

February 9, 2017

Kenya Electricity Expansion Project – Management Action Plan

Dear World Bank Board of Directors,

On February 16, the World Bank Board is scheduled to review a proposed Management Action Plan for the Kenya Electricity Expansion Project (KEEP). This Action Plan follows an investigation by the Inspection Panel which found significant harm to indigenous Maasai villages and lack of compliance with World Bank policies, most notably, the failure to trigger the Indigenous Peoples Policy which could have safeguarded the communities from many of the subsequent project failures. Following the Panel's investigation, the Management Action Plan was postponed during a mediation process led by the European Investment Bank's Compliance Mechanism and supported by the Grievance Redress Service.

The Maasai villages impacted by KEEP's Olkaria IV geothermal development have seen their land greatly diminished such that it cannot support their livelihoods, the resettlement site lacks adequate water and roads, the community has not been afforded any benefit sharing for the commercialization of their resources, nor have they been provided with legal title to their new lands, and their ability to practice their culture has been substantially compromised. Due to certain limitations discussed briefly below, the final Mediation Agreement does not go far enough in addressing these issues. Moreover, the vast majority of actions agreed to in the mediation agreement have not been implemented. The project history reveals a continuing lack of good will on the part of KenGen and a lack of adequate supervision and monitoring on the part of the Bank, both of which continue to deny the Maasai's rights as indigenous peoples. **It is critical that the Board ensure that the Management Action Plan includes concrete time-bound commitments and use of Bank remedies to deliver results on the items discussed below in order to bring the project into compliance with the Involuntary Resettlement and Indigenous Peoples policies.**

1) Limitations of the mediation agreement.

The Mediation Agreement should not be viewed as a proxy or outline for a Management Action Plan. First, the Management Action Plan has as its benchmark the World Bank safeguards, in this case the Involuntary Resettlement and Indigenous Peoples policies. The mediation process, unfortunately was not anchored in the requirements of 4.10 or 4.12, neither in terms of respect for indigenous peoples' decisionmaking processes, nor in terms of substantive requirements on collective land rights or benefit-sharing. Additionally, and importantly for this case, mediation between a community and a State-run company (KenGen) brings significant power imbalances such that what the mediation is able to achieve may be significantly below what the community is due as a matter of law or policy. In this case, while the mediation agreement addresses some areas of concern to the community, others were left out or not adequately addressed. In a survey of 55 community members, including 7 participants in the mediation, we noted significant shortcomings in the mediation process.

Respondents indicated concerns with corruption and lack of representation. Respondents reported insufficient time to consider key issues during the mediation, a rushed deadline, and a sense that the only option was to agree to KenGen's proposals. Comments from KenGen appear to have contributed to this environment. Two respondents noted indication from KenGen that not agreeing could bring negative consequences such as not being considered in the review of housing and compensation claims. Several on the mediation team raised the concern that Elders were situated as "friends of the mediation" and encouraged to sign the agreement, but not able to participate in discussion, contrary to Maasai tradition where Elders take the lead in critical matters. While the original mediation calendar included a public meeting to discuss the agreement prior to signing, that meeting did not take place and the community was not consulted until over a week after the agreement was signed. The Agreement still has not been translated into the predominant local language, Maa.

From the survey of community members:

48 out of 52 respondents reported being unhappy with the mediation agreement. Of the 7 mediation participants surveyed, 4 said they were not satisfied with the agreement and did not feel it was a good outcome given the options available, 3 said they were unsure. 0 said they were satisfied.

"All what we thought could be given first priority were dropped (e.g. grazing land, transition allowance etc. and that made not all agreed nor signed."

"There was an imminent and deliberate hurry. Consultation of main community complainants was done after signing and that was wrong. Statements of closing down the mediation by KenGen were issued as threats with the option of filing a Court case."

"If those allowed to contribute and adopt contributions signed, then I who was designed not to talk had got no option but to sign though painfully. We the elders did not even have the chance to question."

"Time announced as too short and will never be there again. Duped to believe that mediation gives more than any other package that could be there."

"Elders in Maasai communities are symbols of authority, arbitration, mediation, unity, peace, sustenance of cultural norms...It is a taboo to have younger community members passing hard decisions that would have been made by those labelled as Members of Council Cabinet...The mediation [was] the opposite: Elders remain silent, their sons/grandchildren make decisions that would permanently determine the fate of the community. Too amazing, especially after Inspection Panel investigation indicated to recognize the position of Council of Elders."

>>The Bank should ensure fulfillment of the Mediation Agreement, and in addition the Action Plan must include the additional measures identified below to bring the project into compliance with Bank policy.

