

AFRICAN DEVELOPMENT BANK GROUP



MANAGEMENT RESPONSE ON THE COMPLAINT FILED WITH THE COMPLIANCE REVIEW AND MEDIATION UNIT WITH RESPECT TO THE NAIROBI RIVERS BASIN REHABILITATION AND RESTORATION PROGRAM: SEWERAGE IMPROVEMENT PROJECT

AUGUST 2015

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EXECUTIVE SUMMARY

The African Development Bank (AfDB) Board of Directors approved a loan of 35 million UA to the Government of Kenya (GoK) for the improvement of sewerage infrastructure in Nairobi city. The Loan was approved on 6 December 2010 and signed on 23 March 2011. The project was launched on 16 May 2011 and the borrower fulfilled the Conditions Precedent to First Disbursement on 22 February 2012. The deadline for last disbursement for the project is 31 December 2016. The project's three main components are: a) Wastewater infrastructure – covering rehabilitation and expansion of the sewerage network and treatment, b) Sanitation, hygiene and social environmental support, and c) institutional development support.

Following complaints from a Requestor that the project sewer works had encroached on their land and caused damage to property, the Compliance Review and Mediation Unit (CRMU) registered the request on 9th July 2015, and whose effect requires Management to furnish CRMU with a written response, within twenty one (21) working days with evidence that it has complied, or intends to comply, with the Bank Group's applicable policies and procedures on the said project.

Management notes that the principal concerns of the Requesters are the need to be compensated for their assets damaged during the installation of the sewer line and secondly, the need for re-instatement of the damaged assets, including sheds for chicken, goats and sheep.

Notwithstanding the commitment of the Athi Water Services Board to compensate for and restore the assets damaged by sewer works, Management observes that there developed a disagreement on the modalities for compensation and re-instatement of the said assets which did not allow settlement on the Requesters concerns in line with the Bank's requirements under Operational Safeguards 2 of the Integrated Safeguards System (ISS) which provides that "affected people are compensated for all their losses at full replacement costs".

It is also evident that the differences in opinion regarding the boundaries of the affected plots, vis-à-vis the limits of the adjacent road reserve partly contributed to the impasse that delayed settlement of the Requesters' concerns. In view of this, the parties agreed to conduct a survey using the services of a Government Surveyor, and it is hoped that the outcome of the survey will pave way for an amicable settlement. Management is therefore hopeful that settlement will be reached after the outcome of the survey and the subsequent negotiations between the Requesters and the AWSB.

ABBREVIATIONS AND ACRONYMS

AfDB	African Development Bank
AWSB	Athi Water Services Board
CRMU	Compliance Review and Mediation Unit
EARC	East Africa Regional Resource Center
EIA	Environmental Impact Assessment
ESIA	Environmental and Social Impact Assessment
GoK	Government of Kenya
GRM	Grievance Redress Mechanism
ISS	Integrated Safeguards System
NaRSIP	Nairobi Rivers Basin Rehabilitation and Restoration Program: Sewerage Improvement Project
NEMA	National Environment Management Authority
NoR	Notice of Registration
OS	Operational Safeguard
PAPs	Project Affected Persons
RAP	Resettlement Action Plan
RoW	Right of Way

1.0 INTRODUCTION

The Nairobi Rivers Basin Rehabilitation and Restoration Program: Sewerage Improvement Project (NaRSIP) was approved by the Africa Development Bank (AfDB) Board of Directors on 6 December 2010. The total cost of the project is 35 million UA and involves three main components: a) Wastewater Infrastructure – covering rehabilitation and expansion of the sewerage network and treatment, b) Sanitation, Hygiene and Social Environmental Support, and c) Institutional Development Support.

1.1 PROJECT IMPLEMENTATION STATUS

As of July 2015, the overall project implementation is at 70% with a disbursement rate of 63.6%. The status for the four civil works contracts is summarised below:

Component/Activity	Progress
Lot 1: Construction of trunk and reticulation sewers in the Kiu River Basin and expansion of Dandora sewerage treatment plant.	Works are 98% complete, and commissioning of the works has been scheduled for July 2015.
Lot 2: Construction of trunk and reticulation sewers in Mathare, Ngong and Nairobi river basin.	Works are in progress and 88% complete with 48km of trunk and reticulation sewers installed. RAP implementation in sections covering 1.4 km has encountered delays occasioned by challenges in securing the Right of Way in the densely populated urban neighbourhoods.
Lot 3: Construction of trunk and reticulation sewers in Kangundo road, Upperhill and Kibera trunk	Works are in progress and 70% complete. Works are expected to be complete by February 2016. RAP challenges and costly road crossings have caused delays on the contract.
Lot 4 Rehabilitation of Kariobangi sewerage treatment plant	The contract has been awarded and works are in progress at 5% physical progress. The contract was awarded late (when?) and the completion date is May 2016

