

**PEOPLE OF LEÓN AND CHINANDEGA'S COMPLAINT REGARDING  
THE OPERATIONS OF NICARAGUA SUGAR ESTATES LIMITED S.A.  
INTERNATIONAL FINANCE CORPORATION PROJECT 25331**



**SUBMITTED TO THE OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN  
MARCH 31, 2008**



## Table of Contents

<b>I. Summary</b> .....	<b>1</b>
<b>II. Facts</b> .....	<b>2</b>
<b>III. Injuries</b> .....	<b>4</b>
<b>IV. Desired Remedies</b> .....	<b>5</b>
<b>V. Documentation</b> .....	<b>8</b>
<b>VI. Policy and Procedure Violations</b> .....	<b>8</b>
A. Violations of IFC Performance Standards .....	8
1. Performance Standard 1 .....	8
2. Performance Standard 2.....	13
3. Performance Standard 3.....	15
4. Performance Standard 4.....	17
5. Performance Standard 5.....	19
6. Performance Standard 6.....	19
7. Performance Standard 7.....	20
8. National Laws.....	21
B. Violations of IFC Policy and Review Procedure .....	21
<b>Annexes</b> .....	<b>25</b>
Annex A: Complainants.....	
Annex B: Community Support Team .....	
Annex C: Administrative Proceedings and Denuncias .....	
Annex D: Water Use.....	
Annex E: Information on Chronic Renal Insufficiency .....	
Annex F: ILO and IACHR Proceedings .....	
Annex G: Indigenous Land.....	
Annex H: Newspaper Articles .....	
Annex I: Nicaraguan Laws .....	



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**I. Summary**

This complaint is submitted to the Office of the Compliance Advisor Ombudsman by members of communities adversely impacted by the operations of Nicaragua Sugar Estates Limited, S.A. (“NSEL”) in the states of León and Chinandega, Nicaragua, and NSEL’s former employees. The complainants seek redress for injuries to their health, environment, and livelihoods resulting from the failure of the International Finance Corporation (“IFC”) to comply with its Policy on Social and Environmental Sustainability and its Environmental and Social Review Procedures in its loan to NSEL.

On October 25, 2006, the IFC approved a \$55 million loan to finance expansion of NSEL’s production and processing of sugarcane. The purpose of the loan, Project 25331, is to enable NSEL to acquire up to 2,482 hectares of additional land for sugarcane cultivation; improve the efficiency and maximize the capacity of its existing sugar mill; to purchase equipment for mechanical harvesting and invest in plantation infrastructure and maintenance; to install more efficient irrigation systems; and to construct an ethanol plant to produce and export ethanol.

The complainants, listed in Annex A, are (1) residents of Goyena and Abangasca, communities located in León, Nicaragua, in which NSEL cultivates sugarcane; (2) residents of Chichigalpa, Nicaragua, the community in which NSEL’s sugar mill is located; and (3) former NSEL employees. The adverse impacts to complainants’ health, environment, and livelihoods resulting from NSEL’s operations under the IFC loan include, *inter alia*:

- An epidemic of Chronic Renal Insufficiency (“CRI”) among NSEL sugarcane workers and members of communities adjacent to NSEL sugarcane fields;
- Interference by NSEL in attempts to establish a union independent of NSEL control and associated retaliation against those workers who sought to form or join the union;
- Impacts to indigenous Sutiaba lands from pesticide drift;
- Air pollution and associated respiratory illnesses experienced by communities adjacent to NSEL sugarcane fields as a result of sugarcane burning prior to harvest;
- Depletion of groundwater as a result of NSEL’s irrigation of sugarcane fields;
- Suspected contamination of community drinking water supplies and natural water bodies with pesticide, runoff from sugarcane fields, and improper treatment and disposal of effluent from cane processing; and
- Incarceration and/or persecution and harassment of community members, and current and former employees, who raise concerns about NSEL’s activities.

The IFC failed to comply with its Policy on Social and Environmental Sustainability (“PSES”), its Disclosure Policy, and Environmental and Social Review Procedures (“ESRP”) in its

appraisal, monitoring, and supervision of Project 25331. Specifically, the IFC failed to assure itself that NSEL was in compliance with domestic laws and IFC's Performance Standards; miscategorized the project; failed to assure itself that NSEL's community engagement led to broad community support for the project; failed to ensure local disclosure of NSEL's social and environmental assessment; and failed to conduct the necessary due diligence of NSEL's environmental and social track record as required under the ESRP that would have demonstrated NSEL could not be expected to meet IFC's Performance Standards ("PS").

