

December 19, 2011

Via Electronic Mail

Dr. Keith Kozloff
Director, Office of Accountability
Overseas Private Investment Corporation
1100 New York Ave., NW
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Re: Response to Draft Final Report on Problem-Solving Phase of Cerro de Oro Case

Dear Keith,

We are writing to provide observations to the draft of the OPIC Office of Accountability (“OA”) *Final Report on Problem-Solving Phase of Cerro de Oro Case* (“Final Report” or “Report”). We are gravely concerned about the process OA has used to solicit observations on this draft as well as the Report’s content. The draft includes several factual omissions and inaccuracies that undermine the credibility and legitimacy of the dialogue process and your Office.

Congress established the OA to provide “a forum for resolving concerns regarding the impacts of specific OPIC-supported projects . . .”¹ As such, the OA should “be transparent in its operations and outputs . . . and insure the independence and integrity of [its] evaluations and advice...”² The OA only gave complainants — rural Mexican villagers, some without even telephone access — two days to conduct a factual review the English-language draft Report without providing a comprehensible or complete Spanish translation. This process does not provide the elements necessary for an adequate consultation with affected communities. Furthermore, it is both in the interest of the parties and the OA to provide a fair and impartial accounting of the dialogue process. The official record of the OA dialogue process will only be useful and credible if the parties believe it accurately reflects a description of their interests, the process and the outcome. Likewise, the OA’s credibility, reputation and ability to serve OPIC and Congress’ interests in accountability and transparency rely on an impartial accounting of the process. Finally, future claimants will look at the record of this first completed dispute-resolution process to evaluate the OA. If the process is viewed as biased, this will likely undermine the usefulness of the office.

¹ See House of Representatives Report 108-339 for the Overseas Private Investment Corporation Amendments Act of 2003, Background and Need for Legislation, Pub.L. 108-158, available at <http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1%28hr339%29> (last accessed December 16, 2011).

² *Id.*

We have attached in “track changes” the edits compiled from the communities despite the severe limitations created by OA’s review process. As the communities’ selected representatives who have closely accompanied and assisted them throughout this process, we submit this letter to explain and clarify some of the communities’ comments, as well as to provide reflections missing from the description in the Report regarding why the communities made the decisions they did.

I. Factual Inaccuracies and Omissions that Could Lead to a Biased Impression of What Occurred in the Problem-Solving Phase

The draft of the Final Report contains technical inaccuracies and omits key contextual information. It is particularly worrisome that the background section does not include a summary of the problems and policy violations that led the parties to the dialogue table. In its present state, the draft includes a biased narrative of the dialogue process that is biased against the affected communities.³

This section will first discuss factual inaccuracies and then detail information discussed during the dialogue process that led communities to reject the Project.

1. Factual Inaccuracies

The factual inaccuracies corrected in “track changes” in the Final Report itself are, for the most part, self-explanatory. There are a few inaccuracies, however, that may require some explanation.

First, OPIC’s website incorrectly states that, on November 30, 2010, Accountability Counsel sent a letter to OPIC President Elizabeth Littlefield “reflecting the community of Los Reyes’ desire to be added to the original complaint.”⁴ The circulated draft of the Final Report repeats this error in the lessons learned section by stating that all four communities were party to the complaint. In fact, Accountability Counsel sent a letter to the OPIC President requesting that she use her powers as the President to include Los Reyes in any compliance review because, although the community was *not* a party to the complaint, some community members had told Accountability Counsel that they were concerned about the project, but afraid to join the complaint for fear of retribution.⁵ The community of Los Reyes has never been a party to the complaint and never expressed a desire to be added to the complaint. Instead, once the OA process began, in March 2011, Los Reyes asked to be included in the OA’s dialogue process. All of the parties agreed to their participation.

³ Additionally, the information on OPIC’s website, incorporated into the Final Report by reference in the background section, also omits key information and contains some factual inaccuracies.

⁴ *Cerro de Oro complaint*, OPIC, available at <http://www.opic.gov/cerrodeorocomplaint> (last accessed December 15, 2011).

⁵ See Letter from Accountability Counsel to OPIC President Elizabeth Littlefield *Re: Request for Compliance Review for Los Reyes related to the Cerro de Oro Hydroelectric Project* (November 30, 2010) (on file with Accountability Counsel).

This distinction is important for several reasons. First, fear and intimidation continue to be concerns in the village of Los Reyes. Over the past year, there have been a number of additional examples of attempts to coerce community leaders and of examples of community members speaking out against the project and the Company,⁶ only to have those views not represented by their leaders. Second, the complaints filed by Paso Canoa, Santa Ursula, and Cerro de Oro do not contain a full description of the complaints of the community of Los Reyes because they were not signatories of the original complaints. Los Reyes villagers have expressed significant concerns at the dialogue table and community meetings, but there is no written document attesting to their concerns.

