

World Bank Environmental and Social Framework (ESF) – Guidance Notes
Comments by the Asian Development Bank (ADB)
21 December 2017

Introduction

- ADB would like to thank the World Bank for the opportunity to comment on the ESF Guidance Notes (GNs). While there are some differences, the ESF is broadly aligned with the policy principles ADB's Safeguard Policy Framework (SPS, 2009). Further, the GNs are generally consistent with ADB's safeguard implementation and international good practice.
- Overall, we find that the guidance notes (GNs) are useful and should be helpful to borrowers in explaining the ESF policy provisions. Overall, they do allow tremendous flexibility and latitude to tailor requirements to project specific circumstances. Consistent with the ESF, the GNs reflect a risk based approach to safeguards, with level of effort and resource allocation to be commensurate with the magnitude of risks. There is a conscious effort to reduce unnecessary front loading and strengthen implementation efforts. The adaptive management approach embodied in the GNs will also allow more emphasis on implementation, more efficient allocation of resources and probably better outcomes.
- On the other hand, the approach taken will require significant professional judgment which will be challenging where WB and/or borrower capacity is weak. It may also make decision-making more difficult for those who prefer strict rules-based approaches. Borrowers may indeed benefit from additional advice in the form of good practice notes, handbooks, and other non-prescriptive material.
- In terms of content, there are some specific areas where were ADB feels that the GNs could be strengthened, through additional details or supporting information. Examples are provided below.

Comments of GN for ESS1: Assessment and Management of Environmental and Social Risks and Impacts

- **Use of Country Safeguards Systems (CSS):** We find the guidance on the use of country safeguard systems (use of borrower systems) to be a bit vague - like the treatment of CSS in the ESF itself. We assume this must reflect a conscious decision to deal with the whole issue of borrower systems later and down the road. The benchmarks to be applied, the potential scope of CSS application (ie. all ES standards or only those relevant to the project), the nature of diagnostics to be undertaken (both for assessment of "material consistency" and assessment of capacity/track record), and much of the actual process to be followed remains unclear at this stage. While we recognize that the ESF has evolved from earlier approaches, ADB would hope that the WB approach to diagnostics will not present a major departure from the approach taken by ADB, since this may become a source of confusion for borrowers and other stakeholders. Since the GNs don't shed much light on the this, we would welcome the further development of additional guidance developed in due course.

- **Material Consistency:** This term is used throughout the document. Some clarity on the definition of the term and some details as to how it should be applied in various aspects of safeguards are needed. Material consistency is mentioned both in the context of a common approach in project co-financing and in the context of CSS use. Does this imply that the instrumentation and the overall approach to determine material consistency will not be different between CSS and common approach?
- **Scope:** The GN states that “*scope of the application of ESS for guarantees will depend on the activities or commitments covered by the guarantee*”. This flexibility is a positive step. However, it would be useful to add more details as to how this flexible approach is to be implemented.
- **Co-financed Project:** The GN proposes a common approach for co-financed projects. This makes sense, given that most of the MFIs and have very similar safeguard policies. However, how this approach will manage the differences in policies/procedures need to be made clear.
- **Associated Facilities:** If the borrower can't exercise control or influence on an associated facility, according to GN, borrower should provide details of the legal, regulatory or institutional factors to explain why it cannot exercise control or influence. The GN only says in such situations the risks and impacts will be considered in assessments. This leaves it open ended, and more clarity is needed as to how these types of situations are managed.
- **Existing Facilities:** The GN brings more flexibility by stating that “It is recommended, when facilities or activities need to meet ESS requirements, to focus on aspects that present significant risks”. This leaves options for judgements by safeguard specialists, but such judgements can be challenged by accountability mechanisms. Additional guidance seems to be needed here in terms of the risks to be considered.
- **Independent Specialists:** The GN proposes to use independent specialist for high risk projects. Intensions for this sounds reasonable, but it is not clear how this would be implemented in practice. What does independency mean? Not hired by the project executing agency or WB? Or just on a spate contract with different reporting arrangements? In practice, it might be more practical to just have a third-party review. Also, the proposal to use the same specialists for planning and implementation may violate procurement policies of some MFIs
- **Mitigation Hierarchy:** The GN proposes compensation or offsets for residual significant impacts when they are technically and financially feasible. However, the GN require also provide the option to for not using compensation or offsets due to technical or financial reasons. Leaving significant impacts without mitigation is problematic in our view and undermines the who purpose of the mitigation hierarchy. We would suggest that at least an economic cost benefit analysis including the cost of the impacts not mitigated should be conducted to show the overall development impact of the project is positive despite not implementing the mitigation measures.
- **Risk classification:** the GN does not provide information on derivation of a project's overall risk. It seems presenting some outline of such methodology can be helpful to understand the rating system.

