

NEWS ANALYSIS: The Equator Principles in the OECD

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Permitting and public participation requirements in the 31 countries that the World Bank classifies as high-income Organization for Economic Cooperation and Development (OECD) generally meet or exceed the initial assessment and review requirements of the Equator Principles (EP). Therefore, when financing a project located in one of these countries, which include the United States and Canada, obtaining a compliance opinion is usually fairly straightforward. This process, which takes place at the pre-construction stage, is often based on the results of environmental studies, project design specifications, successful completion of the required permitting process, and is contingent upon financing documents including covenants related to monitoring, reporting, and compliance. This follows from the language found in the third principle, which says:

...the regulatory, permitting, and public comment process requirements in High-Income OECD Countries ... generally meet or exceed the requirements of the IFC Performance Standards and EHS Guidelines. So the ... successful completion of an Assessment (or its equivalent) process under and in compliance with local or national law in High-Income OECD Countries is considered to be an acceptable substitute for the IFC Performance Standards, EHS Guidelines and further requirements as detailed in Principles 4, 5, and 6.

Thus, for projects in high-income OECD countries, successfully completing the permitting process is an acceptable alternative to the initial project review and categorisation conditions of the principles. So, for projects that are in the pre-construction stage, are successfully permitted, and have loan covenants that require compliance, the principles often receive little attention. So, it can come as a surprise when a lender requests an EP compliance report a year into a project, or when a compliance opinion is required during financing of a project that is already under construction.

It is important to note that Principle 3 does not say that for projects in high-income OECD countries, the EP do not apply. Additionally, it does not say that if a developer obtains the required permits for construction and operation, its EP obligation is complete, or that compliance with applicable permit requirements translates into EP compliance. What the language in Principle 3 does say is that a project is generally in compliance with EP requirements for review, categorisation, and environmental and social assessments if it is located in a high-income OECD country and has obtained its required permits and authorisations.

Once a project is under construction or has moved into operation, the compliance review process changes considerably. For projects in these stages, the principles require a demonstration of compliance with the commitments made during the pre-construction permitting process. The key item related to compliance with EP requirements after initial permitting is found in the ninth principle. Principle 9 says that an Equator Principle financial institution (EPFI) will, for category A projects and as appropriate for category B projects, ... require appointment of an independent environmental and/or social expert, or require that the borrower retain qualified and experienced external experts, to verify its monitoring information

These compliance requirements come from multiple sources, which include:

The credit agreement, which generally includes language requiring the borrower to comply in all material aspects ... with all Environmental Laws and guidelines now or hereafter applicable to the project

Permits and authorisations, which require monitoring, recordkeeping, and reporting

Specific requirements of the EP

International Finance Corporation (IFC) environmental, health, and safety general guidelines

Industry-specific IFC Guidelines, such as those for thermal power or wind energy

Applicable laws, ordinances, industry standards, and company policies

With later compliance opinions, it is important to note that potential issues could arise when conducting EP reviews. The start of construction usually triggers monitoring, recordkeeping, and reporting (MRR) requirements contained in the credit agreement and in various permits and approvals. It also triggers the need for many EP requirements, including environmental, health, and safety (EHS) programs and associated training. Once MRR requirements are triggered, a review of project programmes is required in order to assess compliance with the principles. An EP compliance review could include tasks such as:

Verification that the EHS organisation is in place, including position responsibilities and organisational policies

Review of specific permit requirements such as limits for air emissions and water discharge

Review of procedures for handling grievances and complaints, including lines of responsibility

Review of project sponsor requirements for auditing EHS programs, including who performs the audits, how results are interpreted and used, and frequency

Review of project EHS programs and procedures, which may include waste management, personal protective equipment, emergency preparedness and response, storm water pollution prevention, and drug and alcohol policies

Review of training requirements and evidence of training

Review of EHS programme requirements for contractors and audit functions

Projects in high-income OECD countries are not expected to have specifically developed an action plan and management system (APMS), as the principles prescribe. However, each project will have MRR requirements and implementation procedures that are functionally equivalent to an APMS. To the extent that an EPFI specifically requires the development of an APMS, separate from existing regulatory requirements, those documents could be developed from applicable regulatory requirements.

Developing an EP opinion for a project that is under construction or in operation is not as straightforward as developing an opinion for a pre-construction project. Developers or lenders that request an opinion of compliance on extremely short notice may not realise that it will take considerable time and effort to produce this. However it is increasingly likely that one of the lenders will indeed require an EP review and compliance opinion. Therefore, in order to minimise delays and schedule interruptions in the future, both the lenders and project sponsors should consider the EP at all stages of project development.

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