam fear that the explosions could threaten the integrity of the Dam's structure, given that the reservoir is often at or above capacity during rainy seasons. Project sponsors did not consult with Complainants living close to the Dam curtain about the risk of a dam breach, flooding, or other serious risks associated with the use of explosives.

Construction activities are already adversely impacting Paso Canoa Complainants. For example, the use of dynamite to dredge the La Sal Creek has cracked the cement walls of a Complainant's home. She fears that her house will collapse while her family is inside.⁷² A breach of the Dam curtain or an increased risk of flooding due to Project activities would have

⁶⁸ See URS, *supra* note 21, at 38 ("Various avian and bat species were found along the transmission line route during the Plant and Wildlife Characterization Studies").

⁶⁹ See interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁷⁰ The diverted water will power turbines that will generate hydroelectricity. Through contact with lead and other machinery metals, residents fear this will increase the water temperature of and contaminate existing waterways.

⁷¹ See interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁷² See interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010).

catastrophic consequences for Paso Canoa residents given their close proximity to the Dam curtain.

Despite verbal assurances from the Project sponsors that contractors would use other roads, Project contractors routinely use a bridge in Paso Canoa to transport heavy machinery. Paso Canoa Complainants fear that the bridge will not support regular use by heavy construction vehicles, and if the bridge is damaged, the community will be cut off.⁷³ Project sponsors have also broken promises made to Santa Ursula Complainants. Project sponsors committed to digging a well for drinking water as part of Project negotiations to obtain *ejido* approval.⁷⁴ Instead, Project sponsors have decided to treat water from the Cerro de Oro reservoir. Complainants are not satisfied with this alternative, as water from the reservoir has a foul smell and contains detritus.

Cement injected into the ground by Project contractors to construct the powerhouse has leaked into a critical water source that Santa Ursula and Los Reyes residents depend on for their daily water uses, including for drinking and cooking.⁷⁵ There are unconfirmed reports that Project sponsors have halted construction because Los Reyes residents complained to Mexico's National Commission on Water ("CONAGUA") about the impact on an important water source.⁷⁶

E. Important Cultural and Historical Impacts

The La Sal Creek is historically, socially, and culturally important to Complainants. It is a center of social activity, and residents have long used its waters for recreational and livelihood activities, such as bathing and fishing. La Sal Creek also is one of the few natural waterways not altered by the construction of the Cerro de Oro Dam. The creek originates from water that filters naturally from the reservoir at the foot of the dam curtain, providing clean and potable water to Santa Ursula residents. The Creek supports many forms of life not found in the contaminated waters of the reservoir or Santo Domingo River.

According to Complainants, Santo Domingo River, once an idyllic and vibrant water source, was destroyed by the construction of the Cerro de Oro Dam.⁷⁷ The La Sal Creek is one

⁷³ See interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁷⁴ *EJIDO MEETING MINUTES*, *supra* note 16, at 7.

⁷⁵ See interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010).

⁷⁶ See interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁷⁷ See interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Gabino Vicente,

of the last remaining natural waterways in the area. Complainants feel a strong historical and cultural tie to the La Sal Creek and are deeply concerned that the Project will fundamentally and irreversibly damage this irreplaceable stream. The Project does not consider the unique significance of this natural asset to affected communities.⁷⁸

F. Impacts on Vulnerable Populations

The Project will disproportionately affect vulnerable groups in the Project area, including female, indigenous, and low-income Complainants, as well as those without formal land rights. Project Sponsors have failed to adequately consult with these groups or adopt measures to account for or mitigate the Project's impact on vulnerable persons.

The State of Oaxaca has the highest concentration of indigenous people in Mexico.⁷⁹ According to Project documents, approximately 17% of the population of the municipality of San Juan Bautista Tuxtepec is indigenous, of which 45% speak Chinanteco and 13% speak Chinanteco Ojitán.⁸⁰ Nonetheless, Project sponsors have not separately addressed Project impacts on indigenous persons living in affected communities. Approximately 60% of the community of Santa Ursula and 50% of the community of Paso Canoa are indigenous persons. Many of the non-*ejidatarios* and poorest Complainants are also indigenous.

Project documents uniformly ignore the history of the area and its legacy of environmental, economic, social, and cultural degradation. The construction of the Cerro de Oro Dam flooded the region of San Lucas Ojitlán and forced the relocation of 5,000 indigenous Chinanteco families.⁸¹ In total, the Dam caused forced displacement of approximately 26,000 individuals during the 1970s and 1980s.⁸² Project sponsors describe the profound impact of the original Dam's construction as a benefit because "the land has already been affected with the construction of the Cerro de Oro."⁸³ Furthermore, Project sponsors have capitalized on past

Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Manuel Neco, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

⁷⁸ See interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁷⁹ EIA, *supra* note 6, at 75.

⁸⁰ *Id.* at 111; URS, *supra* note 21, at 32.

⁸¹ See International Labour Organization, *Report of the committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Association Workers*, ILO Doc. 161999MEX169 (1999).

⁸² BARABAS, *supra* note 13.

⁸³ EIA, *supra* note 6, at 5-6, 75, 115.

exploitations that impoverished and marginalized Complainants currently residing in the Project area.

Many residents of Santa Ursula and Paso Canoa lament the construction of the Dam. Complainants have suffered the environmental consequences because the construction permanently changed the River and the ecology of the region, without bringing the promised benefits to the communities.⁸⁴ Socially, families were divided, as some members were forced to move to Veracruz and others migrated to the north to find work.⁸⁵ Culturally, the construction undermined Chinanteco culture, dispersing the people and preventing access to ancestral lands and waterways.⁸⁶

Project documents have ignored this socio-cultural history as well as the needs of indigenous persons residing in the Project area. For example, the Project has not developed an Indigenous Peoples Development Plan. Project sponsors have failed to identify potential impacts on indigenous persons, and ignored measures to prevent or mitigate such impacts.⁸⁷

Oaxaca lags far behind the national averages for education, nutrition, social services, and other indicators of community well-being.⁸⁸ Approximately 24% of Oaxaca residents are illiterate, nearly double the national average.⁸⁹ More than half of residents of Oaxaca do not have drainage and electricity, while less than 20% have running water and drainage.⁹⁰ Marginalization and unemployment are pressing problems in the state.⁹¹ Nearly a quarter of state residents suffer from low nutrition.⁹² Despite these difficulties, Project sponsors have made minimal efforts to account for the particular vulnerabilities and needs of poor and uneducated persons impacted by the Project.

⁸⁴ See interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24-27, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁸⁵ See interview by Komala Ramachandra with Yolanda Ortega Estaban, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

⁸⁶ See interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010).

⁸⁷ According to OPIC, the Social and Environmental Assessment is still in draft form. Letter from Nicole Cadiente, Administrative Counsel, Overseas Private Investment Corporation, to Natalie Bridgeman Fields, Accountability Counsel (November 19, 2010), attached hereto as Exhibit 2 [hereinafter Cadiente Letter]. Although Project construction has begun, the social and environmental risks and impacts have not been fully identified and the corresponding mitigation measures have not been enacted. Project sponsors' failure to comply with applicable provisions of PS 1 threatens the integrity and survival of indigenous persons residing in the area. IFC PS 1: Soc. and Envtl. Assessment and Mgmt. Sys. ¶¶ 13-16 (2006).

⁸⁸ See EIA, *supra* note 6, at 108.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 109.

⁹² *Id.* at 111.

The majority of Complainants do not have formal land rights, *i.e.*, are not *ejidatarios* nor private property holders. In Santa Ursula, Project sponsors only negotiated with and compensated *ejidatarios*, while those outside of *ejido* system have been completely ignored. Non-*ejidatarios* members are disproportionately impacted by the Project, as Project activities are focused around the margins of *ejido* lands, and non-*ejidatarios* rely more heavily on the natural environment for basic necessities and supplemental income. Project sponsors ignored the interests and very existence of many poor, indigenous and non-*ejidatario* Complainants.

Ejidatario Complainants, despite having some property rights, are also often indigenous and uneducated farmers, who sell raw agricultural goods in a competitive market. They have greater economic security, but are also poor in comparison with national averages. Project sponsors took advantage of the weak bargaining position of these Complainants by misrepresenting the Project's benefits, risks, and impacts to obtain agreements favorable to them. Although Project sponsors committed to undertake community development projects in Santa Ursula during negotiations, these promises have gone unfulfilled.