- **Climate Change:** The GN requires climate change impacts to be considered in the ESIA. No details are given as to how this will be accomplished.
- **Ecosystem Services:** The GN requires ecosystem service impacts to be considered in the ESIA. This is a positive step in broadening the policy application. However, assessing impacts of a project on ecosystem services can be quite challenging. Some case studies or references which explain the methodology options would be useful.
- **Additional comments**
 - Borrower's responsibility in assessing, planning and implementing safeguards are clearly explained including contractors' responsibilities.
 - GN brings more clarity on use of less stringent requirements for ESH.
 - GN brings more clarity to induced impacts

<p>Comments for GN on ESS2: Labor and Working Conditions</p>

- The GN provides details with respect to the 8 fundamental ILO conventions on labor: Freedom of Association and Protection of the Right to Organize, Right to Organize and Collective Bargaining, Forced Labor, Abolition of Forced Labor, Minimum Age of Employment, Worst Forms of Child Labor, and Equal Remuneration. While it aims to cover all the conventions, the guidance note is not mandatory and it notes that implementation of the conventions will be in coordination with the country's labor law and will be contextual. This could be challenging during implementation and it is questionable whether all the detailed provisions will be implementable by borrower/client.
- The ESS2 further defines employers and employees' relationships and the obligations of both parties (section A). It requires that the borrower/client to verify that third party contracts with workers are legitimate and reliable. It leaves the monitoring of the labor management procedure with the borrower/client, which could be challenging. In some cases, in countries where there are significant gaps in labor laws and weaknesses borrower systems, it may be useful to consider third party monitoring.
- Definition of contracted workers, community workers, and primary supply workers are important—this is an area that will need to be further expanded and more examples are needed to clarify how they are covered under the ESS2. When the ESS2 implementation starts, some examples and cases could be added to the guidance notes to further strengthen staff understanding.
- There are areas where it is ambiguous as to whether borrowing countries' laws or the ESS2 prevails. For example, in paragraph 9 section A. Working Conditions and Management of Worker Relationships, GN 9.6 (Footnote 9), it is not clear what happens when the ESS2 and the national law are inconsistent.
- Overall, the aim of the ESS2 is comprehensive in coverage of the ILO's conventions. However, the Freedom of Association and Right to Organize and Collective Bargaining provisions may be susceptible to political interpretation. Clearer and more detail guidance on how borrower/clients should ensure protection of workers would be useful.

Comments for GN on ESS3: Resource Efficiency and Pollution Prevention and Management

The Guidance Note for ESS3 covers the key issues mentioned in the ESS3 and provides explanation of some key issues. However, the guidance note lacks adequate details and does not provide the detailed procedure to properly apply ESS3. The application of the guidelines will be very much subjective and will largely depend on the capacity, experience and willingness of the Borrower. Some examples are provided below:

- It is mentioned that Borrower will adopt measures specific in the Environment, Health and Safety Guidelines (EH&S) to optimize energy usage, to the extent technically and financially feasible (Paragraph 6). The technical and financial feasibility of an option will vary with the country context. For example, an option can be both technically and financially feasible for middle-income country, but such option may not be financially or technically feasible for Least Developed Country for a similar kind of project. It would be more appropriate to maintain standards or benchmark in terms of emissions, energy use and efficiency, otherwise it is unlikely that World Bank will be able to ensure consistency across its operations globally.
- The GN11.2 mentions monitoring is particularly important for projects with impacts that are uncertain and/or potentially irreversible. These projects consequently may call for more frequent or more detailed evaluation of emission levels or ambient quality. It is not clear who will decide on the need for additional monitoring or evaluation and who would cover the additional cost.
- For projects with high-water demand that have potentially significant adverse impacts on communities, other users or the environment, a detailed water balance will be developed, maintained, monitored and reported periodically. This makes sense. GN8.2 then provides some requirements for water balance studies, however details are lacking. Experience shows that difficulties arise in undertaking water balance studies because there are many unknown and poorly defined variables and people are also ingenious in their adaptations to change. Without appropriate predictions, projections, and scenario building, water balance studies will not provide an adequate basis for planning.
- The projects having significant health and safety risks to project workers and communities will require assessment of the assimilative capacity of the environment. This is a good initiative. However, the guidance note (G.N.13.2) is brief. It should explain the conceptual approach for assessment of assimilative capacity with some examples in different sectors.
- In explaining the management of hazardous waste (GN17.1 and Paragraph 18), the guidance note mentions that the Borrower will ascertain whether licensed disposal sites are being operated to acceptable standards and where they are, the Borrower will use these sites. Where licensed sites are not being operated to acceptable standards, the

