

Comments on September 2015 Report of the Independent Environmental & Social Consultant, Oyu Tolgoi Mining Project

We write to submit the following comments regarding the September 2015 Independent Audit Report (“IAR”) of the Oyu Tolgoi Mining Project by D’Appolonia, the project’s current Independent Environmental and Social Consultant (“IESC”).¹ Our comments on the report are based on the publicly disclosed version available on the Oyu Tolgoi LLC (OT) website.² However, unlike all previous audit reports on this project, only a portion of this IAR has been publicly disclosed. We sent a direct request to OT for disclosure of the full audit report and received a response indicating that the full report will not be made available, for this or future audits, citing the resources needed to translate the report into Mongolian as the rationale.

Shortly afterwards, the OT website was updated to say that the full audit report would be available upon request. We question why the company did not inform us of this option in its formal response to our letter, which also leads us to wonder if or how this option has been communicated to the local community, as many of them do not have reliable internet access. We submitted a request for the full report to the contact email provided on 27 April 2016, but have not received a response to date.

Incomplete public disclosure of audit reports goes against the aims of transparency and information sharing encompassed especially in the IFC Sustainability Framework³ and the EBRD Environmental and Social Policy.⁴ For example, the IFC Performance Standards require annual updates to affected communities which must include information on ongoing risks or impacts, updates on implementation and progress of specific items in the project’s Action Plan and any other issues of concern to those communities.⁵ The partial disclosure of audit reports does not provide enough information on OT’s ongoing implementation of mitigation measures for communities to understand or develop informed opinions on these issues, and therefore fails to satisfy this requirement.

Given the longstanding and unresolved issues with consultation and information disclosure surrounding this project, OT’s decision to stop releasing full audit reports in both English and Mongolian, limiting information disclosure regarding environmental and social issues even further, is unacceptable. Both OT and lenders have referenced the audit reports as a main source of updated information for stakeholders on the project’s social and environmental impacts and how they are being addressed.⁶ Preventing stakeholders from accessing this critical project

¹ The Independent Audit Report is available on the OT website at: <http://ot.mn/esia-audit-reports/>.

² http://ot.mn/media/ot/content/esia-audits/OT_ESIA_Audit_report_201509_EN.pdf.

³ See 2006 Sustainability Framework, IFC (May 2006) available at http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework_2006.

⁴ See 2008 Environmental and Social Policy, EBRD (May 2008) available at <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>.

⁵ See IFC’s Guidance Notes: Performance Standards on Social & Environmental Sustainability, IFC (Apr. 2006), PS 1 at para. 26, G66.

⁶ This was the case, for example, during a recent meeting between NGO representatives and the IFC project team on 17 February 2016.

information by requiring them to jump through numerous bureaucratic hoops, when public updated information on project impacts and mitigation measures is already sparse, fails to accomplish the goal of sharing project information with affected communities as required for Category A projects.

Rationalizing this decision with a discussion of the costs of Mongolian translations only worsens the problem; this rationale implies that the company values the money saved by skipping a translation over the herders' need to receive full, updated information on the project's impacts. In addition, OT argues that the full audit report is unnecessary and only repeats information included in the public summary, but the information in the summary only raises more questions for herders and other stakeholders regarding how OT is achieving compliance with lender requirements on highly controversial issues such as water resources management. Comparing the summary to the information included in past audit reports, one can see that the audit teams' findings, observations and analysis to support its conclusions are typically located in the non-disclosed sections of the report. Without the full report, herders are being deprived of the information needed to understand issues that are critical to their health and livelihoods.

What follows is our commentary on the publicly disclosed portion of the IAR.⁷ Where the summary version does not provide sufficient information for herders to adequately understand the IAR's conclusions, we note this. We hope that these comments will assist OT's lenders to ensure that the OT mining project is being subject to rigorous monitoring assessments, as befits a mining project of its size, and living up to its commitments under all international lender standards.

Ecological Management and Biodiversity (IAR Section 1.8)

A critical part of the IAR regards the biodiversity plans of OT, where the report finds the project not to be in compliance with respect to IFC PS 6/EBRD PR 6.⁸ OT contests this finding, arguing that its updated management plan and other planned activities are sufficient to meet its targets. They stress that they worked on key elements and updated timeframes and plans. While they have published updated versions of the "Biodiversity Action Plan", "Biodiversity Management Plan", "Offsets Management Plan" and "Biodiversity Monitoring and Evaluation Plan" in early May 2016, some of the aspects that the IAR highlighted as material non-conformances with the Project Standards are not solved through these new documents.