The majority of Complainants are women. While women made up a small fraction of those who attended *ejido* meetings with Project representatives, Project activities directly impact many activities traditionally undertaken by women, such as providing food and water. Women have little room to provide input at male-dominated *ejido* assemblies, and Project sponsors made no attempt to consult with or develop measures to address their concerns.

III. Policy Violations

Project sponsors have failed to comply with applicable OPIC policies and procedures, laws, and regulations. These failures have already caused, and continue to cause, harm to the Complainants.

OPIC applies the most current World Bank Guidelines to every project to which such guidelines are applicable.⁹³ Where there are gaps in the World Bank Guidelines on a given environmental or natural-resource issue, OPIC applies relevant U.S. federal standards, World Health Organization standards, and standards set by other international authorities.⁹⁴

With regards to the Project, OPIC classified the Project in Category A and identified the following applicable guidelines: International Financial Corporation ("IFC") Performance Standard ("PS") 1 (Social and Environmental Assessment and Management Systems); IFC PS 2 (Labor and Working Conditions); IFC PS 3 (Pollution Prevention and Abatement); IFC PS 4 (Community Health, Safety and Security); IFC PS 5 (Land Acquisition and Involuntary Resettlement); IFC PS 6 (Biodiversity Conservation and Sustainable Natural Resource Management); IFC General Environmental, Health and Safety Guidelines ("EHSG"); and EHSG for Electric Power Transmission and Distribution. Project performance should also be reviewed in light of IFC PS 7 (Indigenous Peoples), as the Environmental Impact Assessment ("EIA"), and the third party compliance review conducted by URS Corporation Mexico ("URS Report"), both

⁹³ OPIC, OPIC ENVIRONMENTAL HANDBOOK 16 (2004) [hereinafter ENVIRONMENTAL HANDBOOK].

⁹⁴ *Id.*

identify the presence of indigenous persons in the area. The Project should also be considered in light of IFC PS 8 (Cultural Heritage) given the La Sal Creek's cultural and historical significance.

The URS Report also states that the Equator Principles "provide the Project with a baseline and framework to implement internal environmental and social procedures and standards in a manner that is socially responsible and reflect healthy environmental management practices."⁹⁵ In addition, all OPIC projects must comply with host country environmental regulations;⁹⁶ in this case, Mexican land and environmental law is particularly relevant.

A. Inadequate Disclosure and Consultation

Project sponsors failed to consult with Complainants in accordance with OPIC policies. Project sponsors have entirely ignored the community of Paso Canoa and individuals living outside the *ejido* system. To the extent that Project representatives did communicate with affected individuals and communities, these efforts were far from adequate and did not constitute "consultation." Project sponsors undertook cursory discussions and provided affected communities with generalized, incomplete, and misleading information.

1. Applicable Standards

OPIC policy requires project sponsors to initiate and maintain meaningful consultation with affected individuals and communities during all phases of the project. IFC PS 1 explains that the "purpose of community engagement is to build and maintain over time a constructive relationship with these communities."⁹⁷ OPIC's Transparency Initiative requires project sponsors of Category A projects like this one to "formally consult with the locally-affected communities, by providing project information in a language, format, and medium that is accessible."⁹⁸ Consultations must be "inclusive and culturally appropriate and meet the needs of disadvantaged and vulnerable groups."⁹⁹ When a project impacts indigenous persons, as in this case, IFC PS 7 requires "an ongoing relationship with the affected communities" that is "culturally appropriate and commensurate with the risks and potential impacts to the Indigenous Peoples."¹⁰⁰ Specifically, IFC PS 7 requires that the consultation process involve representative bodies of indigenous peoples, and "[b]e inclusive of both women and men and of various age groups in a culturally appropriate manner."¹⁰¹

⁹⁵ URS, *supra* note 21, at 9.

⁹⁶ See ENVIRONMENTAL HANDBOOK 16 (2004).

⁹⁷ IFC PS 1: Soc. and Env'tl. Assessment and Mgmt. Sys. ¶ 19 (2006).

⁹⁸ OPIC, *Transparency*, OPIC ANTI-CORRUPTION & TRANSPARENCY INITIATIVE (2006) [hereinafter OPIC TRANSPARENCY INITIATIVE], <http://www.opic.gov/about/transparency>.

⁹⁹ *Id.*

¹⁰⁰ IFC PS 7: Indigenous Peoples ¶ 9.

¹⁰¹ *Id.*

OPIC policy also provides guidelines to determine the adequacy of consultation efforts. According to IFC PS 1, effective consultation:

- (i) should be based on the **prior** disclosure of relevant and adequate information, including draft documents and plans;
- (ii) should begin **early** in the Social and Environmental Assessment process;
- (iii) will focus on the social and environmental risks and adverse impacts, and the proposed measures and actions to address these; and
- (iv) will be carried out on an **ongoing** basis as risks and impacts arise.¹⁰²

At a minimum, “consultation will involve early discussion of the project at the screening stage, and later opportunities to review and comment on the Environmental and Social Impact Assessment (ESIA) or baseline audit document.”¹⁰³ Project sponsors should make the baseline document “available to locally-affected people in a language, format and medium that is accessible and allows for the free expression of opinions.”¹⁰⁴ In addition to the baseline document, project sponsors are required to provide a translated copy of the executive summary of the document, and make that summary available to local communities “in a format that is readily understandable and tailored to meet the information needs of the affected community.”¹⁰⁵

In keeping with IFC PS 1, “the consultation process will ensure their free, prior and informed consultation and facilitate their informed participation.”¹⁰⁶ Projects are instructed to engage communities in ways “free of external manipulation, interference, or coercion, and intimidation, and conducted on the basis of timely, relevant, understandable and accessible information.”¹⁰⁷

IFC PS 7 instructs that “informed participation,” of indigenous persons should include consultation about “proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.”¹⁰⁸ IFC PS 7 also instructs projects to allow “sufficient time for Indigenous Peoples’ collective decision-making processes.”¹⁰⁹

Consultation continues beyond initial project acceptance, and should be an ongoing process throughout the various stages of project development. “Consultation will continue

¹⁰² IFC PS 1: Soc. and Envntl. Assessment and Mgmt Sys. ¶ 21 (2006) (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶ 22.

¹⁰⁷ *Id.* at ¶ 19.

¹⁰⁸ IFC PS 7: Indigenous Peoples ¶ 9 (2006).

¹⁰⁹ *Id.*

during the implementation, monitoring, and evaluation of compensation payment and resettlement.”¹¹⁰ Such ongoing consultation assures that projects are able to “mitigate [the] adverse social and economic impacts from land acquisition or restrictions on affected persons’ use of land.”¹¹¹

2. Violation of Applicable Standards

The Project failed to consult with Complainants from the community of Paso Canoa and the non-*ejidatario* members of Santa Ursula. Additionally, the consultations purportedly undertaken with Santa Ursula Complainants were abbreviated and insufficient.

Although the Project will divert water for a stretch of the Santo Domingo River along Paso Canoa lands (potentially affecting agriculture and pasturing on community lands), and reintegrate water further downstream (raising concerns of flooding), Project representatives have not recognized Paso Canoa as an affected community. According to Project documents, Paso Canoa will “have a direct interaction with the hydroelectric project,”¹¹² yet Project representatives neglected to consult with Paso Canoa residents prior to the start of project construction. To date, Project sponsors maintain that Paso Canoa will not be affected by the Project.¹¹³

Additionally, the Project’s consultation process excluded non-*ejidatarios*, ignoring the vast majority of Santa Ursula Complainants. Only 82 of the more than one-thousand residents of Santa Ursula are *ejidatarios*.¹¹⁴

Consultations undertaken with Santa Ursula Complainants were deficient and inconsistent with applicable IFC Performance Standards and the spirit and letter of OPIC’s Transparency Initiative. Complainants have not been informed of Project details or provided with copies of Project documents,¹¹⁵ and therefore have no basis for making informed decisions about land concessions or compensation. Project sponsors have not established an ongoing consultation with Complainants or addressed Complainants’ concerns.¹¹⁶ Project sponsors claim

¹¹⁰ *Id.* at PS 5: Land Acquisition and Involuntary Resettlement ¶ 9. Though IFC PS 5 does not address market transactions, the standard should inform an understanding of free, prior, and informed consultation.