Considering that the project involves laying of sewerage pipes in various parts of Nairobi city, including in densely populated slum areas, the design of the project aimed at minimizing the relocation of people as much as possible. Under the Resettlement Action Plan (RAP), a total of 2,280 Project Affected Persons (PAPs) were to be impacted by the project trunk sewer system, including a limited number owning temporary shelters on the riparian land. The cost of compensation (Kshs 173 million) was provided for in the project and to be borne by the Government of Kenya (GoK). As of July 2015, the AWSB reports that an estimated Kshs. 169,883,916.5 from the escrow account has been paid as compensation to 1,230 PAPs to secure the sewer way leaves in Lots 1, 2 and 3.

2.0 ISSUES RAISED IN THE REQUEST FILED WITH CRMU

Following earlier complaints submitted to the implementing agency for the project, the Athi Water Services Board (AWSB), and earlier e-mails sent to CRMU, the Principal Requestor, Mr. Oscar Njuguna, on behalf of his family, submitted a request to the Director of the Compliance Review and Mediation Unit (CRMU) on June 30th 2015, complaining that the project sewer works had encroached on their land and caused damage to property. According to the Notice of Registration (Request No. RQ2015/3), Mr. Njuguna claimed that “the company in charge of building the sewerage line in Dagoretti area, Nanchang Sewerage Company, came and passed the sewerage line through their compound. The Contractor allegedly destroyed properties and damaged the Nairobi Water Main lines. The complainant requested AWSB to fulfil its promise to pay compensation after completion of works”.

The family further alleged, according to the Notice of Registration (NoR), that despite their follow up, including a formal reminder sent on 20 March 2015, “the Contractors and AWSB have been un-cooperative on both issues of repairing the damage caused to their property or compensating them for the loss they have incurred”.

The NoR further indicates that “CRMU received confirmation also from Mr. Njuguna that their two elderly neighbors, Mr. Julius Ephantus Mwangi and Mr. Thomas Kamau Macharia are joining him in his complaint. Both families are facing similar challenges with the Contractor and AWSB. The Mother of Mr. Kamau allegedly died during the demolition done at their premises. She was sickly, and they claim that the shock of seeing her hard earned property being destroyed may have contributed to her demise”. They further allege that “there was no consideration that there was a sick and elderly person in the compound before they proceeded to carry out work on her land” and that “She never gave her consent”. These individuals also further allege that “their property was destroyed and animals also died in the process” and that “none of these families have received any compensation of any kind even after pursuing AWSB for the last 2 years”.

In accordance with paragraph 24 and 36 of the IRM Rules and procedures, the Bank’s Management is required to submit to CRMU within twenty one (21) working days of receipt of the NoR, a response with written evidence that it has complied, or intends to comply, with the Bank’s applicable policies and procedures on the project. Accordingly, Management’s response is to be submitted to CRMU by no later than 7th August 2015.

casting the top slab of the manhole, the contractor prepared to reinstate the above mentioned sheds. However, the reinstatement did not proceed as the complainant and the contractor disagreed on the modalities of reinstatement of the affected properties. The disagreement was premised on the following:

(i) The property owners and the contractor disagreed on the nature of materials to be used to replace the properties that had been demolished in the course of works (including chicken, sheep and Goat sheds). Whereas the property owners wanted their properties replaced with new materials, the Contractor wanted to use the original materials from the demolished sheds.

(ii) The property owners wanted the site re-instated before completion of Manhole 14, while the contractor wanted to complete construction of the manhole prior to reinstating the entire site. It was understood that the property owners did not trust the contractor to compensate them after he has completed the works.

(iii) Following the stand-off resulting from (i) and (ii) above, and notwithstanding the fact that the contractor is said to have agreed to reinstating the demolished properties with new materials, the property owners, perhaps upon further reflection, changed their minds and wanted to be compensated for land encroached on.