First, the IAR highlighted the lack of "dedicated resources for OT's biodiversity management programme".⁹ The updated Biodiversity Action Plan reacts to this by simply stating that OT will ensure that the biodiversity management program will be resourced and financed with completion indicator and timeframe "ongoing"¹⁰, which is not exactly a precision.

⁷ These comments were prepared based on four sets of written responses provided by Battengel Lkhamdoorov and other herder representatives from Gavliiut and Javhlant Baghs in response to a summary of the audit report findings and targeted questions sent to the Elected Herder Team. They are also informed by prior conversations with herders both via Skype and in person.

⁸ IAR, Section 1, p. 5

⁹ IAR, Section 4, p. 33

¹⁰ Biodiversity Action Plan, p. 1, *available at* http://ot.mn/media/ot/content/page_content/commitments/ESIA/1_ESIA/5-may/4_OT-10-E14-PLN-0004-E-Biodiversity_Action_Plan_v1.1.pdf

Another point of concern was the lack of underpasses for habitat connectivity for wildlife species. The new Offset Management Plan now stresses, that “uncertainty over the technical, financial and political feasibility of wildlife crossings has resulted in the project (in collaboration with biodiversity advisors and lenders) deciding not to install such mitigation at the outset, but instead to monitor impacts and adaptively manage mitigation and offsets in response.”¹¹ In practice this means that the fragmentation of the habitats of rare animals continues and will only be monitored for the time being and not mitigated.

The IAR also warned that a proportion of the existing bird flight diverters have failed, which led to incidences of mortality.¹² While OT has developed the idea to set “powerline standards” for all of Mongolia as a biodiversity offset measure, they themselves think it to be unlikely that this will meet the requirement of “no net loss” for the Houbara Bustard, one of the “high value” protected species potentially negatively impacted by OT.¹³

The summary information included in the IAR identifies unresolved issues with OT’s biodiversity performance, but without further information on the observations leading to this assessment it is difficult to develop a clear understanding of the issues. This in turn creates difficulties in determining how OT’s future planned actions may or may not address the identified non-conformance issues. Disclosure of the full audit report is necessary to allow stakeholders to fully understand OT’s current and future performance on critical biodiversity issues.

Environment Air Quality and Mineral Wastes Management (IAR Sections 1.5 and 1.3)

Another critical area of the IAR relates to air quality, as the IESC has raised the risk/harm classification of OT’s long-standing lack of effective ambient air monitoring, persistent long-standing lack of required effective stack emissions monitoring on the central heating plant and incinerator, and dust mitigation on particulates emissions from the coarse ore stockpile.¹⁴ The audit notes that the revised Air Quality Monitoring Plan (AQMP) commitments are not being implemented, and more importantly, the project’s air quality standards are not being complied with.¹⁵ In fact, the audit report notes that the request for funds to purchase the equipment needed to implement the AQMP was denied in March 2015, without giving an explanation for the delay.

Moreover, the Comments/Report Reference columns in the Issues Table instructs readers to refer to sections 5.5.2.1 and 5.5.2.2 with regards to air quality,¹⁶ which indicates that there is relevant information about the extent of the non-compliance on air quality issues in the full report. Similar references to content in the main body of the report, primarily Chapters 5 and 6, appear several times throughout the Issues Table. Without access to the full IAR, it is impossible for stakeholders to check these references and determine whether or not OT’s proposed actions will

¹¹ Offset Management Plan, p. 28, available at http://ot.mn/media/ot/content/page_content/commitments/ESIA/1_ESIA/5-may/2_OT-10-E14-PLN-0007-E-Offset_Management_Plan_v1.0.pdf

¹² IAR, Section 1, p. 26

¹³ Offset Management Plan, p. 38

¹⁴ IAR, Section 4, p. 23

¹⁵ IAR, Section 1.5, p. 7

¹⁶ IAR, Section 4, p. 23

adequately address the dust issues, especially as previous OT responses to audit criticism have not been implemented.