¹¹¹ *Id.* at ¶ 3.

¹¹² EIA, *supra* note 6, at 68.

¹¹³ While a Commission from Paso Canoa met with Project representatives, they were told at the meeting that Paso Canoa would not be affected. Interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

¹¹⁴ Estimates taken from visit to community of Santa Ursula on October 28, 2010. Project documents mention that representatives consulted and negotiated agreements with approximately six private landowners, but do not provide details about the timing or content of the negotiations.

¹¹⁵ See e.g., Gyna Martínez, *Codeci Rechaza Candidatos y Obra de Hidroeléctrica*, ElTuxtepecano.com, Jun. 30, 2009, <http://www.eltuxtepecano.com/2009/06/codeci-rechaza-candidatos-y-obra-de-hidroelectrica>.

¹¹⁶ In fact, when residents of Paso Canoa attempted to discuss the Project with Project representatives they were turned away and told that they would not be affected by the Project. See interview by Komala Ramachandra with

that OPIC consultation requirements were fulfilled by posting the Environmental Impact Study (EIS) on OPIC's website,¹¹⁷ providing copies at a SEMARNAT office in Mexico City,¹¹⁸ and one-off meetings with *ejido* assemblies.¹¹⁹ This assertion undermines the objective of OPIC policy—to ensure that project sponsors engage in “meaningful consultation with local stakeholder during all phases of project development.”¹²⁰

Finally, Project representatives have disingenuously portrayed the objective of the Project. From the outset, Project sponsors have stated that “residents regard [the Project] as a great opportunity for the creation of new temporary jobs during the construction process and afterwards, during the operation stage, they consider it will be an additional energy source where new job-offering industries will be established.”¹²¹ However, Project documents state that the energy to be produced will go exclusively to three companies, none of which are located in the region. It is unlikely, therefore, that the local communities will reap any of the benefits from the electricity generated.

Project sponsors have consistently overstated the Project's acceptance by local stakeholders and concealed its primary purpose to benefit private corporations outside the Project area. For example, the EIA claims that “[t]he construction project . . . is well accepted by the residents of the surroundings of the federal zone. Such residents regard it as a great opportunity for the creation of new temporary jobs . . . they consider it will be an additional energy source where new job-offering industries will be established.”¹²² In fact, the electricity generated will benefit private corporations, not the public, and many Complainants strongly oppose the Project, while other Complainants have serious concerns and grievances.¹²³

B. Bad Faith Negotiations and Inadequate Compensation for Land Acquisition

Project sponsors undercompensated Santa Ursula Complainants for the easements and land acquired from the community. Project sponsors did not undertake negotiations in good

Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

¹¹⁷ See URS, *supra* note 21, at 12. The public comment period for Cerro de Oro on the OPIC website took place from October 22, 2009 to December 21, 2009; no comments were recorded. See <http://www.opic.gov/doing-business/investment/environment/documents>.

¹¹⁸ See URS, *supra* note 21, at 14 (claiming that the EIS was made available for public consultation at the DGIRA office of SEMARNAT and on the SEMARNAT website).

¹¹⁹ See URS, *supra* note 21, at 24. Notably absent from the list of communities that met with Project sponsors is the community of Paso Canoa. Furthermore, as noted throughout this complaint, the meetings listed did not constitute consultation. Only a small segment of affected community members were provided with misleading, incomplete, and false information.

¹²⁰ See OPIC TRANSPARENCY INITIATIVE (2006).

¹²¹ See EIA, *supra* note 6, at 113.

¹²² See *id.*

¹²³ Letter from Eidencio Flores Rico et al., President and Members, Paso Canoa Ejido, to Gerente Regional del Golfo-Centro, Comisión del Agua (Nov. 12, 2010), attached hereto as Exhibit 3

faith, in violation of OPIC policy and contrary to the spirit of OPIC’s Transparency Initiative. Negotiations were concluded without adequate disclosure or consultation and Project sponsors have failed to follow through on promises to undertake community development projects. Such behavior violates applicable standards that mandate good faith negotiations with indigenous peoples, and discourages sponsors from taking advantage of asymmetrical information and bargaining power. Additionally, the current compensation regime does not address potential damage to indigenous practices, livelihoods, and ignores Complainants from Paso Canoa as well as Santa Ursula Complainants living outside the *ejido* system.

1. Applicable Standards

IFC PS 5 establishes guidelines for determining the adequacy of a project’s compensation and negotiation processes.

OPIC encourages its projects “to acquire land rights through negotiated settlements wherever possible.”¹²⁴ Projects reach negotiated settlements by “providing fair and appropriate compensation and other incentives or benefits to affected persons or communities, and by mitigating the risks of asymmetry of information and bargaining power.”¹²⁵ In determining what constitutes a “fair” amount of compensation, IFC PS 5 states that the price reached should further the goals of mitigating the social and economic impacts of the land acquisition by providing not only for the loss of assets or land, but also accounting for the effect the transaction would have on the “livelihoods and standards of living of the displaced persons.”¹²⁶

When working with indigenous peoples, project sponsors must ensure that “development fosters full respect for [the] human rights, dignity, cultures, [and] natural-resource based livelihoods of indigenous Peoples.”¹²⁷ To do so, project sponsors should look for ways to “minimize, mitigate, or compensate . . . and to provide opportunities for development benefits, in a culturally appropriate manner.”¹²⁸ An objective of IFC PS 7 is to “foster good faith negotiation with and informed participation of Indigenous Peoples.”¹²⁹

2. Violation of Applicable Standards

The terms negotiated with Santa Ursula Complainants grossly undervalue the impacts the Project will have on their lands and livelihoods. In Santa Ursula, *ejidatario* Complainants

¹²⁴ IFC PS 5: Land Acquisition & Involuntary Resettlement ¶ 3 (2006), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf).

¹²⁵ *Id.*

¹²⁶ *Id.* at “Objectives.”

¹²⁷ *Id.* at PS 7: Indigenous Peoples ¶ 2.

¹²⁸ *Id.*

¹²⁹ *Id.*

received approximately USD \$4,000 each for the Project's use of their land for 30 years.¹³⁰ During initial negotiations, Project representatives also promised MXP\$100,000 (approximately USD \$8,000) to Santa Ursula for a new roof for the community meeting hall¹³¹ and a new water system.¹³² In addition, Project representatives promised to construct a bridge on the road between Los Reyes and Santa Ursula, and a bridge over the La Sal Creek to transport harvests.¹³³ More recently, Project representatives have made additional, verbal promises to pave roads, dig wells, and build community buildings. These promises have all gone unfulfilled.¹³⁴

At the time of the 2007 consultations, Project sponsors did not disclose the Project's full scope and impact to *ejidatarios*. As a result of this asymmetry of information and bargaining power, the Complainants settled for less favorable terms. The settlement does not account for the impact of the Project on the La Sal Creek, Complainants' potable water supply, or the local environment. For example, Project representatives told one Santa Ursula Complainant that the Project would not impact him, but later discovered Project contractors chopping down trees located on his property. Project sponsors did not engaged in "good faith" negotiations because Project impacts were not fully disclosed.¹³⁵

To date, the Project sponsors have yet to deliver on their promises to construct bridges, pave roads, build wells, and erect community buildings for Santa Ursula. The Project sponsors' failed promises violate the principle of good faith negotiation and demonstrate the Project's failure to "mitigat[e] the social and economic impacts of . . . land acquisition" in accordance with IFC PS 5.

Finally, the Project has failed to compensate the non-*ejidatarios* of Santa Ursula and the residents of Paso Cano for loss of land, livelihood, or property resulting from Project activities. For example, one Paso Cano resident has not been compensated from damage to her home caused by explosives.¹³⁶ Economically vulnerable and marginalized from the *ejido* decision-making process, non-*ejidatarios* will bear the brunt of impacts to shared community resources, such as the La Sal Creek and federal lands used for agriculture or livestock grazing.

¹³⁰ See, e.g., interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

¹³¹ See URS, *supra* note 21, at 29-30; see also *EJIDO MEETING MINUTES*, *supra* note 16, at 7.