KEY ISSUES FOR THE ACTION PLAN

1) Inadequate land size and suitability.

The Indigenous Peoples Policy and Involuntary Resettlement Policy should have required an alternative to resettlement except in exceptional circumstances. In such exceptional circumstances, there should have been free, prior and informed consultation to the resettlement, and the resettlement should be land-based, with productive potential, locational advantages, and other factors at least equivalent to the original site. Instead, there is no indication that an alternative to resettlement was genuinely considered, and in the resettlement process communities were not given viable resettlement locations to choose from. In the end, four villages (approx 1200 people) were resettled from a 4200 acre area to an area of 1700 acres. The Maasai are a pastoral people, yet the resettlement land is marked by deep ravines which are not only a hazard for livestock and residents, but render the land unsuitable for grazing. The communities' herds have been significantly impacted, negatively affecting their economic wellbeing and cultural identity. As the Panel Investigation Report sites "RAPland cannot be considered equivalent in quality to the land where the PAPs lived previously." The Panel report additionally states that "[s]ince there were no investments to increase productivity to meet the requirements of the Policy, the area should at least have been the same size as the pre-displacement land." KenGen reportedly committed to allow the communities to continue to utilize their grazing lands on the project site. However, that access was never codified and today the communities' access is impeded. Moreover grazing land is continually shrinking as new developments such as Olkaria V and a related industrial park begin construction.

While land acreage was a primary issue for complainants and the first issue addressed on the mediation agenda, the final Mediation Agreement says nothing about land size. The Agreement only commits KenGen to "undertake studies ...to assess and recommend" interventions to improve land productivity, and to begin planting stabilization grass and trees by March 2017. The fact is that the communities have lost their grazing land and the new land cannot be made suitable for grazing. Rehabilitation of the landscape to increase its productivity will take years. In the meantime, the communities will be forced to sell off their herds.

From a survey of community members:

46 of 47 respondents described resettlement land as negative or worse than their previous land.

"The acre of the land is too small for the communities."

"Unsuitable for human settlement."

"There is no grazing land so we have to live far away from our animals. very sad!"

>>The Action Plan should require that additional land is provided by KenGen to ensure adequate grazing land to meet the communities' economic and cultural needs and restore their livelihoods.

2) Lack of valid collective title and tenure security.

Under the Indigenous Peoples Policy, land title, recognizing indigenous peoples' customary ownership, should have been secured prior to resettlement, and in fact, KenGen signed an MOU with the communities to this effect. Yet two and a half years after resettlement, the communities still do not have title. The Mediation Agreement states that KenGen will complete transfer of title once the community has cooperated in measures to strengthen corporate governance of the Welfare Society so that it is able to serve as a trustee for the land titles. World Bank and EIB committed to supporting these measures by September 30, 2016. These measures have not taken place. There are additionally complaints that the commercial area of Cultural Centre has not been included within the demarcation of that parcel.

Moreover, the titles which have been offered are leaseholds, not freeholds – they do not constitute ownership. This leaves uncertainty and lack of tenure security for the community, since the actual ownership of the land will still rest with the government. There are also significant irregularities in the titling proposal. One title document states 999-year leases requiring an annual payment of 176,805ksh (approximately 1700 \$USD) for the two parcels, which could potentially increase – creating significant insecurity. Another document provides for a lease of only 99 years. The Community Land Act, enacted September 2016, explicitly provides for community land in freehold.¹ This is the more secure form of title, the form backed by the Indigenous Peoples Policy, and the form the communities have been advised by their legal counsel to accept. Because of the rash of other developments in the Olkaria area and the recent history of violent evictions, land tenure security is critical.

From a survey of community members:

39 of 39 respondents said they do not feel secure in Rapland (the resettlement site).

“I don't feel people who were resettled are safe because nothing show that the land belong to them: lack title deed / beacon certificate.”

>> The Action Plan must provide resources for the community to secure independent legal counsel, and must ensure that legal title is awarded as community-held freehold title, not leasehold, in accordance with the Community Land Act.

3) Inadequate infrastructure.

Although the Involuntary Resettlement Policy requires infrastructure and public services to be provided as needed to improve, restore, or maintain accessibility and levels of service for the displaced people, several areas of Rapland do not have road access and due to the gullied terrain, other roads are vulnerable to flooding, creating dangerous conditions. Water is being delivered via truck and is inadequate to meet the communities' needs. The Mediation Agreement committed

¹ Community Land Act, 2016, PART II: RECOGNITION AND PROTECTION OF COMMUNITY LAND RIGHTS, 4. (3) (3) Community land shall vest in the community and may be held under any of the following tenure systems (a) customary; (b) freehold; (c) leasehold; (d) such other tenure system recognized under this act or other written law.