Water Management (IAR Section 1.2)

The IAR finds that OT is in compliance with lender requirements regarding water and wastewater management. To substantiate this conclusion, the publicly disclosed report states that a water review that assessed available hydrogeological data related to the Undai River Partial Adjustment and Protection Project in November 2014 “did not identify a risk of significant impact to groundwater resources,” but it is not clear what analysis, if any, the IESC has conducted since that time to assess whether impacts have in reality accrued.¹⁷ The audit team’s Environmental/Hydrologist Specialist did not participate in the September 2015 site visit, and based on the limited discussion of water issues in the publicly disclosed report, it is not clear whether any on-site information was collected about water resources, even though this has been a longstanding and priority issue for project stakeholders. Nonetheless, the audit team decided to close two water-related compliance issues through this audit, including the non-compliance related to the Undai River Partial Adjustment and Protection Project.

Meanwhile, a joint fact-finding mission by the Tripartite Council found that over 20 wells and springs in the Undai River Basin have dried up, some of which may have been impacted by the Undai River partial diversion.¹⁸ Herder families living within 20 km of the OT Mine License Area have had to start using water trucked in by the company as these springs and wells have started disappearing. In addition, they also report that the “cascading” boreholes have still not been sealed, causing significant loss of water resources. While the IAR recognizes that this issue is still outstanding, it considers this to be low risk, in spite of the herder experiences.

The publicly disclosed IAR also gives no indication that relevant studies and reports on the OT project were taken into account by the audit team. Notably, an Independent Expert Panel (IEP) Report on OT’s diversion of the Undai River and relocation of the Bor Ovoo spring released in February 2015 found that the OT project has caused groundwater drawdown in the Undai River alluvium and that herders have lost access to surface water along the diverted section of the river during periodic flood flows, among other findings.¹⁹ These findings contradict the conclusions in the IAR that there is no significant risk of groundwater impacts from the mine and that the Undai River diversion “maintains continuity of groundwater flow and is serving as a valid interim mitigation.”²⁰ The IEP Report was conducted by a team of independent experts at the joint request of OT and affected herders, as part of a dispute resolution process facilitated by the IFC’s independent accountability office, the Compliance Advisor Ombudsman. Nonetheless, the

¹⁷ IAR, Section 1.2, p. 6

¹⁸ See attached list of impacted wells and springs (in Mongolian). The previous version of these comments incorrectly reported that all 20 wells and springs dried up after the Undai river diversion was completed, when in reality several of the springs on the list had dried up before any diversion activities began. It also did not specify that the government and OT LLC, not only the herders, were responsible for developing this list through the Tripartite Council.

¹⁹ See IEP Report Executive Summary, available at http://www.cao-ombudsman.org/cases/document-links/documents/ExecutiveSummary_edit_Jan_30_2015-ENG.pdf, and IEP Report Recommendations to Stakeholders, available at http://www.cao-ombudsman.org/cases/document-links/documents/RecommendationstoStakeholders_edit_Jan_11_2015-Eng.pdf.

²⁰ IAR, Section 1.2 and Issues Table M1.1, pp. 6, 20.

discussion of water resources in the publicly disclosed IAR does not reference the findings of the IEP or make any attempt to reconcile those findings with its compliance determination.

The full IEP Report is not publicly available and it is not clear whether the IESC was given access to it. It is important that the IESC have access to this, and any other recent, independent reports on relevant issues, to enable it to draw accurate conclusions regarding OT compliance in the future.

Without access to the full IAR we, like the herders, cannot know whether it takes into account herders' viewpoints on disappearing water sources and the findings of the IEP Report. This is just one example of why the publicly disclosed summary is inadequate to provide herders an opportunity to understand critical compliance issues. If this information is not included in the full IAR, then the problem lies instead with the level of rigor applied by the audit team.

Livelihoods (IAR Section 1.10)

The IAR finds that “with the exception of one family who is in the vulnerable people program, the resettled households are considered to have restored or improved their livelihoods and standards of living.”²¹ The report then goes on to discuss the study that has been commissioned as part of the ongoing CAO dispute resolution process, in which a multi-disciplinary team (“MDT”) will conduct a full assessment of herders' livelihoods to assess how they have been impacted by the Oyu Tolgoi mine – in other words, an ongoing study that will seek to answer the very question that the IAR purports to have answered back in September 2015. The MDT study was commissioned because the herders feel their livelihoods have already been severely harmed by the project and believe that under present conditions those impacts will continue. It is striking that the conclusion in the IAR makes no mention of a difference of opinion or room for disagreement on this issue.