¹³² *EJIDO MEETING MINUTES*, *supra* note 16 (Santa Ursula was promised "la construcción de un Nuevo pozo para el suministro de agua potable").

¹³³ See URS, *supra* note 21, at 29-30

¹³⁴ See interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

¹³⁵ While as a matter of general understanding, all contract negotiations must be made in "good faith," as a matter of policy, OPIC specifically applies this requirement to indigenous people. See IFC PS 7: Indigenous Peoples ¶ 2.

¹³⁶ Interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Cano Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010).

C. Failure to Establish a Grievance Mechanism

In violation of IFC PS 1, Project sponsors have not established a grievance mechanism or provided Complainants with a means to file complaints related to the Project or obtain Project information. The lack of a grievance mechanism undermines the right of Complainants to informed participation in Project activities while increasing Complainants' frustration with and confusion about the Project.

1. Applicable Standards

OPIC standards require project sponsors to establish a grievance mechanism for the Project. According to IFC PS 1, whenever project sponsors anticipate ongoing risks or adverse impacts associated with a project, they must establish a grievance mechanism.¹³⁷ As this is a Category A Project that has the potential of "diverse and irreversible" environmental impacts, a grievance mechanism is required.¹³⁸

Under IFC PS 1, a grievance mechanism should: (i) be scaled to the risks and adverse impacts of the project; (ii) address concerns promptly; (iii) use an understandable and transparent process that is culturally appropriate and accessible to all segments of the affected community; (iv) be usable without cost or fear of retribution; and (v) not impede access to judicial or administrative remedies.¹³⁹ Where a grievance mechanism is required, project sponsors must inform the affected communities about the mechanism during the community engagement process.¹⁴⁰

Other IFC Performance Standards elaborate on these basic characteristics. Accordingly, the grievance mechanism should allow affected communities to express concerns about security arrangements and acts of project personnel;¹⁴¹ must receive and address specific complaints raised by displaced persons and communities;¹⁴² must include a recourse mechanism designed to address disputes in an impartial manner;¹⁴³ and must be culturally appropriate for any affected indigenous people identified.¹⁴⁴ Furthermore, PS 1 requires projects to create a Social and Environmental Assessment and establish a program to "establish and manage social mitigation and performance improvement measures and actions that address the identified social and

¹³⁷ IFC PS 1: Soc. & Env'tl. Assessment & Mgmt. Sys. ¶ 23.

¹³⁸ Initial Project Summary, *supra* note 3.

¹³⁹ IFC PS 1: Soc. & Env'tl. Assessment & Mgmt. Sys. ¶ 23; *see also*, Equator Principles, Principle 6: Grievance Mechanism (2006) (directing projects to establish a grievance mechanism proportional to the project's risks and impacts that responds to complaints in a prompt, transparent manner and that is accessible to affected communities) (*cited by* URS, *supra* note 21, at 25).

¹⁴⁰ IFC PS 1: Soc. & Env'tl. Assessment & Mgmt. Sys. ¶ 23.

¹⁴¹ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 13.

¹⁴² IFC PS 5, ¶ 10.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at PS 7: Indigenous Peoples ¶ 9.

environmental risks and impacts [(“Action Plan”).”¹⁴⁵ As part of periodic reporting on the project’s “Action Plan,” project sponsors must describe how the project has responded to concerns raised by affected community members through the grievance mechanism.¹⁴⁶

2. Violation of Applicable Standards

Complainants have not been informed of the existence of a grievance mechanism. Complainants have no means of communicating with Project sponsors. Those who have tried to contact Project representatives have been turned away, and Project sponsors have not addressed Complainants’ concerns.¹⁴⁷

Project sponsors claim that a grievance mechanism has been established and that community concerns are being addressed. Project material states that “a Project office” near the Project site has been established where concerned citizens can access Project information and voice their concerns regarding the Project.¹⁴⁸ However, no further details—such as the procedures for hearing complaints or remediation, the office location, the rank and number of office personnel, the accessibility of the mechanism to workers, the measures adopted to address the needs of indigenous community members—are provided.

Additionally, Project documents state that:

The Project owner and sponsors have been in direct communication with affected communities in order to disclose the Project activities. Doubts and concerns from community members have been properly and timely attended by the Project owner and sponsors at community meetings and at the Project site office; therefore no grievances have been recorded.¹⁴⁹

No examples are given or cited to support these assertions. If Project sponsors were following OPIC requirements, Action Plan reports should include community concerns.¹⁵⁰ Moreover, according to OPIC, the Project’s Action Plan is still in draft form.¹⁵¹

The minutes of meetings with *ejidos* representatives in four affected communities are the only available record of Project consultations.¹⁵² These meeting minutes make no mention of a

¹⁴⁵ *Id.* at PS 1: Soc. & Env’tl. Assessment & Mgmt. Sys. ¶ 13.

¹⁴⁶ *Id.* at ¶ 26.

¹⁴⁷ See interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

¹⁴⁸ URS, *supra* note 21, at 25.

¹⁴⁹ *Id.*

¹⁵⁰ See IFC PS 1: Soc. & Env’tl. Assessment & Mgmt. Sys. ¶ 26.

¹⁵¹ See Cadiente Letter, *supra* note 94; Exhibit 2.

¹⁵² See *Ejido Meeting Minutes*, *supra* note 16.

Project grievance mechanism.¹⁵³ IFC PS1 requires notification of the grievance mechanism during the community engagement process.

D. Harm to Water Quality

Several Project activities adversely impact the hydrology of La Sal Creek, the Santo Domingo River and other local water sources, with deleterious effects on the communities' potable water quality and the viability of the area's aquatic biodiversity. The contamination of La Sal Creek, the primary source of Santa Ursula's drinking water, violates OPIC policies regarding pollution abatement and community health and safety. The Project also poses a threat to fish populations in violation of OPIC policies regarding consultation and loss of livelihood.

1. Applicable Standards

OPIC-sponsored projects are required to minimize risks to the health of surrounding communities by "avoid[ing] or minimiz[ing] adverse impacts . . . on soil, water, and other natural resources in use by the affected communities."¹⁵⁴ With regards to water quality, "[t]he client will prevent or minimize the potential for community exposure to water-borne, water-based, water-related [. . .] diseases that could result from project activities."¹⁵⁵

OPIC obliges its projects to "avoid or minimize adverse impacts on human health and the environment by avoiding or minimizing pollution from project activities."¹⁵⁶ Concerning waste in particular, OPIC mandates that "[w]here waste generation cannot be avoided [. . .] the client will recover and reuse waste; where waste cannot be recovered or reused, the client will treat, destroy, and dispose of it in an environmentally sound manner."¹⁵⁷

2. Violation of Applicable Standards

Complainants report specific Project activities that violate OPIC policies on water quality and waste disposal. First, Project representatives told Santa Ursula community members that, as a result of alterations to the La Sal Creek, their new source of potable water would come from the Dam's reservoir via a purification system. La Sal Creek originates near Santa Ursula, and provides exceptionally clean, high quality potable water to residents. Complainants object to the replacement of natural spring waters with water from the reservoir, which is foul smelling and full of detritus. Project sponsors made this decision unilaterally without consulting the affected community.

Additionally, cement being poured into the soil by Project sponsors is entering into local wells, springs, and ponds used for drinking water by Santa Ursula Complainants. Applicable

¹⁵³ *Id.*

¹⁵⁴ IFC PS 4: Cmty. Health, Safety & Sec. ¶ 9.

¹⁵⁵ *Id.* at ¶ 10.

¹⁵⁶ *Id.* at PS 3: Pollution Prevention & Abatement ¶ 1.

¹⁵⁷ *Id.* ¶ 5.

standards require waste from construction or land clearing to be treated, destroyed, or disposed of in an environmentally sound manner.¹⁵⁸ Under no conditions, should project sponsors use bodies of water for waste disposal, especially water used by local communities for consumption.