KenGen to upgrade roads to all-weather condition by December 31, 2016, and review feasibility of box culverts, identify areas where additional works are needed and deploy more equipment. KenGen committed to repairing the road to unreachable houses by June 30, 2016. While some sections of road have been repaired, most remain in disrepair, the road repair to unreachable houses and weathering has not been done, and bridges are incomplete. The Mediation Agreement committed KenGen to restore and expand a permanent waterline by December 31, 2016. This has not been done.

From a survey of community members:

“The land that we live now has a lot of gullies, no water, access of road is very tough.”

“No water for animals, lack security from wild animal eating our animals, others falling in gully/valley.”

>> The Action Plan should require repayment of project funds to ensure financing of roads and watermain construction.

6) Livelihood restoration.

According to Bank policy, resettlement efforts should be “*conceived and executed as sustainable development programs,*” and displaced people should be assisted to improve or restore their livelihoods to pre-displacement or pre-project implementation levels, whichever is higher. Instead, the communities’ two main sources of livelihood – pastoralism and tourism – have been severely compromised. The Panel Investigation Report notes, “the Project documents do not seem to have addressed the effects of the vacant village on tourism and on the livelihoods of this community.” Additionally, the relocation of the communities far from commercial centers and the choice of modern housing have greatly increased their cost of living. In the Mediation Agreement KenGen committed to a training program for women by July 31, 2016 and for youth by September 30, 2016, and to provide advice and support on business development and marketing. Cultural Centre was to be fenced by December 31, 2016. These limited commitments not only will not address the serious livelihood impacts of the resettlement, but they themselves remain unfulfilled.

The Resettlement Policy requires that displaced individuals be supported to restore their livelihoods, and that a transition allowance be provided in the interim. The resettled Maasai were awarded a 35000ksh (approx. 330 USD) transition allowance. However, because electricity connections were not provided to new homes, they were encouraged to forfeit the allowance in order to pay for electricity connections. The Panel “found no valid justification for Bank acceptance to the use of the transitional allowance for electricity connections instead of for its intended purpose.” In the Mediation Agreement, the 35,000ksh reimbursement, which should have been reimbursed as a matter of course, was instead used as a negotiating chip to get the community representatives to drop claims for benefit sharing and other compensation. The Mediation Agreement states that KenGen agrees to “[r]eimburse the power connection fee of 35,000ksh *in consideration for the community dropping item 7 [500,000ksh transition allowance] and marking as agreed items 8 [profit sharing], 9 [benefit sharing] and 10 [subsidized electricity]*”. Mediation participants were reportedly told by bank staff that bank policy did not support a transition allowance of 500,000ksh. Given that the disturbance to the Maasai’s livelihoods is severe and of a structural nature, the “transition period” until livelihoods can be restored will be years. \$330 USD is entirely inadequate to bridge this gap and it is unclear why bank staff would weigh in to limit the livelihood restoration available to the communities.

From a survey of community members:

31 of 41 respondents reported a worsening in their income or ability to find work. 10 reported no change. 0 reported an improvement. 29 out of 31 respondents reported increased cost of living or transportation. 25 out of 28 respondents reported a worsening in their ability to tend their animals. Only 3 out of 43 respondents reported a belief that their livelihood would be restored if the mediation agreement is fulfilled.

“It is total suffering because it have been compulsory for me to hire a motorbike morning and evening to & from my animals”

“I have to pay 400ksh every day to and from workplace”

“Everything [has to be] bought - firewood, water, house to live, not like before.”

“Livelihood restoration measure of not less than 500,000 ksh was dropped [in mediation] as agitated by the two banks’ representatives present. They said there was no such policy in their banking institutions. That amount was to serve as conformity or transitional allowance.”

>> The Action Plan must ensure that a livelihood assessment is undertaken and disclosed and set concrete time-bound measures to restore conditions for pastoralism and tourism, as well as new employment. Until such time as livelihoods are restored, economic assistance should be provided sufficient to ensure a standard of living at least equal to pre-resettlement.

5) Benefit-sharing.