The Complainant thereafter is alleged to have denied the contractor access to his property, unless his demands for compensation were met.

4.0 EFFORTS TO RESOLVE THE ISSUE

Following further Complaints received in early March 2015 through the complainant's son, Mr. Oscar Njuguna and daughter, Eva Wambui, an initial site meeting was conducted on 16th March 2015 with representatives from the AWSB, the contractor, the consultant and the complainant.

The following were established:-

- i) The chicken, goat and sheep sheds had not been reinstated;
- ii) The Contractor was ready and willing to carry out reinstatement works, even using new materials as a sign of good will;
- iii) The complainant was no longer interested in the reinstatement works as earlier agreed;
- iv) In addition to the chicken, goat and sheep sheds, the complainant claimed the following had been damaged by the contractor:-
 - vegetation covering an area of 3 x 3m
 - 2 no. trees
 - 1 no. water meter
 - 1 inch GI water pipe and;
 - 180 hens (claimed to have died due to disruption caused by removal of chicken sheds)
- v) The complainant wanted compensation for the above assets as well as for encroachment
- vi) The manhole inside the compound was incomplete as access could not be granted.

The Complainant is reported to have further denied access to the construction team to complete the manhole works despite being warned of having sewage overflow from the incomplete manhole once connections upstream was effected.

Following further complaints by the Principal Requestor, additional meetings were held at the AWSB offices and on site on the 31st March 2015. This was also followed by further correspondences between the parties towards resolving the issue. As at 11th June 2015, the following actions in Table 1 had been identified as the way forward as suggested by the AWSB:-

Table 1: Agreed actions and responsibilities to resolve the conflict

ITEM DAMAGED	ACTION TO BE TAKEN	RESPONSIBLE PARTY
1 chicken shed – 3.3x3m	To be reinstated using new timber and iron sheets	Contractor
1 sheep shed – 3.3x3m	To be reinstated using new timber and iron sheets	Contractor
1 goat shed – 3.3x3m	To be reinstated using new timber and iron sheets	Contractor
Vegetation 3x3m	To establish which vegetation had been damaged and compensate using applicable rates for crops	Complainant and AWSB
2 No. trees	To establish which species of trees had been damaged and compensate using applicable rates for various tree species	Complainant and AWSB
1 No. water meter	To report to NCWSC about the damaged water meter and apply to get a new one	Contractor
1 Inch GI water pipe	To replace the damaged GI pipe section	Contractor
Death of 180 hens	To provide proof that 180 hens died due to disruption caused by removal of chicken sheds	Complainant

Notwithstanding the above efforts, the complainant is said to have subsequently rejected all suggestions on the way forward including the above compensations, and demanded that the constructed sewer line be removed from where it had been laid. (E-mail exchanges seen between the requestor and AWSB attest to this and these are attached as Appendix 1).

At its own cost, AWSB engaged a Government Surveyor, through the Ministry of Lands, Housing and Urban Development to ascertain the boundaries of the complainant's plot including the suspected encroachment. This exercise was conducted on the 29th of July 2015 and a report is expected within two (2) weeks.

5.0 COMPLIANCE WITH THE BANK’S OPERATIONAL SAFEGUARD 2 ON “INVOLUNTARY RESETTLEMENT: LAND ACQUISITION, POPULATION DISPLACEMENT AND COMPENSATION”.

The scope of Operational Safeguard 2 (OS2) of the Bank’s Integrated Safeguards System (ISS) covers economic, social and cultural impacts associated with Bank-financed projects involving involuntary loss of land, involuntary loss of other assets, or restrictions on land use and on access to local natural resources that result in:

- Relocation or loss of shelter by the people residing in the project area of influence;
- Loss of assets (including loss of structures and assets of cultural, spiritual, and other social importance) or restriction of access to assets, including national parks and protected areas or natural resources; or
- Loss of income sources or means of livelihood as a result of the project, whether or not the people affected are required to move.

Whereas these provisions are relevant to the concerns of the Requesters, Management observes that the overall RAP implementation for the project has thus far proceeded relatively smoothly, despite challenges related to securing RoW for the sewer lines in areas where some

PAPs have not vacated the RoW even after receiving compensation. Out of a total of 2, 280 PAPs recorded in the RAP, 1, 230 had already been compensated to secure the sewer way leaves in Lots 1, 2 and 3. As expected during RAP implementation, disputes often emerge and the project has a Grievance Redress Mechanism (GRM) to address emerging disputes as stipulated in the ISS. In the case of Mr. Njuguna’s Request, it is evident that effort had been made to try to amicably resolve the issue.