Additionally, Complainants are concerned about potential effects of the Project infrastructure on the quality and chemical composition of water in the La Sal Creek, as well as the threat the Project poses to the viability of fish populations currently used by local communities for recreation, food, and income. While the loss of fishing implicates IFC PS 5 (compensation for loss of livelihood) and PS 1 (inadequate consultation as impacts to fishing were never considered or mentioned to affected communities), it also implicates IFC PS 4 on Community Health and Safety. Complainants fear that the Project will contaminate water and fish used for consumption and recreational activities, thus increasing the incidence of water-borne diseases, cancer and other adverse health effects by processing water to generate electricity, exposing water to EMF emissions, and directly dumping concrete into the La Sal Creek.¹⁵⁹

E. Degradation of a Bird Sanctuary

Project sponsors have not adequately considered impacts to important bird and bat species. Project materials disregard the biological significance of the Project's location within *Áreas de Importancia para la Conservación de la Aves* (Areas of Importance for the Conservation of Birds, "AICA") established by the Mexican government and international conservation agencies. During the construction phase, the Project will clear land, remove trees, erect transmission towers and lines, and alter the La Sal Creek and Santo Domingo River. Although Project activities are located inside and adjacent to AICAs, there has been no consultation with *Comisión Nacional para el Conocimiento y Uso de la Biodiversidad* ("CONABIO"), a Mexican governmental agency, prior to construction activities.¹⁶⁰ Complainants are concerned about the Project's irreversible impacts to wildlife, including important bird and bat species.

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, interview by Komala Ramachandra with Luz Ma del Pilar Zetino Martinez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 24, 2010); interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Sixta America Cohetero Montor, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Tomasa Ronquillo Hernandez, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

¹⁶⁰ According to an interview with SEMARNAT representatives, Project sponsors sent notice of the start of Project construction on June 21, 2010. Interview by Komala Ramachandra with Eduardo E. Gonzalez Hernandez, Gen. Dir. EIntl. Impact & Risk, SEMARNAT, Mexico City, Mexico (Nov. 5, 2010).

1. Applicable Standards

Several OPIC standards recognize a duty to avoid or mitigate adverse impacts to the environment.¹⁶¹ Under IFC PS 6, project sponsors must assess all threats to biodiversity as part of the social and environmental assessment in order to mitigate risks.¹⁶² IFC PS 6 also establishes three categories of impacted habitats—modified, natural, and critical habitats—and describes the standard of care required with regard to each.¹⁶³

Project sponsors must not significantly degrade a “natural” habitat, unless certain conditions are met, and must incorporate mitigation measures designed to achieve no net loss of biodiversity.¹⁶⁴ IFC PS 6 affords “modified” habitats less protection, but requires the project sponsor to exercise care to minimize conversion or degradation of the natural environment and, commensurate with the scale and nature of the project, identify opportunities to protect and conserve biodiversity as part of its operations.¹⁶⁵ A “critical habitat” is described as a subset of modified and natural habitats defined by high biodiversity value.¹⁶⁶ Project sponsors may implement project activities in a critical habitat only if the project will not cause adverse impacts to the vulnerable species or biological functions of the habitat or reduce any recognized endangered species, while mitigating lesser impacts (*i.e.*, the project is designed to achieve no net loss of biodiversity where feasible).¹⁶⁷ Furthermore, the development of lands with natural or plantation forests must not degrade any critical habitats.¹⁶⁸

Finally, if the area is “legally protected,”¹⁶⁹ project sponsors must also act in a manner consistent with any protected area management plans and consult with protected area sponsors and managers, local communities, and other key stakeholders on the project.¹⁷⁰

¹⁶¹ The AICA designation also potentially implicates a threshold issue. OPIC must categorically reject certain projects on environmental grounds which it screens as “Category F,” including those Projects which (i) significantly degrade national parks or protected areas; (ii) destroy or significantly degrade the habitat of endangered species; (iii) involve large dams that disrupt ecosystems; or (iv) pose any other “unreasonable or major environmental, health or safety hazards,” among others that are less relevant to the Project. OPIC, OPIC Environmental Handbook 8-9 (2004).

¹⁶² IFC PS 6: Biodiversity Conservation & Sustainable Natural Res. Mgmt. ¶ 4.

¹⁶³ *Id.* at ¶¶ 6-8.

¹⁶⁴ *Id.* at ¶¶ 7-8.

¹⁶⁵ *Id.* at ¶ 6. Significant conversion or degradation is defined as either “(i) the elimination or severe diminution of the integrity of a habitat caused by a major, long-term change in land or water use; or (ii) modification of a habitat that substantially reduces the habitat’s ability to maintain viable population of its native species.” *Id.* note 1.

¹⁶⁶ *Id.* at ¶ 9.

¹⁶⁷ *Id.* at ¶ 10.

¹⁶⁸ *Id.* at ¶ 14.

¹⁶⁹ *Id.* at ¶ 11 n.6 (“This Performance Standard refers to areas legally designated for the protection or conservation of biodiversity, including areas proposed by governments for such designation.”).

¹⁷⁰ *Id.* at ¶ 11.

The duty to address and mitigate adverse environmental impact is ongoing, beginning at the project assessment stage and monitored throughout the operation of the project. As part of the Management Program, project sponsors are required to avoid and prevent risks, or identify mitigation measures if adverse impacts are impossible to avoid.¹⁷¹

2. Violation of Applicable Standards

Project sponsors have failed to provide adequate protection for species residing in the Project area. Even assuming that the Project area constitutes a “modified habitat” as defined by IFC PS 6, Project sponsors must nonetheless protect and conserve biodiversity as part of Project operations.¹⁷² The EIA cites various mitigation measures, but none specifically account for the Project’s location within an AICA.¹⁷³ Despite the Project’s plan to erect extensive transmission lines in a biologically important area, avian and bat collisions were not considered during the environmental impact assessment.¹⁷⁴ In fact, Project sponsors contend that the Project will have “zero environmental cost during the operation stage.”¹⁷⁵

The URS Report recommends that the Project consider the Industry-Specific EHS Guidelines for Electric Power Transmission and Distribution with respect to Terrestrial Habitat Alteration and Avian and Bat Collisions.¹⁷⁶ These guidelines identify several prevention and control measures to minimize bat and bird collisions and electrocutions.¹⁷⁷ There is no indication that these recommendations were implemented. Project sponsors have not satisfactorily identified opportunities to protect and conserve biodiversity in the Project area as required by IFC PS 6.

Furthermore, Project documents do not take precautions commensurate with the Project area’s AICA distinction. Under IFC PS 6, Project sponsors violated obligations to act in a manner consistent with defined protected area management plans and to consult with protected area sponsors and managers, local communities, and other key stakeholders. According to OPIC, the Social and Environmental Assessment is still in draft form.¹⁷⁸ Although Project construction has begun, the social and environmental risks and impacts have not been fully identified and the corresponding mitigation measures have not been enacted. Project sponsors’ failure to comply with applicable provisions of PS 1 threatens the region’s biodiversity.

¹⁷¹ IFC PS 1: Soc. & Envtl. Assessment & Mgmt. Sys. ¶ 14.

¹⁷² See IFC PS 6: Biodiversity Conservation & Sustainable Natural Res. Mgmt. ¶ 6.

¹⁷³ See EIA, *supra* note 6, at 11.

¹⁷⁴ See URS, *supra* note 21, at 31.

¹⁷⁵ EIA, *supra* note 6, at 178.

¹⁷⁶ URS, *supra* note 21, at 31.

¹⁷⁷ Envtl. Health & Safety Guidelines for Elec. Power Transmission & Distrib. 4-5 (Int’l Fin. Corp. 2007).

¹⁷⁸ See Cadiente Letter, *supra* note 94; Exhibit 2.

F. Threats to Community Health and Safety

Project sponsors have violated their obligations to identify and avoid or mitigate adverse health and safety impacts and risks to individuals and communities potentially affected by Project activities as required by IFC PS 1, IFC PS 3, IFC PS 4 and IFC PS 6. Complainants have serious concerns about health and safety impacts from Project waste disposal, EMF emissions, contamination of food and water, and the use of explosives.