The IAR does discuss OT's support of herder cooperatives immediately before concluding that “the previous non-conformance regarding herder livelihoods has been closed.”²² However, the publicly disclosed report goes no further than to mention that these cooperatives have been established and that they will require OT's continued support. Direct reports from herders suggest that while the cooperatives are a nice idea, in practice they have not been well designed, and have therefore had an overall negative impact on at least some herders. One cooperative required herders to pay a prohibitively high price for materials or to pay for services that are typically performed for free, leading to the complaint that herders felt locked into a dependent supply-chain relationship on unfavorable terms. Questions have therefore been raised about whether these cooperatives in their current form can truly be considered as having an overall positive impact on herder livelihoods in the long term, especially as shrinking pasture and water resources make herding more difficult. The publicly disclosed IAR does not discuss these nuances, providing only positive information on the cooperatives.

Herders themselves report that the livelihoods of those resettled to make way for the OT mine have deteriorated, and that many resettled herders now live in fear that they will not have any

²¹ IAR, Section 1.10, p. 10.

²² IAR, Section 1.10, p. 11.

way to sustain their households in the future. Many resettled herders have experienced difficulty finding stable employment, including some that originally received employment under the terms of the 2004 resettlement contract. As discussed above, the Tripartite Council has established that approximately 20 springs and wells have dried up in the area in recent years. This has necessarily impacted herder households that previously relied on those springs as their primary water source, but the section of the publicly disclosed IAR discussing herder livelihoods does not mention water impacts or any other negative impacts to herder livelihoods from the OT mine. It is unclear why these impacts were not discussed, or how a conclusion regarding the current status of herder livelihoods could reasonably be made in their absence.

One herder, a member of the Elected Herder Team that represents affected herders in discussions with OT,²³ reports that he was interviewed by the audit team during their September 2015 site visit. He recalls speaking to them about herders' loss of traditional herding routines, difficulties with pasture and water access, wells running dry, and the insufficiency of compensation packages and temporary jobs to substitute for the stability of traditional herding livelihoods.²⁴ The IAR notes that the audit team spoke with a range of stakeholders, including Tripartite Council representatives and herder households, but this herder's comments are not captured in the publicly available IAR. This herder has noted in follow-up communications that the translator used by the audit team was a staff member of OT, and he fears that there may have been a conflict of interest in accurately translating his responses. We are concerned about both perceived and real issues of bias arising due to auditors performing their duties without an independent translator.

Without access to the full report, it appears that the audit team's treatment of herder livelihoods does not take into account the viewpoints of herders themselves, even viewpoints that herders report sharing with them. On the issue of herder livelihoods, in particular, the viewpoints of herders are of central importance and any differing viewpoints should be noted in the IAR. We also urge the IESC team to hire an independent translator during their next site visit to avoid even the appearance of bias during their interviews with local herders.

Stakeholder Engagement (IAR Section 1.11)

On stakeholder engagement issues, the publicly disclosed IAR lists a variety of specific ways in which OT has engaged with local people. It also lists local parties with which the audit team spoke during their site visit, yet its summary of stakeholder engagement does not include any herder perspectives on OT's engagement activities.

Direct reports from herders indicate that while OT does occasionally hold community meetings that are intended to fulfill its consultation requirements, these meetings are primarily used by the company as an opportunity to conduct "one-way" positive public relations and do not include any form of "asking" or "consulting" on the substantive issues that herders care about. Moreover,

²³ The Elected Herder Team represents affected herders in the Tripartite Council, a group consisting of representatives of OT, the local Khanbogd soum government and local herders, which meets regularly to resolve certain grievances raised by the herders related to OT's impacts on herder pastures and water.

²⁴ Email from Battsengel Lkhamdoorov, 19 Feb. 2016.

when herders do try to propose agenda items that are relevant to them, the meeting organizers deflect the issue by claiming that they are not part of the topic of the meeting.