Management notes that the two demands of the requestors relate to the need for AWSB to (i) pay compensation for damage caused to property and (ii) to repair and restore the property damaged during the laying of the sewer line. From the correspondences between the two parties, Management notes that the AWSB had all along demonstrated commitment to fulfil these two demands. These demands are in line with the Bank’s ISS which provides that “affected people are compensated for all their losses at full replacement costs”. Unfortunately, due to disagreement on the modalities of execution, these two demands could not be fulfilled.

Notwithstanding the demands of the Requesters as indicated above, Management is also aware of the differing opinions between the Principal Requester and AWSB regarding the status of ownership of the land where the sewer lines have been laid. Following the Request, Management undertook some fact finding through document review, meeting the relevant parties and site visit to ascertain the nature of the complaint on the ground. From the e-mail exchanges obtained (Appendix 2), it is evident that there was apparent lack of agreement as to which party was right with regard to the boundaries of the plot(s) in question on one hand and limits of the road reserve on the other. It was evident that lack of clarity on this issue could have contributed to slowing down the resolution of the concerns of the PAPs due to differing understanding whether or not the property of the Principal Requestor (Mr. Njuguna’s family) was indeed within or outside the Government gazetted road reserve area, or whether the sewer works indeed have been installed within the Principal Requesters legally titled land.

In view of the above, the parties involved, (AWSB and the Requesters) contracted the services of a Government Surveyor who undertook the verification of boundaries on 29th July 2015 in the presence of all the parties and local authorities. Management views this decision to bring on Board

the Government Surveyor to determine plot boundaries as a good step towards clarifying the issue of boundaries. This will significantly assist in determining eligibility for compensation.

Preliminary findings communicated to all the parties on site immediately after the survey indicated that (a) the Plot of the Principal Requester encroached on the road reserve and that the sewer line currently within the Principal Requestor's perimeter wall is within the road reserve. (b) The plot of the second requestor, Mr. Julius Ephantus Mwangi, is not within the road reserve, meaning that the sewer line is actually laid within his legally titled land.

A formal report of the Government Surveyor will be available within 2 weeks. The outcome of the survey notwithstanding, Management understands that AWSB is still willing to negotiate with the affected requestors once the final report of the Government Surveyor is submitted.

As the report of the Government Surveyor is being awaited, Management draws attention to an observation made during the site visit to the effect that the boundary wall to the plot of concern to the principal Requestor had a yellow marking with an "X". Considering the ongoing works on the adjacent road, there is probable that the boundary wall could have been identified to be within the road reserve as it is common practice to mark properties within road reserves with this sign when road works are planned. While this is not a conclusive observation, it is worth noting especially as the issue of boundaries is being addressed, and considering further that some other properties along the road had a similar mark.



Fig. 2: The arrow shows the orange "X" mark on the boundary wall to one of the plots of concern