Borrower will minimize waste sent to such sites and consider alternative disposal options, including the possibility of developing its own recovery or disposal facilities at the project site or elsewhere. It is not clear what is meant by 'licensed disposal sites'. In many developing countries, disposal sites are owned and maintained by the municipal authorities and considered legal/licensed. However, many of these sites are operated far below the national standards and GIIP standards. We would therefore recommend that the GN be changes to refer to licensed disposal sites that meet national national standards, and preferably comply with GIIP standards.

- The World Bank in 2012 published a Sourcebook of Pollution Management Policy Tools for Growth and Competitiveness. There is also Pollution Prevention and Abatement Handbook 1998. Will these resources still be considered in addition to the Guidance Note?

Guidance Note for ESS4: Community Health and Safety

- Overall the GN is useful and provides good supporting information on areas such as universal access, road safety, community exposure to health issues, hazardous materials, security personnel, and dam safety. However, several other areas have very limited guidance and it is likely that borrowers will require additional information to implement the ESF provisions. These include the following:
 - Ecosystem services – This section of the GN provides almost no guidance at all, apart from definitions. What would be valuable here is information on the types of services that should be considered in the assessment. For example, impacts on provisioning services such as forest products, soils and water resources can be readily assessed in the context of an EIA. However, others such as impacts on ecosystem functions such as soil formation and nitrogen fixation are almost impossible to assess in the context of an EIA and would require a long-term academic study. What would be useful here is some guidance on the scoping of ecosystem services that will be relevant to the assessment, and clarification whether qualitative versus quantitative assessments can be used.
 - Dam safety – overall this section is clear and the additional annex on dam safety reporting requirements is useful. In addition, it would be helpful to provide some guidance on the qualifications expertise that would be acceptable for teams undertaking such studies.
- Consultation requirements – While the ESF requires that the Borrower will evaluate the risks and impacts of the project on the health and safety of the affected communities, the guidance not says almost nothing regarding the need for consultation and engagement with affected people on health and safety issues. To implemented successfully, it needs to be recognized that communities are key stakeholders in the process and need to be actively engagement in the process of identify and addressing certain kinds of risks. To address this, we suggest that the NG add a paragraphs with some guidance on good practices for consultation and engagement.

The Guidance Note for ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

- Introduction and overall presentation: In the introduction section of each GN (prior to Content), it may be helpful to include a brief explanation about the structure of each GN. In addition, the start of guidance seems arbitrary, and the numbering may seem somewhat confusing: For example, GN 4.1. refers to para 1 and footnote 1; however, it is not clear why it is numbered 4.1. and why it is not included immediately after para 1, footnote 1. It takes a while to understand the logic of the GN flow in the beginning.
- While certain sections of GN provide 'helpful advice' several sections are repetitive and only duplicate the text of ESS5 and its standards and footnotes. Certain elements of ESS paras are explained in more detail and with clarity while others are provided limited explanation and remain vague. For example, since ESS 5 is applicable in case of 'negotiated settlement', more details should be provided in the GN on the type of due-diligence that will be required in cases of negotiated settlements. However, in case of 'voluntary market transaction' and 'voluntary land donation' the GN is clearer on the kind of due diligence required. The GN could also provide more clarity with specific examples.
- GN4.15. It may be helpful to reference this para to 4(h). Also, it may be helpful to clarify what happens in a situation when it is established that resettlement in a particular area started before project identification (and determined to be not in anticipation of the project), but resettlement is not yet complete as of the time of project identification, with such sections/areas becoming components of a project. Will WB policy start to apply to the outstanding resettlement activities? If yes, how will differential treatment of PAPs within the same area be dealt with, especially if resettlement has been ongoing for more than a "reasonably close" amount of time (GN4.16)?
- GN6.2.: It may be helpful to include more examples of those affected by voluntary transactions beyond situations with customary rights. Will para 6 cover informal tenants/leaseholders of facilities to be sold by owners through willing buyer/willing seller transactions, for example?
- GN 7.2 could be made clearer on what the borrower is required to do in case of 'private – private' disputes arising in titling context. Just a statement 'where two private parties claim the same land and the land is granted to one party, the other party is not entitled to protection under ESS5' may not be helpful for the borrower. It would be useful to provide guidance to the borrower in such cases.
- GN10.1: Just as an observation, borrowers tend to take a very legalistic approach to treatment of Cat (b) types of PAPs. The discussion frequently turns to availability of particular provisions in national legislation that should describe such "legalizable" PAPs as also being eligible for compensation in addition to being able to register their right to

own or use land. If possible, it may be helpful to clarify further that legalizability under ESS5 is sourced only from regulations formalizing land use rights/ownership.