According to herder reports, the performance of the OT Community Relations office has deteriorated over the past two years. When the president of Mongolia visited the site in 2012, they felt that many issues were covered. G. Batsukh, the Chairman of the Board of Directors was tasked to carry out monthly consultation meetings with Khanbogd soum residents, but the herders feel that these sessions have been used more for information sharing than for consensus building. Some herders have expressed that they feel OT is using these sessions to strengthen the company's relationship with the government rather than truly listening to the concerns of the impacted herder households.

False claim related to EBRD PCM complaint

The IAR as originally posted on OT's website definitively stated that "EBRD PCM has recently informed OT that the complaint made against them . . . has been dismissed."²⁵ This claim is patently false and it is unclear how the audit team came away with this impression, when even publicly available information on the PCM's website clearly indicates that the complaint was found eligible for compliance review in December 2014 and that a compliance audit has been underway ever since. We contacted the PCM about this statement and the report has now been corrected. However, the indication that the audit team received wrong information about the status of the PCM investigation, whether intentionally or by mistake, is troubling. Even more troubling is the implication that the audit team did not take even obvious steps to confirm that the information provided was correct (such as checking the PCM website).

Now that the report has been corrected, we note that there is no mention whatsoever of the outstanding PCM complaint in the stakeholder engagement section. We understand that this was done at the request of EBRD management, who believe the ongoing compliance review falls outside the scope of the audit report. However, we find this reasoning to be disingenuous, as the PCM complaint, along with the open mediation cases with the CAO, have been included in every audit report from October 2013 until now.

We note that the IAR points to the low number of complaints to the project-level grievance mechanism as evidence of community satisfaction, but there is no evidence of any discussion around whether herders feel comfortable using this mechanism when there are ongoing complaints at the institutional level, especially if they feel that the OT Community Relations team is not responsive to their concerns in community meetings. Even if future audit reports continue to reference the number of project-level complaints as evidence of community satisfaction, they must also reference and consider any ongoing institutional level complaints, with reference to any outstanding issues that remain in dispute through those processes.

We therefore remain concerned that the IESC did not adequately take into consideration the ongoing PCM process. The PCM compliance audit is investigating complaints related to impacts from OT mining roads, including pasture fragmentation, excessive dust, traffic accidents and felled animals, and is therefore highly relevant to the audit team's assessment of compliance with

²⁵ IAR (originally disclosed version), Section 1.11, p. 11.

related lender requirements. The corrected version of the IAR still fails to recognize the ongoing nature of this investigation or to reference the substantive issues being assessed by the PCM, yet it goes on to make sweeping conclusions that OT is in compliance with all lender requirements, including those related to air quality, transport management, and livelihoods improvement. Once again, it is surprising that the IESC was willing to draw definitive conclusions about OT compliance while an investigation process into some of the same issues is currently underway.

Labour and Working Conditions (IAR Section 1.9)

The IAR finds that OT has made significant progress in implementing enhanced HR/ER performance audits of contractors. Its explanation of OT's progress states that OT has conducted additional audits of contractors, but it provides no independent assessment of the strength of these audits, or any other independent information on which to base its positive assessment of OT's performance in this area. Based on the publicly disclosed version of the audit, the review of compliance in this area appears superficial. Without an opportunity to review the remainder of the audit report, stakeholders are left with insufficient information to understand whether OT's performance has been rigorously assessed and confirmed as adequate.

Worker Safety (IAR Section 1.13)

We recently learned from a mid-level official at OT that despite any safety measures, the rate of workplace casualties has not gone down. However, the IAR only comments on the existence of workplace health and safety incident tracking and assessment protocols, without mentioning whether they have had any real impact.²⁶

Conclusion

We urge the project lenders to require OT to reinstate its former practice of disclosing full audit reports in print and online in both English and Mongolian, to enable stakeholders, including affected herders, to reasonably rely on those reports to stay informed of project updates and compliance issues. We further urge the lenders to ensure that a rigorous standard is being applied to all audits of the OT project, including ensuring consistency with other publicly available documentation such as the IEP report. In view of our comments above, including the need to use appropriately independent interpreters when interviewing stakeholders, we also recommend that senior lenders publish the audits' Terms of Reference.

Sincerely,

Oyu Tolgoi Watch (Mongolia)
Accountability Counsel (USA)
Bank Information Center (International)
Both ENDS (Netherlands)
CEE Bankwatch Network (Europe)
London Mining Network (UK)
Urgewald (Germany)

²⁶ IAR, Section 1.13, p. 12.