1. Applicable Standards

IFC PS 1 requires project sponsors to conduct a “Social and Environmental Assessment that [] consider[s] in an integrated manner the potential social and environmental (including labor, health, and safety) risks and impacts of the project.”¹⁷⁹ This assessment must provide an “adequate, accurate, and objective evaluation and presentation of the issues, prepared by qualified and experienced persons.”¹⁸⁰ For a Category A Project, the assessment must also be comprehensive and include “an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed.”¹⁸¹ Finally, the assessment must “identify individuals and groups that may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status.”¹⁸²

Where disadvantaged or vulnerable individuals or groups are identified, the assessment must propose and implement differentiated measures to avoid disproportionate impacts to these populations and to ensure their access to development benefits and opportunities.¹⁸³ Project sponsors must also design and implement a Management Program—and where necessary an Action Plan—to address the risks and impacts identified during the assessment.¹⁸⁴ The Management Program should prioritize avoidance or prevention of adverse impacts; where avoidance is not possible, the Management Program should identify mitigation measures to ensure compliance with applicable laws, regulations and standards.¹⁸⁵

During the assessment phase, IFC PS 4 requires project sponsors to identify risks and impacts to affected communities’ health and safety, IFC PS 3 requires project sponsors to consider ambient conditions and apply pollution prevention and control techniques, and IFC PS 6 requires project sponsors to assess the significance of project impacts on all levels of biodiversity and to establish preventive measures.¹⁸⁶ These measures must “favor the prevention or

¹⁷⁹ IFC PS 1: Soc. & Envtl. Assessment & Mgmt. Sys. ¶ 4.

¹⁸⁰ *Id.* at ¶ 7.

¹⁸¹ *Id.* at ¶ 9.

¹⁸² *Id.* at ¶ 12.

¹⁸³ *Id.* at ¶ 12.

¹⁸⁴ *Id.* at ¶¶ 13, 16.

¹⁸⁵ *Id.* at ¶ 14.

¹⁸⁶ *Id.* at PS 3: Pollution Prevention & Abatement ¶ 3, PS 4: Cmty. Health, Safety & Sec. ¶ 4.

avoidance of risks and impacts over minimization and reduction.”¹⁸⁷ A project must disclose its Action Plan to affected communities and relevant government agencies whenever it identifies “risks to or adverse impacts on the health and safety of affected communities.”¹⁸⁸ The assessment of ambient conditions must include a consideration of the finite assimilative capacity of the environment, existing and future land use, the project’s proximity to ecologically sensitive or protected areas, and the potential for cumulative impacts with uncertain and irreversible consequences.¹⁸⁹ For significant emissions in an already degraded area, project sponsors must also consider strategies that will improve the ambient conditions of that area.¹⁹⁰

Project sponsors must meet several substantive standards related to community health and safety. They must ensure that structural elements of the project are designed, constructed, operated and decommissioned in accordance with good international industry practice.¹⁹¹ Special care must be taken when damage to or failure of structural elements could cause injury to the community. Where especially high risks are present, such as the failure of a dam curtain, outside experts must be retained, separate from those responsible for the project’s design or construction, to review the project as early as possible and throughout the life of the project.¹⁹² For these types of risks, project sponsors must document their emergency preparedness and planned responses and include them in their Action Plan, coordinate their planned and executed responses with relevant government agencies, and inform affected communities of significant potential hazards in a culturally appropriate manner.¹⁹³ Additionally, project sponsors must “avoid or minimize the exacerbation of impacts caused by natural hazards, such as landslides or floods that could arise from land use changes due to project activities”¹⁹⁴

Projects that operate equipment on community roads must seek to prevent the occurrence of incidents and accidents associated with the operation of such equipment.¹⁹⁵ Project wastes must be avoided or minimized to the extent practicable; waste that cannot avoided must be reused, or where reuse is impossible, treat, destroy and dispose of it in an environmentally sound manner.¹⁹⁶ The production of hazardous wastes must be avoided to the extent feasible, and where avoidance is not possible, minimized or controlled.¹⁹⁷ Project sponsors must also “seek to prevent or minimize the potential for community exposure to hazardous materials that may be released by the project” and “exercise commercially reasonable efforts to control the safety of

¹⁸⁷ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 4.

¹⁸⁸ *Id.* at ¶ 5.

¹⁸⁹ *Id.* at PS 3: Pollution Prevention & Abatement ¶ 9.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 6.

¹⁹² *Id.* at ¶ 6; *see also id.* PS 3: Pollution Prevention & Abatement ¶ 7.

¹⁹³ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 12.

¹⁹⁴ *Id.* at ¶ 8.

¹⁹⁵ *Id.* at ¶ 6.

¹⁹⁶ *Id.* at PS 3: Pollution Prevention & Abatement ¶ 5.

¹⁹⁷ *Id.* at ¶ 6.

deliveries of raw materials and of transportation and disposal of wastes.”¹⁹⁸ They must “avoid the release of pollutants or, when avoidance is not feasible, minimize or control the intensity or load of their release.”¹⁹⁹ Furthermore, Project sponsors must “avoid or minimize adverse impacts due to project activities on soil, water, and other natural resources in use by the affected communities.”²⁰⁰

Project sponsors’ obligations with regards to wildlife habitat destruction are detailed in subsection E of this section.²⁰¹ In addition to those obligations, Project sponsors must manage natural resources in an environmentally friendly manner.²⁰²

The Industry-Specific EHS for Electric Power Transmission and Distribution recommend that, in order to mitigate adverse consequences from EMF exposure, project sponsors evaluate potential exposure to the public against the reference levels developed by the International Commission on Non-Ionizing Radiation Protection (“ICNIRP”). Sponsors must also ensure that public exposure does not go over the recommended amount and consider placing facilities or transmission lines so as to minimize public exposure, *e.g.* avoid placing them above or adjacent to residential properties or other locations intended for high-frequency human occupancy. , If the EMF is expected to exceed exposure limits, project sponsors should utilize technology to reduce the EMF produced, by, for example, using with specific alloys, burying transmission lines, increasing the height of transmission towers, or modifying the size, spacing and configuration of conductors.²⁰³

2. Violation of Applicable Standards

Complainants report that Project workers have dumped Project wastes into a ravine in Santa Ursula,²⁰⁴ and the contamination of water sources shared by local communities as a result of site preparation.²⁰⁵ This behavior poses a risk to Complainants and violates the duty set by IFC PS 3 to dispose of wastes in an environmentally sound, and IFC PS 4 to dispose of materials in a manner that avoids or minimizes risks and adverse impacts on soil, water, and other natural resources used by affected communities.

¹⁹⁸ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 7.

¹⁹⁹ *Id.* at PS 3: Pollution Prevention & Abatement ¶ 4.

²⁰⁰ *Id.* at PS 4: Cmty. Health, Safety & Sec. ¶ 9.

²⁰¹ *See* IFC PS 6 ¶¶ 6-11.

²⁰² *Id.* at ¶ 14.

²⁰³ *Envtl. Health & Safety Guidelines for Elec. Power Transmission & Distrib.* 6 (Int’l Fin. Corp. 2007).

²⁰⁴ Interview by Komala Ramachandra with Petra Lagunez Aguillar, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010).

²⁰⁵ Interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

The degradation of the La Sal Creek and the Santo Domingo River by Project activities—including the dredging and expansion of the La Sal Creek, the use of water to generate hydroelectric power, the diversion of water from the Santo Domingo, and contamination from Project produced wastes—compromises the health and well-being of community residents that depend on these water sources for food, irrigation, raising livestock, bathing, fishing, and general household needs. Complainants also place great cultural importance on the La Sal Creek, and consider its degradation a great loss to their communities. The Project sponsors are violating duties with regards to modified habitats under IFC PS 6 and to community livelihoods under IFC PS 5. Additionally, they are blatantly breaching their duty to “promote the sustainable management and use of natural resources” as set by IFC PS 6.

Furthermore, Complainants are concerned about adverse impacts from the Project’s use of explosives. The detonation of explosives near the dam curtain and in an area of high seismic activity prone to flooding from hurricanes creates serious risks to Complainants.²⁰⁶ A breach of the Dam curtain would have disastrous and likely fatal consequences for Project area residents. Additionally, Project sponsors have ignored Complainants residing in homes close to detonation areas because residents are not *ejidatarios*. At least one Complainant’s home has been damaged from these blasts.²⁰⁷

Project sponsors have not prepared an emergency response plan nor coordinated with local officials to prepare for a possible dam breach, even though Project activities present a high risk to affected individuals, in violation of IFC PS 4 and IFC PS 3. Project sponsors have not provided Complainants with Project plans as required by IFC PS 4. Furthermore, Project contractors are making heavy use of a bridge relied on by Paso Cano residents; despite residents’ fear that the bridge will be damaged. Damage to Complainants’ property caused by explosives and equipment violates the general duties set by IFC PS 4 to identify and mitigate risks to community health and safety and obligations established by IFC PS 5 to prevent, minimize, mitigate or compensate for destruction to the property of affected individuals.