- GN on minimizing impacts could be made clearer to help the borrower. For example, the statement ‘a meaningful analysis of possible alternatives that incorporates an estimate of the social and project costs associated with displacement helps the Borrower to identify optimal solutions’ is rather vague, may not be very helpful for the borrower.
- Though the concept of ‘replacement cost’ is explained adequately in ESS, how it should be implemented at project/program level by the borrower needs to be made clear. Borrowers should be provided with clear guidelines on how to arrive at replacement cost if the legally defined rates are not equal to replacement cost (GN12.2), rather than a simplistic statement ‘additional measures may be necessary to ensure that the compensation paid meets the requirements of ESS5’. A few examples on how it could be done from the past practices would be useful for the borrower to meet ESS5 requirement. It should also clarify if there is a distinction between ‘replacement cost’ and ‘replacement value’ as both the terms are used. In addition, GN12.1 may further include a discussion of how frequently replacement rates should be updated. Will such update be linked to census/survey update recommendation (3 years as in GN 20.4 “historic” cut-off date discussion)? Should this para mention other triggers for rates update, such as economic shocks and inflation? In relation to this, inflation is briefly mentioned in footnote 6, but no guidance is available on suggested periodicity of re-evaluation.
- Though the GN provides some guidelines on ‘community engagement’, including its early initiation and inclusion of poor, vulnerable and women, it could be more detailed on the methods of community engagement. Surprisingly, the GN does not provide any requirement for ‘disclosure’ on what, how and when the project impacts and IR Instruments should be disclosed. Both the ESS5 and GN do not seem to see the need for disclosure of IR planning documents either to affected peoples or to the other stakeholders and public in general via electronic sources such as websites.
- Grievance Redress Mechanisms are an important instrument for affected peoples. Borrowers often require clear guidelines on setting up GRMs including roles and responsibilities at various levels. However, the GN provide very scant information on how to set up an effective GRM. Lack of a specific timeline for disclosure of GRM (as the GN states ‘as early as possible’) leaves this open to interpretation.
- The Planning and Implementation section is also unclear. Both the ESS5 and GN do not provide a timeline by which the IR Instruments should be prepared and disclosed. Moreover, the advice provided under the GN is vague. For example, GN 20.3 states that ‘Diligent efforts should be made to ensure that the claims of individuals or groups who, for valid reasons, are not present at the time of the census...’ it would be useful for borrowers to get some insights on what could be ‘diligent efforts’?

- Wherever the GN add some value, its non-mandatory status diminishes the possibility of such value adds being implemented. For example, in case of explaining 'cut-off date', GN20.4 provides a good overview of 'cut-off date' including good practices, but since the GN are not binding these value-add could be easily overlooked.
- Similarly, the GN on monitoring provides very scant information. Though the ESS 5 requires that for the projects with significant IR impacts will retain competent resettlement professionals to monitor, the GN barely gives any advice on the role and responsibilities of such monitor. The GN is also vague on the timing of when the monitoring should commence.
- GN20.5 Based on available best practice it may also be helpful to provide additional examples of alternative steps to ensure women's access to secure tenure.
- GN20.5, GN 23.1, GN24.1 and elsewhere: It may be helpful to include the definition of what constitutes "significant involuntary resettlement impacts." Will some quantification of impacts or benchmarks be used to differentiate between minor/moderate and significant involuntary resettlement impacts? There are also other definitions that are not necessarily operationalized, e.g., "significant economic displacement."
- Displaced persons participation in the resettlement planning process (GN26.1) does not seem to provide how it should be done, especially how the feedback from the displaced persons is incorporated in the resettlement planning process.
- Overall, the GN should think of more tangible steps that will help both the Bank staff/consultants and the borrowers in implementation of ESS5. Finally, the GN seems to be silent on procedural aspects on plan preparation, disclosure, timings for setting up monitoring and GRM indicating that much of preparatory and implementation requirements could become randomized and most of the procedures/processes could be controlled by the borrower.

<p>Comments on GN for ESS6: Biodiversity Conservation and Sustainable Management of Living Natural Resources</p>

Overall, ADB finds that the ESS6 guidance note is useful and is consistent with existing international good practice. GN11.1 is particularly useful in providing guidance on the key content of the ESIA with respect to biodiversity and habitats.