Second, the lessons learned section of the Report inaccurately states that “the parties pre-agreed to accept the methodology” of the expert study on dam safety.⁷ While the parties did agree to accept the findings of the expert report, the methodology used by the expert, Raul Flores Berrones, was never agreed upon and was so problematic that it undermined the credibility and legitimacy of his findings.

An additional factual inaccuracy is the statement that SEMARNAT and CRE “had previously transmitted formal written communications that the alternative design is acceptable.”⁸ First, if there are documents from SEMARNAT and CRE that state that the alternative design is “acceptable”, the OA has not provided the communities with a copy of these formal written communications. Consequently, the Final Report should note that the communities did not have the opportunity to review any such correspondence in the context of the dialogue process. Second, the Final Report misstates the content of the federal agencies’ position. The letter that we did receive from CRE states only that the “Commission does not find it inconvenient for the Company to continue with work to obtain modifications and permits and authorizations required for relevant authorities that would pertain to the construction of the Mini-Hydroelectric Project Cerro de Oro.”⁹ This is a substantively different statement than saying that the alternate design is acceptable to CRE, a determination they could make only after formal permits have been requested.

With regard to communications from SEMARNAT, neither the communities nor we have seen these formal written communications. It is inappropriate for the OA, through its Final Report, to impliedly put the weight of Mexican federal authorities behind the alternative project in this manner.

Finally, as noted in track changes to the Final Report, the communities of Cerro de Oro, Paso Cano and Santa Ursula circulated a letter to the OA and the Company on November 29, 2011 that rejected the original project and the alternative per the March 11, 2011 agreement.

⁶ Throughout this letter, “Company” refers collectively to Conduit Capital Partners, LLC, Electricidad del Oriente and Corporación Mexicana de Hidroelectricidad (“COMEXHIDRO”).

⁷ Final Report at 3.

⁸ Final Report at 1.

⁹ Letter from the Comision Reguladora de Energia (“CRE”) to Keith Kozloff, August 8, 2011 at 2 (translation by Accountability Counsel).

This letter had nothing to do with the offer of the state government to convene a further dialogue process.

2. *Omitted Information that is Key to an Unbiased Understanding of the Dialogue Process*

The Final Report omits information necessary to understand the communities' decision to withdraw from the dialogue process. These omissions obfuscate the reasons the communities distrust the dam safety report, have on-going concerns, and ultimately rejected the project.¹⁰ In finding that the communities' decision to reject the project is unjustified, the Final Report ignores key facts and damages the OA's credibility and legitimacy by creating, at least, the appearance of bias.

First, OA's website fails to describe the concerns raised in the complaint in any detail and also fails to acknowledge the specific concerns raised by the Cerro de Oro community in the January 17, 2011 addendum to the original complaint. In the interest of transparency, the website should include, at a minimum, links to the actual complaint and addendum. This problem is compounded by the characterization of the dialogue table agreements in the Final Report as representative of the communities' concerns. This implies that, so long as the Company's alternative design addressed the concerns expressed in the agreements, the communities would or should accept the alternative project.¹¹

A fair and impartial accounting of the dialogue process should include a summary of all of the concerns raised by the communities. In addition to concerns raised about dam safety and the viability of water sources, communities also are extremely concerned about the damage caused to their homes by the Company's use of explosives, the impact of the construction and operation of the project on their local environment (including protected areas), and to quote concerns from the original complaint that equally pertain to the project alternative, fear that the project would "devastat[e] income-generating fishing areas; erod[e] and encroach[] on land used for agriculture and livestock; contaminat[e] and spoil[] fragile ecosystems; and disrupt[] local and indigenous leadership, infrastructure, housing, and culture."¹² A majority of these concerns were not the subject of any of the agreements generated by the dialogue process, addressed by the dam safety study or mitigated by the alternative project proposal.

By oversimplifying or ignoring the communities' concerns, the Final Report creates the impression that the decision to reject the alternative project was irrational and unreasonable. Given the OA's neutral role in this process,¹³ we feel that it is inappropriate for the Final Report

¹⁰ We note that per the March 11, 2011 agreement, the communities were not required to give any reasoning for their rejection of the original or alternative project. The company agreed to respect the decision of the communities regardless of their decision and any reasons given or not given. While they did give reasoning, not only was this omitted from the Report, but the OA is hereby making a judgment regarding whether their reasoning was sufficient, a wholly inappropriate use of the OA's office which undermines its independence and credibility.