Complainants are also concerned about the effects of exposure to the Project’s EMF on area residents and natural resources. Project sponsors have identified a significant, adverse EMF impact to the ecosystem of the riverbank from electricity generated by the Project that may be mitigated, but claim that “[n]o impact” will be generated by the transmission line.²⁰⁸ The Project provides no support for this assertion. Due to this omission, the URS Report recommended comparing the Project’s expected EMF emissions against the ICNRIP recommended exposure limits and, if EMF levels exceeded the recommended amount, suggested several mitigating techniques that mirror some of those found in the Industry-Specific EHS for Electric Power Transmission and Distribution described above.²⁰⁹ Project sponsors have provided no indication that these recommendations have been followed. At a minimum, Project sponsors should assess

²⁰⁶ See Initial Project Summary, *supra* note 3.

²⁰⁷ Interview by Komala Ramachandra with Gregoria Trenado Abascal, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

²⁰⁸ EIA, *supra* note 6, at 134.

²⁰⁹ URS, *supra* note 21, at 39.

expected EMF emissions in comparison to ICNRIP recommended limits. The failure to consider the effects of EMF exposure, or to even acknowledge the presence of many Complainants who will be exposed to the Project's EMF, violates IFC PS 1 and IFC PS 4.

Project sponsors have failed to accurately assess significant Project risks and impacts and to identify those impacted as required by IFC PS 1. According to OPIC, the Social and Environmental Assessment is still in draft form.²¹⁰ Additionally, no differentiated measures have been established to account for the unique vulnerabilities of disadvantaged populations—in particular indigenous peoples, those outside of the *ejido* system, and the poor—as required by IFC PS 1. Unsurprisingly, the Project's adverse effects have fallen and are continuing to fall disproportionately on these populations. The EIA does not offer an adequate, accurate, and objective evaluation or “comprehensive” explanation of issues as required for Category A Projects. Project sponsors have not prepared an Action Plan nor made one available to Complainants, as required by IFC PS 1.²¹¹

Complainants have been denied their right to informed participation although the Project creates significant risks to their health, safety, livelihoods, environment, natural resources, and general community well-being. Project sponsors failed to identify and consult with most Complainants, and those that did meet with Project representatives were never provided with a copy of the EIA or any other Project documents essential for understanding the Project's impacts to the health and safety of affected communities.

G. Disproportionate Impacts on Indigenous Persons

Project sponsors failed to satisfy obligations to the indigenous persons residing in the Project area.

1. Applicable Standards

IFC PS 7 describes duties to indigenous peoples residing in a project's area of influence. IFC PS 7 recognizes that:

Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalized and vulnerable segments of the population. Their economic, social and legal status often limits their capacity to defend their interests in, and rights to, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. They are particularly vulnerable if their lands and resources are transformed, encroached upon by outsiders, or significantly degraded.²¹²

²¹⁰ See Cadiente Letter, *supra* note 94; Exhibit 2.

²¹¹ *Id.*

²¹² IFC PS 7: Indigenous Peoples ¶ 1 (2006).

Project sponsors are required to identify all potentially affected indigenous persons and seek to avoid adverse impacts wherever possible; where avoidance is not feasible, adverse impacts must be mitigated, minimized or compensated for in a culturally appropriate manner.²¹³ As indigenous persons are by definition vulnerable, IFC PS 1 requires that the assessment also propose and implement differentiated measures to avoid disproportionate impact on indigenous persons and to ensure that they receive an equitable share of the project's development benefits and opportunities.²¹⁴ Project sponsors must include proposed actions in a time-bound plan, such as an Indigenous Peoples Development Plan, or a broader community development plan with separate components for indigenous persons.²¹⁵ Project sponsors must establish an ongoing relationship with the affected communities of indigenous persons from as early as possible in the project planning and throughout the life of the project.²¹⁶

Where the project will have adverse impacts on indigenous persons, the consultation process must ensure their free, prior, and informed consultation and facilitate their informed participation on matters that affect them directly.²¹⁷ The process of community engagement must be culturally appropriate and commensurate with the risks and potential impacts to these indigenous peoples.²¹⁸ In particular, the process must involve indigenous peoples' representative bodies; include both men and women of various age groups in a culturally appropriate manner; provide sufficient time for indigenous peoples' collective decision-making processes; facilitate the indigenous peoples' expression of their views, concerns, and proposals in the language of their choice, without external manipulation, interference, or coercion, and without intimidation; and ensure that the project's grievance mechanism is culturally appropriate and accessible for indigenous peoples.²¹⁹ Project sponsors must also identify culturally appropriate project development benefits in consultation with affected communities of indigenous peoples and seek to provide these benefits in a timely and equitable manner.²²⁰

IFC PS 7 also recognizes traditional or customary land use by indigenous peoples for livelihoods, cultural, ceremonial, or spiritual purposes that define identity and community even if those uses are not legally recognized or protected under national laws.²²¹ If the development project may adversely impact these uses, project sponsors must take steps in order to respect and protect these uses.²²² IFC PS 8 on Cultural Heritage complements these requirements, by

²¹³ *Id.* at ¶¶ 7-8.

²¹⁴ *Id.* at PS 1: Soc. & Envtl. Assessment & Mgmt. Sys. ¶ 12.

²¹⁵ *Id.* at PS 7: Indigenous Peoples ¶ 8.

²¹⁶ *Id.* at ¶ 9.

²¹⁷ *Id.* See International Labour Organization Indigenous and Tribal Peoples Convention (1989), arts. 5, 7, 15 (signed and ratified by Mexico on September 5, 1990).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at ¶ 10.

²²¹ *Id.* at ¶ 12.

²²² *Id.* at ¶ 13.

applying to “unique natural environmental features that embody cultural values.”²²³ Whenever a project “may” impact cultural heritage, IFC PS 8 requires project sponsors to undertake internationally recognized practices for the protection, field-based study, and documentation of cultural heritage; consult with affected communities to identify cultural heritage; and incorporate this consultation into the project sponsor’s decision making processes.²²⁴

2. Violation of Applicable Standards

More than half of residents living within the Project area are indigenous. While the EIA notes that 17 percent of those in the municipality of Tuxtepec are indigenous, there is a much higher percentage of indigenous people living in the immediate Project area. Project sponsors’ failure to accurately identify the number and concentration of indigenous peoples in the Project area violates IFC PS 7. The Project also fails to enact mitigation or prevention measures and differentiated measures as required by IFC PS 1 and IFC PS 7. The majority of affected indigenous communities were not consulted with as required by IFC PS 7, as the vast majority of indigenous people are non-*ejiditarios*, and Project sponsors made no attempt to consult with those outside the *ejido* system.

In violation of IFC PS 7, Project sponsors have not identified or provided development benefits in a timely and equitable manner. For example, promise to construct a new well in Santa Ursula, have since been rescinded. Also in violation of IFC PS 7, Project sponsors have not created an Indigenous Peoples Development Plan or other time-bound plan. Finally, indigenous Complainants place historical and cultural significance on the La Sal Creek as the only local waterway that was not completely altered by the construction of the original Cerro de Oro Dam. Project sponsors have ignored the significance of this waterway in violation of IFC PS 7 and IFC PS 8.

IV. Violations of Mexican Laws and Regulations

OPIC policy requires a project to comply with the environmental laws and regulations of the country where the project is located.²²⁵ In this case, Project sponsors have violated Mexican law, and therefore, OPIC policy.

Mexico’s Agrarian Law requires a minimum of one-month notice and a strict quorum requirement for meetings involving decisions to modify *ejido* parcels that are collectively farmed and administered.²²⁶ Project sponsors violated both rules during negotiations regarding communal plots collectively farmed by Santa Ursula *ejiditarios* to fund local projects. The meeting was announced only ten days before it was held, and only 24 of 82 *ejiditarios* were

²²³ *Id.* at PS 8: Cultural Heritage ¶ 3.