Further, these failures have resulted in violations of the complainants' human rights, including, but not limited to, their right to freedom of association, right to safe and healthy working conditions, right to health, and right to water. Several initiatives are underway to define guidelines for the development of biofuels projects to ensure that human rights and the environment are protected. One such initiative, the Roundtable on Sustainable Biofuels,<sup>1</sup> has already issued a set of principles—principles that NSEL does not meet under this loan.<sup>2</sup>

The complainants have collaborated in the preparation of this complaint with the Center for International Environmental Law ("CIEL"), students from the Yale School of Forestry and Environmental Studies and Vermont Law School, and the New Haven-León Sister City Project. *See Annex B for contact information.*

## **II. Facts**

Nicaragua Sugar Estates Limited, S.A. is a subsidiary of Grupo Pellas, the IFC project sponsor and one of the largest and most diversified corporations in Central America. NSEL cultivates over 24,000 hectares of sugarcane in the states of León and Chinandega, Nicaragua.

NSEL owns the San Antonio Sugar Mill or, Ingenio San Antonio ("ISA"), in Chichigalpa, Chinandega, founded in 1890. In recent years it has expanded its sugarcane fields throughout the states of León and Chinandega. In 1998, NSEL began the involuntary resettlement of its workers residing on its property to the neighborhood of Virgen de la Candelaria. Although the IFC's Environmental and Social Review Summary ("ESRS") describes the move to the Candelaria as an improvement in the lives of NSEL employees, both residents and officials from the mayor's office in Chichigalpa claim that following resettlement the quality of life declined and the services provided are inadequate. Some complainants report that the workers were removed from NSEL property because the drinking water wells were contaminated with chemicals from the sugarcane fields.

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<sup>1</sup> Roundtable on Sustainable Biofuels, Second Version of Global Principles for Sustainable Biofuels Production (Oct. 23, 2007), *available at* <http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Home%20Page/RSB-Second%20version%20of%20Principles.pdf> (last visited Mar. 24, 2008).

<sup>2</sup> The IFC's Guidance Notes refer to several international multistakeholder initiatives for large commodity sectors, though not specifically the Roundtable on Sustainable Biofuels, as a way for companies to improve their environmental and social performance. The IFC is a member of the Better Sugarcane Initiative, but the Initiative has yet to publish a set of principles. INTERNATIONAL FINANCE CORPORATION (IFC), GUIDANCE NOTES: PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY, at GN6, G28 [hereinafter GUIDANCE NOTES].

According to the Pan American Health Organization (“PAHO”), there is a growing epidemic of Chronic Renal Insufficiency (“CRI”) in the states of León and Chinandega.<sup>3</sup> CRI is a progressive loss of kidney function measured indirectly by the level of creatinine in the blood. Treatment can slow the deterioration of renal function, but CRI can lead to end-stage renal disease, which is fatal. NSEL field workers have been disproportionately affected by CRI. According to some estimates, there are 1,000 sugarcane workers with CRI in Chinandega.<sup>4</sup> This population is concentrated in neighborhoods of Chichigalpa, such as the Candelaria. In 2003, as a result of the government’s and NSEL’s failure to respond to the workers’ concerns that their exposure to chemicals while employed by NSEL caused them to contract CRI, former NSEL workers and other agricultural workers protested in front of the National Assembly in Managua for 45 days. *See Annex H for newspaper articles.* Although no definitive study has been conducted to determine the cause of CRI, complainants and community members attribute the high incidence of CRI in the region to exposure to pesticides applied by NSEL. Additional independent and credible studies are needed.

Over the past several years, NSEL’s practices have been the subject of numerous citizen complaints, or *denuncias*, and administrative orders. Members of the communities, including the complainants, have filed legal complaints against NSEL with the Nicaraguan Ministry of the Environment and Natural Resources (“MARENA”), the Ministry of Agriculture, Animal Husbandry, and Forestry (“MAGFOR”), the mayor’s offices in Chichigalpa and León, among other relevant agencies. Environmental Attorney General Chinandega-León, Lic. Ali Alvarado, has issued administrative orders to the NSEL for failure to comply with national environmental laws. *See Annex C.* The complainants have also brought the issue to the attention of the national and international media through media reports and public protests. For the last six months, several of the complainants and their families have been demonstrating at the main entrance to the Ingenio San Antonio in Chichigalpa. *See Annex E for photos of the demonstration.*

On October 25, 2006, the IFC approved a \$55 million loan to NSEL for expansion and intensification of sugarcane cultivation and processing, including the construction of a plant to produce and export ethanol. The investment includes a \$25 million A loan and a syndicated B loan for up to \$30 million. Because the loan was approved after April 30, 2006, the IFC’s new Policy on Social and Environmental Sustainability and its associated procedure and Performance Standards apply. The IFC assessed the project as a Category B project. An environmental assessment was conducted of the ethanol plant. Although the IFC’s website indicates that the environmental assessment is available at the mayor’s office in Chichigalpa, the mayor and his staff maintained that they did not have any assessments of the project. Because communities have been unable to see the assessment, it is unclear if NSEL conducted an environmental and social assessment of the impacts of the sugarcane cultivation—either on new or existing lands—necessary to supply the ethanol plant and sugar mill.