¹¹ See Final Report at 1.

¹² See Complaint at 1.

¹³ See House of Representatives Report 108-339 for the Overseas Private Investment Corporation Amendments Act of 2003, Background and Need for Legislation, footnote 1, *supra*.

to be written in such a way that it could leave that impression, without at least attempting to explain other concerns raised by the communities. It is not in the OA's interest, given its role and mandate, to dismiss community concerns in a biased manner and without a thorough reflection of issues raised.

Similarly, the Final Report and the OA website omit important background information regarding dam safety that help explain the communities' continued mistrust of the expert dam safety report and of CONAGUA. For example, the Final Report omits any reference to the dam risk factors identified by the dam safety expert, Raul Flores Berrones, or the fact that several of those factors are present at the Cerro de Oro dam. Specifically, Flores Berrones identified four common failures for a dam such as Cerro de Oro, which included water coming of the top of the dam and tubification. Risk factors for these failures include over-sedimentation, which can lead to the dam filling beyond its capacity, and vegetation growing on the dam curtain, which can lead to tubification. Both factors are present at the Cerro de Oro dam, as acknowledged by Flores Berrones in his July 20, 2011 presentation. At that presentation, Flores Berrones stated that the trees and other vegetation growing on the dam curtain should be removed and that more verification should be done regarding dam capacity, given the large amount of sedimentation observed in the reservoir. During his boat ride with community representatives the day prior to the presentation, he stated that the area should be dredged but did not make this explicit recommendation in his presentation.

While, as the Final Report notes, Flores Berrones unequivocally found that the dam is currently safe and would continue to be safe during construction, he never gave a coherent explanation, in his study or his presentations, of why the presence of these risk factors did not contradict this finding by posing a danger to the Cerro de Oro dam. Moreover, CONAGUA, the agency in charge of the safety of the dam, agreed that vegetation should be removed from the dam curtain, yet failed to establish a timeline or secure a budget for doing so. The Final Report's failure to mention the presence of these risk factors, Flores Berrones' identification of them as such, and the uncertainty regarding CONAGUA's willingness and ability to rectify them, could be viewed as biased because it gives the impression that the communities had no reason to distrust the conclusions in the dam safety report.

The Final Report also omits any reference to the fact that the communities vigorously disputed Flores Berrones' methodology for his report, which initially did not include a site visit to the reservoir side of the dam or an analysis of the only working instruments, the "*testigos superficiales*", one of the tools used to monitor the status of the dam curtain. While the Report is correct that the communities agreed to accept Flores Berrones' findings, they never agreed to the methodology he used, which relied almost exclusively on existing, outdated documents and a visual inspection due to the fact that most of the instruments used to monitor the dam were missing and/or no longer functioning. The communities were clear throughout the discussions with and about the dam safety expert that they expected an instrument-based study that reflected the current state of the dam curtain based on current data. The fact that Flores Berrones' relied almost entirely on his visual inspection was a further grounds for mistrust given that vegetation covers nearly the entirety of crown of the dam curtain, save for a narrow path, making a visual inspection unreliable; and given that a visual inspection should clearly indicate trees growing out of the dam curtain as a risk, which his final presentations in November 2011 failed to do.

While Flores Berrones was constrained by the fact that CONAGUA had not maintained the dam's monitoring instruments, or installed modern instruments, the fact remains that the communities were never satisfied with the methodology, which directly impacted their willingness to trust Flores Berrones' conclusions. Moreover, Flores Berrones himself recommended the installation of modern monitoring instruments, without explaining why, if the instruments are important, they were not necessary to his current assessment of the dam. Finally, CONAGUA again failed to set any timeline, or secure a budget, for the installation of these instruments.

Three further examples could have been provided to shed yet more light on the basis of mistrust in the dam expert and CONAGUA's findings: (1) the expert's statement to the communities that CONAGUA had "abandoned" maintenance of all Mexican dams only to be told the opposite by CONAGUA; (2) the expert's hydrogeologist declared in the first week of June 2011 that the Arroyo Sal was a filtration of the water from the dam, and only after community complaints did he do further study which found that it is a natural spring; and (3) when the communities questioned CONAGUA and the dam expert about whether they knew the quantity of sediment in the dam in order to verify that it was below the maximum permissible amount, they were told they did not know the quantity.

Finally, when the hydrogeologist confirmed that the Arroyo Sal is not a filtration, but is a natural spring where two communities get their access for domestic water use, at this stage of the process, the communities received confirmation that at the request of the Company, CONAGUA had permitted the destruction of a spring in violation of Mexican law and OPIC standards, thereby undermining faith in CONAGUA's capacity to protect the communities.