²²⁴ *Id.* at ¶¶ 4, 6.

²²⁵ OPIC, OPIC Environmental Handbook 16 (2004). Additionally, this Project’s host country notification letter provides: “We understand, of course, that [the Project] will be subject to the laws of Mexico with regard to protection of the environment, public health and safety.” Host Country Notification, *supra* note 2.

²²⁶ Ley Agraria [Land Law], art. 23 (XIV), art. 25, art. 26 (Mex. 1992).

present during that meeting.²²⁷ Therefore, the permissions obtained during this meeting to construct in communal parcels of the *ejido* are void. During the meeting, Project sponsors acquired land from the Santa Ursula *ejiditarios* by fraudulently misrepresenting and concealing necessary Project-related information.²²⁸ This constitutes a violation of Mexican law on the part of Project sponsors and OPIC.

The Project sponsors also are undermining Mexican treaty obligations by implementing a project in violation of the International Labour Organization Convention No. 169 and the principles established by United Nations' Declaration on the Rights of Indigenous People. Both instruments recognize that states should obtain indigenous persons' free, prior, and informed consent before approving projects affecting indigenous lands, territories, or resources.²²⁹ Mexico signed and ratified ILO Convention No. 169 on September 5, 1990 and is legally bound to the abide by the treaty's provisions. Project sponsors have violated Mexican law by failing to obtain the free, prior, and informed consent of indigenous persons living in Santa Ursula and Paso Canoa.

The Project sponsors have required several communities, including Complainants in Santa Ursula and Paso Canoa, to sign agreements stating that residents would not obtain assistance from outside political and social organizations.²³⁰ These agreements attempt to undermine residents right to seek advice, counsel, and assistance, are a violation of Mexican law and are not binding.

²²⁷ See *EJIDO MEETING MINUTES*, *supra* note 16.

²²⁸ See interview by Komala Ramachandra with Rosa Gonzalez Hernandez, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010); interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico, (Oct. 29, 2010).

²²⁹ See International Labour Organization Indigenous and Tribal Peoples Convention (1989), arts. 5, 7, 15 (signed and ratified by Mexico on September 5, 1990) (Article 5 states that "the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals...[also] the integrity of the values, practices and institutions of these peoples shall be respected[;]" Article 7 establishes that "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly...The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement[;]"), Article 15 states that "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."). United Nations' Declaration on the Rights of Indigenous Peoples (September 13, 2007) art. 32 (" States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.").

²³⁰ Interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

In order to begin construction, the Project Sponsors were required to obtain permissions from various agencies of the Mexican government, as provided in the terms and conditions of the permission granted by the Department of Environmental Impact and Risk (DGIRA) of the Mexican environmental agency, SEMARNAT.²³¹ The terms and conditions established by DGIRA are legal requirements that Project sponsors must fulfill before construction can begin. In its most recent periodic report in October, 2010, the Project Sponsors reported that they had not yet complied with the requirement to obtain a permission from a Mexican federal agency to change the use of forest lands.²³² Despite this oversight, the Project Sponsors reported to SEMARNAT that they had begun construction in June, 2010.²³³ The Project sponsors are therefore in violation of Mexican law.

V. Attempts to Resolve the Dispute

Complainants and other members of affected communities have attempted to learn about the Project and its impacts and to bring their concerns to the attention of relevant government agencies. In addition, Complainants have attempted to resolve disputes directly with Project representatives.²³⁴

Complainants' efforts have been unsuccessful. Project sponsors have refused to meet with Complainants, and Complainants know of no person or office tasked with addressing their concerns. Paso Canoa Complainants have made several attempts to contact Project sponsors, only to have their concerns dismissed by Project representatives and be told that they would not be impacted by the Project.²³⁵

Complainants have visited various government agencies in an attempt to obtain information about the Project and lodge complaints, including the local offices of CONAGUA and the *Procuraduria Agraria*. Government agencies have not addressed their concerns.

Moreover, Project sponsors have obstructed Complainants' efforts to seek redress for concerns about the Project. Project representatives have required Santa Ursula and Paso Canoa residents to sign an agreement that they would not seek any support from outside

²³¹ URS, *supra* note 21, app B. at 26 (SEMARNAT EIS Authorization).

²³² Interview by Komala Ramachandra with Eduardo E. Gonzalez Hernandez, Gen. Dir. Env'tl. Impact & Risk, SEMARNAT, Mexico City, Mexico (Nov. 5, 2010).

²³³ *Id.*

²³⁴ Letter from Eidencio Flores Rico et al., President and Members, Paso Canoa Ejido, to Gerente Regional del Golfo-Centro, Comisión del Agua (Nov. 12, 2010), attached hereto as Exhibit 3

²³⁵ *Id.* See Interview by Komala Ramachandra with Rosa Maria Peña Sosa, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 25, 2010); interview by Komala Ramachandra with Claudia Barrera Avellaneda, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

“organizations.”²³⁶ They have also told Complainants that they seek repayment of compensation with interest should anyone seek to interfere with Project activities.²³⁷

Lastly, affected communities have staged protests in an attempt to bring attention to their concerns and voice their dissatisfaction with Project activities.²³⁸

VI. Requested Next Steps

Complainants request that the OPIC Office of Accountability immediately begin both a Compliance Review of the Project and initiate Problem-solving between Complainants and Project sponsors. Because Complainants are already experiencing serious and ongoing adverse impacts to their livelihoods, health, well-being, property, natural resources, and environment, they request that these two processes work in parallel and start as soon as possible.

Through a Compliance Review, Complainants seek the OPIC Office of Accountability’s confirmation of the Project’s non-compliance with OPIC policies so that steps can immediately be taken to bring the Project into compliance with all applicable social, environmental, health, and transparency standards.

Through a Problem-solving initiative, Complainants request that the OPIC Office of Accountability engage a neutral mediator to facilitate dialogue between the Complainants and Project sponsors.

The majority of Complainants from Paso Canoa and non-*ejidatario* Complainants from Santa Ursula request that:

1. the project be immediately and permanently suspended;
2. an independent environmental impact assessment be conducted and mitigation plan be created;
3. the Project cease alterations to the La Sal Creek; and

²³⁶ Interview by Komala Ramachandra with Gabino Vicente, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 29, 2010); interview by Komala Ramachandra with Fidencio Flores Rico, Paso Canoa Resident, Tuxtepec, Oaxaca, Mexico (Oct. 27, 2010).

²³⁷ Interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010).

²³⁸ See Gyna Martínez, *Codeci Rechaza Candidatos y Obra de Hidroeléctrica*, ElTuxtepecano.com, Jun. 30, 2009, <http://www.eltuxtepecano.com/2009/06/codeci-rechaza-candidatos-y-obra-de-hidroelectrica> (describing area protests organized by the Comité de Defensa Ciudadana [CODECI] against dam projects in the region, including the Cerro de Oro Dam). See also interview by Komala Ramachandra with Dulce Maria Soto Castro, Santa Ursula Resident, Tuxtepec, Oaxaca, Mexico (Oct. 26, 2010) (describing community involvement with CODECI protests).

4. the disclosure of a complete record of Project documents to the communities in a manner that is easy to understand. Community members request a diorama (*maquete*) of the Project, so that they can view and understand Project plans.

Complainants from Santa Ursula, who have already received payments from Project sponsors, also request full disclosure of Project information and an independent environmental impact assessment. In addition, all Complainants request that if the Project does proceed:

1. Project sponsors fully comply with promises made to the communities and bring the Project into compliance with OPIC policy;
2. Project sponsors provide documentation regarding the risks to health, created by the hydroelectric expansion and plans to avoid those risks; and
3. negotiated agreements between the Project sponsor and Complainants address all remaining issues raised in this complaint, including concerns about land use, health, and the Project's environmental and social impacts.

Complainants may be contacted via email through their representatives in the Working Group listed in Exhibit 1. Thank you for your attention to this request. We look forward to hearing from you as soon as possible.

We, as members of the affected communities of the Cerro de Oro Hydroelectric Project in the municipality of Tuxtepec, Oaxaca, hereby sign this complaint to the OPIC Office of Accountability:

[see attached signatures]