The communities of Chichigalpa, Goyena, and Abangasca were informed of the IFC loan only by the students from the Yale School of Forestry and Environmental Studies in the course of their investigations into water quality in the region. Subsequently, the communities learned

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<sup>3</sup> ORGANIZACIÓN PANAMERICANA DE LA SALUD, PROPUESTA DE ABORDAJE: INSUFICIENCIA RENAL CRÓNICA EN TRABAJADORES AGRÍCOLAS DEL PACÍFICO DE NICARAGUA (Mar. 2005) at 3.

<sup>4</sup> *Id.* at 6.

about the CAO complaint process in November 2007 from the Yale students with the assistance of attorneys from the Center for International Environmental Law.

### **III. Injuries**

Although some of the claimants' injuries caused by NSEL began prior to IFC's investment in 2006, NSEL's continued, new, and intensified operations financed by the IFC have resulted in and will result in further social and environmental harms. Discussions with members of the affected communities, together with the results of field investigations, identify the following injuries to NSEL's employees, NSEL's former employees, affected communities, and the environment:

#### **Workforce Impacts**

1. Existence of, and NSEL's inadequate response to, an epidemic of CRI:
  - A. Over 1,000 cases of CRI developed by NSEL employees and subcontracted employees while working in NSEL's sugarcane fields;
  - B. Workers are hired for six-month terms. Contract renewal is conditioned upon test results for creatinine levels (CRI indicator). NSEL will not renew contracts for workers whose levels of creatinine exceed 1.4 mg/dL;
  - C. Failure by NSEL to pay adequate pensions to ex-employees and the families of deceased ex-employees whose inability to continue work for NSEL resulted from occupational illnesses, including CRI, which they developed while employed by NSEL.
2. NSEL's inadequate occupational health and safety practices, resulting in potentially dangerous exposure to pesticides.
3. Interference by NSEL in attempts to establish a union independent of NSEL control, and associated retaliation against those workers who sought to form or join the union.
4. Failure to mitigate the elimination of a significant number of jobs due to mechanization of sugarcane harvesting.

#### **Community Impacts**

1. Recurrent crop damage on land adjacent to NSEL's sugarcane fields as a result of NSEL's aerial fumigation and drift from manual pesticide application.
2. Cattle death associated with contaminated groundwater.
3. Restricted access to paths and roads connecting communities.



4. Air pollution and associated respiratory illnesses experienced by people living near NSEL sugarcane fields, caused by smoke and ash from sugarcane burning. Vulnerable groups such as the elderly, infirm, infants, and youth have been the most severely affected.
5. Depletion of groundwater resulting from irrigation of NSEL's sugarcane fields.
6. Suspected contamination of rivers and community drinking water supplies with pesticides and nutrients.
7. Persecution and harassment of community members, and current and former employees who raise concerns about NSEL's activities.
8. NSEL's flood management practices adversely impact surrounding communities by pumping water from sugarcane fields into residential areas and public roads, exacerbating water quality concerns.
9. After NSEL workers were involuntarily resettled from NSEL property to the Candelaria neighborhood, NSEL closed its company schools that were established for the workers' children, reducing their educational opportunity.

#### **IV. Desired Remedies**

##### **All complainants want:**

- IFC to take the necessary action to ensure that NSEL comes into compliance with all relevant domestic laws and the IFC's Performance Standards and provides redress for harm to community members and current and past NSEL employees.
- IFC to reclassify the project as a Category A project and that the concomitant requirements for Category A projects are met.
- IFC to secure disclosure of all documentation of social and environmental impacts from the project at the mayors' offices in Chichigalpa and León, Nicaragua.

##### **Former NSEL workers want:**

- Indemnification for lost lifetime wages and lifetime health care expenses incurred as a result of illnesses reasonably expected to be caused from occupational pesticide exposure, temperature stress, or consistent dehydration while employed by NSEL.
- The provision of special medical clinics, with relevant specialists, that provide health care to current and past employees that suffer from occupational-related illnesses, not limited to illnesses reasonably expected to be caused from pesticide exposure, temperature stress, or persistent dehydration.