While we agree with and appreciate the lesson learned regarding "*Standards for technical studies*", the lesson that studies should not go forward without agreement on methodology should be accompanied by a discussion regarding *why* that was a problem in this case – *i.e.* that it caused the communities to mistrust the remainder of the process of determining dam safety. The Final Report's failure to acknowledge the communities' dissatisfaction with the expert's methodology and with the continued lack of modern monitoring instruments biases the Report because it inappropriately gives the impression that the communities' mistrust of the dam safety report was irrational.

II. Reasons for Continued Mistrust Between the Parties

We agree with the Final Report's conclusion that there is continued mistrust between the parties, and we agree that there are many factors behind and indicators of that mistrust. We are concerned, however, that nearly all of the examples of mistrust listed in the Final Report relate to ways in which actions of the communities contributed to the atmosphere of mistrust. Like the omissions discussed above, the lack of examples of ways in which the Company's behavior contributed to the mistrust between the parties tends to make the Final Report appear biased. The OA should have a more balanced approach to identifying and describing how the Company contributed to the environment of mistrust, particularly given the OA's delicate dual role as the convener of a dispute resolution process and as the authority charged with ensuring compliance with OPIC policies through its audit function.

The communities' comments to the Final Report include some examples of the Company's behavior during the dialogue process that contributed to the continued mistrust between the parties. There a number of reasons for community mistrust of the Company listed in the compliant, many of which resulted from the fundamental failure of the Company to conduct free, prior and informed consultation with the communities. We list the more recent examples of incidents that have furthered this mistrust for the sake of clarity.

- In July 2011, the Company presented the project alternative to the members of the dialogue table. This presentation included photographs of houses and a business in the communities that the Company claimed were built using money from the Company. The communities immediately recognized these as houses and a business that were built with community members' own financial resources. The Company again presented these pictures in the community of Los Reyes on November 12th, causing outbursts from community members regarding this inaccuracy.
- In August 2011, the communities expressed concern to the OPIC OA through their representatives regarding a concrete example of attempts by the Company to pressure the community of Los Reyes into accepting the project alternative. After receiving the July 31st letter from the communities stating that a decision could not be reached until they received confirmation that the dam is safe, the Company initiated a meeting at their office in Tuxtepec with Felix Lopez Ortiz, the comisariado of Los Reyes. Alvaro Ibañez, the local representative of the Company, was present in person and the Company's Carlos Jinich and Mauricio Justus joined by telephone from Mexico City. Mr. Lopez Ortiz reported that Mauricio pressured him to accept the alternative and asked him to disagree with what was communicated in the letter that had been approved by the community assemblies, including Los Reyes. The communities interpreted this as a direct effort to undermine the dialogue process and an attempt to coerce the leader of Los Reyes. Mr. Lopez Ortiz told the Company that the letter reflected the decision of the community of Los Reyes and reconfirmed that they wanted the final results of the dam safety studies before they could consider the alternative.
- In October 2011, the Company bilaterally contacted the leaders of Los Reyes and Santa Ursula in violation of the March 2011 agreement and invited them to an all-expense paid trip to the state of Guerrero to visit another of the Company's projects. Members of all four communities viewed this as an attempt by the Company to bribe select community authorities into accepting the project alternative, and to create divisions within and between communities.

It is indisputable that the above behavior by the Company caused a great deal of mistrust between the parties. The inclusion of these examples in the Final Report is, therefore, important if the Report is to be considered neutral and independent because, as it currently reads, it suggests that the communities were largely or even entirely to blame for the atmosphere of mistrust.

III. Observations and Lessons Learned

We appreciate the fact that the OA is reflecting on this case as a way to improve its functioning in future cases. We believe that such reflection is both appropriate and useful to developing best practices. While we agree with many of the conclusions and observations in this section, we are concerned about some of the language regarding community representation and the involvement of government entities.

1. Representation

Regarding community representation, we are concerned that the Final Report appears to suggest that it is detrimental for communities to have outside support and representation and that the OA may limit such rights in the future. This raises several issues, both regarding the OA's policy towards community representation and regarding the role Accountability Counsel has played in this case.

First, we strongly believe that it is not the OA's role to determine how communities organize, seek outside counsel or advice, and how they choose to establish a system of communication that best meets their needs. In this case, the communities wanted all communication to go through Accountability Counsel, in order to ensure consistency and transparency between communities. Whether the OA ultimately believes that this was a good idea or not, we do not believe the OA should interfere with this community decision. This sends a dangerous message to the public and future users of this mechanism, suggesting that the OA is not respectful of local decision-making.