- The guidance note could be strengthened in some areas by providing additional information or references to other relevant guidance materials. Examples include:
 - GN 11.3 highlights that decisions may need to be made in the context of scientific uncertainty, but provides no guidance on how to proceed in such circumstance.

- ESS6 para 12 requires that the borrower take a precautionary approach and apply adaptive management. The guidance should provide some information on what this would mean in practice for projects affecting biodiversity.
- No specific guidance is provided on the application of ESS6 provision on natural habitats.
- ESS6 para 23 sets out the definition of critical habitats. The guidance note should provide further details. In this regard, the guidance note for IFC performance standard 6 (which has the same definition) has guidance on thresholds for critical habitats. These are extremely useful and should be considered for inclusion.
- Critical habitats require net gains, however there is no guidance on what this would mean in practice.
- Provisions for primary suppliers are new and will require additional methodological development.
- Appendix A on Indicative Content of a Biodiversity Management Plan – while useful, some additional detail could be added – for example: (i) the plan should summarize the specific project impacts that need to be managed, including any residual impacts after mitigation that should be offset; (ii) requirements should include monitoring indicators to verify the management plan implementation; (iii) expertise and staffing requirements should be added; (iv) meaningful consultation and stakeholder engagement; and (v) contingency and adaptive management measures.

<p>Comments on GN for ESS7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities</p>
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- The guidance notes on ESS7 are very useful in understanding the ESSs for IP/SSAHUTLC and are consistent with the generally accepted good practices in mitigating project impacts on indigenous peoples.
- GN9.1 describes the phrase “during lifetime of members of the community or groups” as a temporal limitation on groups who have lost collective attachment to distinct habitats or territories in the project area due to various reasons as described in para 9. Claims outside this temporal limitation fall outside the scope of Para 9. How about claims that can be supported by hard evidences found in archives such as photos or markers on ground that can be identified?
- GN11.1 discusses targeted assessment for the purposes of ESS7. It would be useful if the guidance notes would expand the discussion on “relative vulnerabilities of the affected IP” especially with regard to a project’s intergenerational impacts.
- GN19.1 indicates that it is important to include in the IP plan appropriate protocols to avoid undesired contact and measures to mitigate potential adverse impacts from undesired contact. The notes should be expanded to provide good examples of such protocols. Some projects may just have risks of unintended contact on a limited time only, and there are projects that increases such risks on a continuing basis such as transport projects. How will appropriate protocols be developed given the two scenarios?

- GN24.2 describes that FPIC may only be required in relation to specific portions of the land or aspects of a project. Can the notes be expanded to provide guidance if there are 'indirect' impacts relevant to remote groups being protected from undesired contact (Para 19)?
- Additional guidance notes relevant to Para 29 may be considered. What are the alternatives if a perpetual or long-term renewable custodial or use rights is also not possible under national laws?

Comments on GN for ESS8: Cultural Heritage

- Overall, we find the guidance note on ESS8 useful in explaining the requirements of the ESSF. In particular, the indicative outline of the elements of the Cultural Heritage Management Plan will be very useful for borrowers. However, some sections would benefit from further elaboration. For example: Natural Features with Cultural Significance – no additional guidance is given for this section. This can be a difficult issue, particularly in cases where avoidance is not possible, or where natural features have significance for Indigenous People. In other areas, reference to GIIP is made, but with no details on what GIIP is in this case. To assist borrowers, it would be useful to quote sources or provide links to some useful and credible sources of GIIP.
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Comments on GN for ESS9: Financial Intermediaries

- Overall, ADB finds that the ESS9 guidance note is useful. However, the guidance note could be strengthened in some areas by providing additional information on:
 - Definition of what is meant by "minor" resettlement?
 - Definition of what is meant by "significant risks or impacts" in relation to environment?
- In relation to the application of ESS2 to the FI if they don't already have in place and maintain requirements would they be ineligible or is it envisaged that corrective action plan would be developed so that the FI can improve the working environment for its staff over time?
- How do they see ESS2 applying to government FI or FI in countries at high risk in relation to core labor standards or security issues?

Comments on GN for ESS10: Stakeholder Engagement and Information Disclosure

- ESS10 provides useful guidance; specifically, on documenting stakeholder engagement, the process of identifying stakeholders, and mechanisms to promote effective grievance redress.
- GN27.1 talks about GRMs building on formal and informal mechanisms for grievance redress. What is the guidance on access to judicial and administrative remedies?