OP 4.10 requires “arrangements to enable the Indigenous Peoples to share equitably in the benefits to be derived from [commercial development of their natural resources]; at a minimum, the IPP arrangements must ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation, and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land.” The Inspection Panel notes that “The Sourcebook considers that project-related benefits typically include *“access to resources, employment in the project, or a share of its revenues.”* This is a higher bar than the mere livelihood restoration requirements under the Involuntary Resettlement Policy. Benefit-sharing is a key priority for the community, including profit sharing or other arrangements that would allow them sustainable development opportunities. However, the communities did not get benefit-sharing arrangements for the commercialization of their resources, and World Bank staff have been averse to exploring such possibilities, citing inconsistent past practice by the Bank and ongoing parliamentary consideration of legislation on benefit-sharing. However, project-specific arrangements do not require national level legislation. Successful benefit-sharing arrangements like the Maasai Mara park already exist in Kenya. As described above, during the mediation, the communities’ demands for benefit-sharing, profit sharing, additional compensation and subsidized electricity were all sidelined, utilizing the leverage of the return of the \$330 USD transitional allowance.

From a survey of community members:

When given a choice between the stipend and a clear share in the profits or benefits from the geothermal development, 24 of 25 respondents expressed interest in the profit sharing, while many expressed the right to both.

“I need to be given a shared benefit from geothermal development because the project will be enjoyed the rest of my life as long as the geothermal project is there”

>> The Action Plan should include negotiation of a benefit-sharing agreement wherein the PAPs directly share in the profits and benefits from the geothermal development on their lands and have a sustainable means of supporting their development.

7) Left-out PAPs, inadequate compensation and vulnerable PAPs.

Fourteen households were excluded from the resettlement, breaking apart family structures. Many Maasai are polygamist and in some cases one spouse was resettled while the other was not, in other cases parents and children have been separated. Those who were tenants have raised complaints of inadequate compensation. KenGen held a clinic to review claims for housing or compensation, together with EIB and World Bank representatives. We have recently learned that after the clinic, five individuals were contacted and given a choice between housing or compensation. Community members are concerned that the amount offered in compensation was significantly less than the cost of the houses constructed, and that those contacted were apparently instructed not to share this information with the rest of the community. There are additionally around 16 individuals (“vulnerable PAPs”) who are particularly vulnerable due to disability or other reasons who have been especially harmed by the resettlement. The Mediation Agreement commits KenGen to address their needs, but this has not yet occurred.

>> The Action Plan should include a participatory process to monitor the outcome of the clinic, implementation of housing and compensation commitments, and measures for vulnerable PAPs.

8) Supervision and monitoring.

As the Inspection Panel Investigation Report noted, the failure to apply the Indigenous Peoples Policy led to a range of other project failures, including lack of free, prior and informed consultation, failure to adequately consider indigenous peoples’ collective land rights, failure to provide benefit sharing, and failure to ensure a culturally appropriate resettlement. These basic elements which underpin indigenous peoples’ development could have elucidated a more successful mediation and should still be the basis of the Action Plan.

Additionally, as a category A project, the project should have had an Independent Evaluation Panel (IEP) with internationally-recognized resettlement and Indigenous Peoples expertise. The Inspection Panel Investigation Report notes that there was at some point an IEP to advise on implementation. However, there is no evidence of its workings. The Panel Report additionally found that “the Bank’s inadequate supervision of the Project’s resettlement activities, and its insufficient monitoring (based on updated sociological data) of PAPs’ wellbeing and the restoration of their livelihoods to pre-displacement levels or better, are in non-compliance with Bank Policy on Involuntary Resettlement.”

The Mediation Agreement, as would be expected, does not detail the supervision and monitoring measures the Bank will take. These must be included in an Action Plan. It is disturbing that the Bank has not reached out to the community to assess the present situation. A mediation process should not serve to put on hold standard Bank supervision and monitoring requirements.

From a survey of community members:

34 of 35 respondents reported a negative impact on their ability to practice their traditions and ceremonies.

“Tradition and ceremonies are no longer to be done because Cultural Centre have been ruined by KenGen.”

“I can't practice my tradition because I am no longer a Maasai”

If you could send a message to the banks, what would it be:

“Not to give KenGen any funds till they follow the policies.”

“To come up with a new method so that the corruption cannot be occurred.”

“Banks financing this project should give the PAPs their rights, and also they should be keen when they give out there money not to destroy life of people.”

>> The Bank should ensure that the elements of an Indigenous Peoples Plan are reflected in the Action Plan. The Action Plan should also require monthly progress and implementation reports from management, and should engage an IEP as well as community-based monitoring to advise and report on ongoing implementation. The Bank should utilize all available remedies to secure KenGen’s compliance with the Action Plan.

We urge you to take these concerns into consideration as you review the proposed Management Action Plan and hope that the Bank will take strong action to ensure that Bank policies are complied with and that the impacted Maasai villages are able to restore their livelihoods and benefit from development with full respect for their human rights.

Signed,

Narasha Community Development Group

Ewangan Sinyati Welfare Society

Mainyoito Pastoralists Integrated Development Organization (MPIDO)

CEE Bankwatch Network