Second, the Report as currently written suggests that Accountability Counsel restricted or inhibited the OA's ability to communicate with the communities. We disagree. Accountability Counsel never attempted to restrict the OA's access to the communities; had the OA wished to speak directly with the communities, this request would have immediately been obliged. In fact, in November, when the OA requested to meet with the communities prior to the final dialogue table, we attempted to arrange such a meeting. With limited notice and tight scheduling of the presentations, however, the only available time was in the morning immediately before the dialogue table meeting, which the OA rejected. We believe that the OA would not have been any more successful in setting up this meeting had it been able to directly solicit the communities or had Accountability Counsel played no role in the case. On several other occasions, Accountability Counsel organized conference calls so that the OA's mediator and the Company could speak directly with community representatives. Rather than inhibiting this communication, it was often *at the suggestion of Accountability Counsel* that this type of direct communication occur and as a result of great effort on Accountability Counsel's part to organize such communications across language barriers, time zones, with scheduling conflicts and among a large number of parties.¹⁴

¹⁴ We also note that on one occasion, the OA sent a mediator to speak with the communities directly, without involvement of or prior notice given to their representatives. Not only did the OA's mediator face severe difficulties

In our opinion, this case presented many communications challenges. Accountability Counsel’s job, as directed by the communities, was to coordinate and represent four separate communities – approximately four thousand individuals – many of whose leaders lacked modern communication tools such as email, voicemail or even functioning telephones. Such logistical issues frequently caused delays in communication, among other challenges, and we agree with the OA that it may have been useful to have a local OA representative. We disagree, however, with the suggestion that the fact that the communities chose to channel all communication through Accountability Counsel made it *more* difficult for the OA to identify, confirm and understand “the underlying interests of the requestors” or interfered with the OA’s ability “to protect everybody’s right to freely express their interests without intimidation or fear of reprisal.”¹⁵ To the contrary, without Accountability Counsel’s assistance, the OA would have required a full-time translator, working nearly full-time for the past year, to communicate with the communities. Accountability Counsel provided this service free-of-charge for the communities as part of our mission and participated in regular conference calls – conducted in English – to coordinate with the Company and the OA. Such communication and coordination would have been impossible without our involvement.

2. *Involvement of Public Authorities*

Accountability Counsel is also concerned with the Report’s suggested framework regarding when to involve government entities in the problem-solving process. First, we believe that the decision regarding the involvement of public authorities should *always* hinge on whether the parties agree that government authorities should be invited to participate. This should be true even if the OA-convened process has reached an impasse. Consultation with the requestors about potentially involving public authorities is particularly important because there may be cases in which the requestors are afraid or mistrustful of those authorities. In fact, some requestors may have chosen to file a complaint with the OA, rather than take legal action in their own country, precisely because of government corruption, repression or retribution.

Second, we believe that many, if not most, cases will have “a significant political dimension that is difficult for OA as an outsider to understand, much less manage.”¹⁶ In our experience, most projects that give rise to complaints and social conflict tend to have complicated political dimensions, which are extremely difficult for outsiders to fully grasp or manage. Thus, were the OA to solicit involvement of public authorities in every case with a significant political dimension, it could end up frequently abdicating its own mandate to independently convene problem-solving processes. Moreover, Accountability Counsel is also concerned that cases with very complicated political dimensions may also be more likely to be cases in which the requestors could feel threatened or intimidated by the participation of public authorities. Given these considerations, we are not convinced that the political dimensions of the case should necessarily be a reason for the OA to solicit the participation of government authorities.

organizing the meetings for this trip, this caused mistrust of the OA within the communities because of a perception that the OA was trying to circumvent their selected representatives.

¹⁵ Final Report at 3.

¹⁶ Final Report at 4.

ACCOUNTABILITY COUNSEL

In conclusion, we appreciate this opportunity to comment on the OA's draft Final Report. While our comments are likely more elaborate than you were seeking, we hope that you understand why we have chosen to send them to you before you finalize this document. We believe that the OA-convened problem-solving process has been an important tool for affected communities in this case, as it will continue to be in others. The future usefulness and credibility of the mechanism relies in great part on the OA's independence, which we believe could be preserved with attention to these comments.

We appreciate your documentation of the Cerro de Oro process, as well as your willingness to reflect on ways in which the OA can improve its functionality in the future.

Please do not hesitate to contact us if you have any questions regarding our comments.

Sincerely,



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Cerro de Oro Working Group (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 Environmental Defender Law Center)