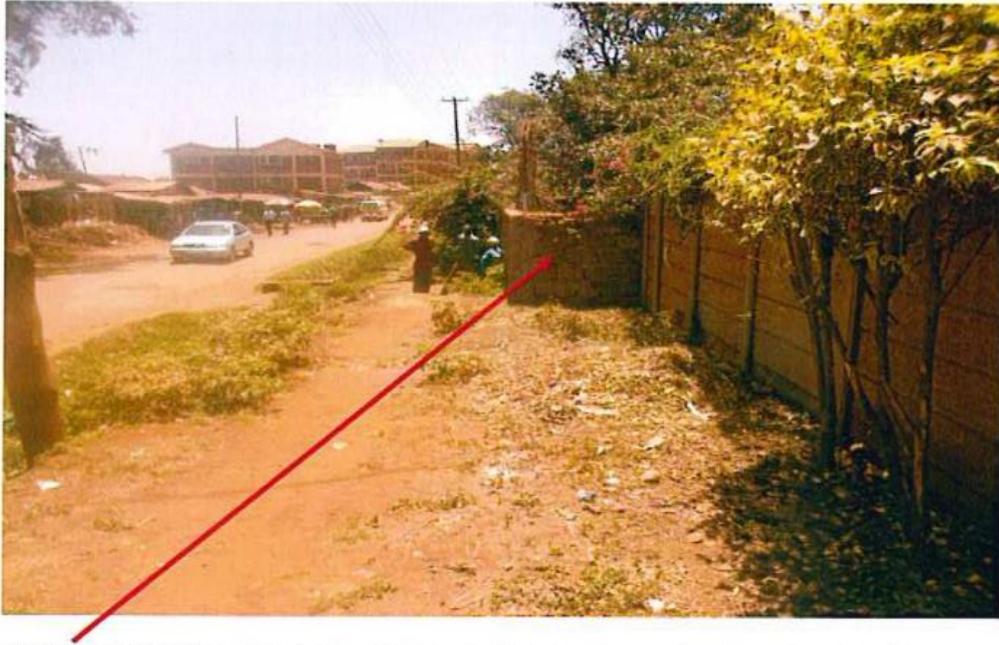


Fig. 3: PAs wall jutting out compared to the fence borders in the neighborhoods

As Management's responsibility during project implementation is to ensure that all aspects of project implementation, including ESMP and/or RAP implementation are carried out smoothly, Management undertook regular supervision missions on this project and the requirement to compensate PAs was always emphasized. These supervision missions were carried out over the periods 26 Nov. – 10th December 2011, 21-30th May 2012, 20-23rd November 2012, 15-19th April 2013, 27th Sept. – 4th October 2013, 21-31st October 2014 and 21-29th April 2015 respectively.

Management would wish to report that while every effort had been made to resolve the concerns of the Requesters as the various correspondences indicate, it would appear that the lack of accurate information on the status of the disputed areas of the sewer line alignment may have contributed to suspicions that did not enable amicable negotiations to proceed to a logical conclusion. This is one of the common problems encountered in RAP implementation, including disputes over land boundaries, and the tendency for PAs to attempt to misrepresent the facts surrounding their own claim for compensation.

Considering that the Bank procedures require continuous engagement with all stakeholders and potential project affected communities, Management draws the attention of the Board to the fact that AWSB has a dedicated team of Sociologists to oversee RAP implementation on this project to ensure continuous engagement and consultations with all stakeholders and to ensure that members of the local communities are fully informed of ongoing project activities, and that any concerns they may have are addressed. The PAs are also included in the RAP Implementation Committee and are involved in the community sensitization and awareness component of the project in order to maintain harmonious relationship with the people whose property and livelihoods could be temporarily disrupted and impacted by construction works.

Management also urges the AWSB to fully utilize the opportunity the GRM offers to resolve any similar issues that could emerge in the future. It is unfortunate that the Bank's Field/Regional Office or even the Task Managers were brought into this matter as it would have been addressed earlier. Management only got to know of this case after it had been sent to CRMU. Management will continue to sensitize PAs and Project Affected Communities to utilize the services of the Bank's Field Offices to resolve matters that affect them at first instance.

6.0 WAY FORWARD.

It is clear that the determination of plot boundaries vis-à-vis the road reserve could go a long way towards establishing the authenticity of the different positions regarding whether or not the sewer line could have been built within land areas legally owned by the complainants. The outcome of the survey conducted by the Government Surveyor on 29th July is therefore a critical step towards a better understanding of the eligibility of the various complainants to compensation. In light of this:

- (i) If the said properties are within the road reserve, then the PAPs will be entitled to compensation for the assets and property damaged (not the land) through a negotiated settlement which should be in line with applicable Bank or country requirements.
- (ii) If the said properties are not within the road reserve, and are on the PAPs' land, the PAPs will still be entitled to compensation through a negotiated settlement in line with applicable Bank or country requirements.
- (iii) In the event it is confirmed that any of the plots in question have encroached on the road reserve, Management recommends that any repairs and re-installation of damaged properties would have to stay clear of the road reserve areas to avoid future demands for compensation in case of future government developments or installations on the same land.

7.0 CONCLUSION

Management acknowledges that RAP implementation in a densely populated urban setting is bound to present a number of challenges as exhibited by this case. It is important to recognize, however, that the Government, through the Implementing Agency, has put in place appropriate measures to address any emerging issues during implementation.

Finally, Management reiterates its commitment to continue working with the AWSB to ensure that the concerns of the requestors are addressed within their eligibility limits and entitlements as stipulated by the Bank's ISS, so that the issues are amicably resolved to the satisfaction of all parties.

Appendix 1: Email exchanges between the Principal Requester and AWSB