- Implementation of adequate occupational health and safety practices as detailed in the IFC Performance Standards on Environmental and Social Sustainability and in the General and Plantation Crop IFC Environmental, Health, and Safety Guidelines (“EHS Guidelines”), not limited to:
  - Ceasing all use of pesticides that are classified by the World Health Organization as extremely, highly, and moderately hazardous;
  - The consistent provision of adequate and appropriate personal protective equipment for pesticide applicators and handlers;
  - Providing adequate safety training in pesticide handling protocols to all pesticide applicators and handlers;
  - No aerial pesticide application;
  - Respecting post pesticide treatment intervals to avoid employee exposure during reentry to crops containing pesticide residues;
  - The provision of potable water and other measures to prevent dehydration for employees who work in the sugarcane fields;
  - The design and implementation of safe work systems to protect employees who work in the sugarcane fields from temperature stress and heat-related illnesses including, but not limited to mandatory paid breaks or a job rotation system that enables the employees to escape the sun and hydrate themselves;
  - The provision of adequate lavatories and showers for changing out of work clothes and for personal hygiene for all employees who apply, handle, and that are exposed to pesticides;
- Payment of adequate pensions required by domestic law to former NSEL employees and the families of deceased former employees whose inability to continue to work resulted from occupational illnesses which they developed while employed at NSEL due to pesticide exposure, inadequate provision of drinking water, or lack of protection from temperature stress;
- Allowing the establishment and continued operation of a union independent of NSEL control without retaliation against workers who seek to join;
- Re-hiring of workers terminated for attempting to form a union and dismissal of all false criminal charges against said workers;
- University scholarships for the children of former employees who are unable to work due to occupational illnesses, including CRI, which they while employed by NSEL;

- An economic development program for the widows of former NSEL employees;
- Implementation of a grievance mechanism for NSEL employees as provided for in the IFC's Performance Standards;

**The residents of Chichigalpa, Goyena, and Abangasca want:**

- Cessation of aerial fumigation in Chinandega;
- Economic development programs to assist community members in farming their land, in gaining employment, in receiving job training, and in receiving microfinancing;
- A health clinic with medical staff and all necessary equipment and medicine;
- Provision of electricity;
- Fence repair for grazing areas to prevent livestock from wandering into sugarcane fields and subsequent seizure by NSEL;
- Provision of clean drinking water for communities if wells are found to be depleted or contaminated;
- Water supplies to irrigate their fields to compensate for the lowering of water tables caused by NSEL's irrigation;
- Withdrawal or relocation of NSEL irrigation wells an appropriate distance from community drinking water wells;
- Restoration of rivers contaminated by effluent from San Antonio Sugar Mill;
- Indemnification to farmers for crop and livestock damage caused by NSEL pesticide application;
- Establishment of appropriate buffers: sugarcane fields 100 meters back from all homes and wells, 50-meter forested buffer zone between sugarcane fields and communities, 200-meter buffer zone between sugarcane fields and riparian areas;
- Cessation, or adequate control, of sugarcane burning that produces ash and smoke, causing respiratory illnesses;
- Moratorium on application of chemicals to sugarcane fields when communities are harvesting their crops;
- Implementation of flood control practices in sugarcane fields to avoid inundation of community roads and residential areas;

- Re-opening or widening of roads and paths, or creation of similar such roads, that have historically connected communities to each other and neighboring towns and cities;
- Cessation of the persecution of, dropping of all charges against, and compensation for community members who legally protest company activities;

## **V. Documentation**

We are submitting hard copies of this claim, signed by the complainants, via express mail.

## **VI. Policy and Procedure Violations**

The IFC failed to comply with its Policy on Social and Environmental Sustainability (“PSES”), its Disclosure Policy, and its Environmental and Social Review Procedures (“ESRP”) in its appraisal, monitoring, and supervision of Project 25331. Specifically, the IFC failed to assure itself that NSEL was in compliance with domestic laws and IFC’s Performance Standards; miscategorized the project; failed to assure itself that NSEL’s community engagement led to broad community support for the project; failed to ensure local disclosure of NSEL’s social and environmental assessment; and failed to conduct the necessary due diligence of NSEL’s environmental and social track record as required under the ESRP that would have demonstrated NSEL could not be expected to meet IFC’s performance standards. Further, these failures have resulted in the violation of the complainants’ human rights, including, but not limited to, their right to freedom of association, right to safe and healthy working conditions, right to health, and right to water. The loan is also inconsistent with the principles developed by the Roundtable on Sustainable Biofuels.<sup>5</sup>

### **A. The IFC Failed to Assure Itself that NSEL is in Compliance with the IFC Performance Standards on Social and Environmental Sustainability**

The IFC PSES requires the IFC to ensure that the projects it finances are operated in a manner consistent with the requirements of the Performance Standards (“PS”).<sup>6</sup> That NSEL’s activities were and are not in compliance with the Performance Standards is known and should have been known to IFC.

#### **1. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 1**

Performance Standard 1 (“PS1”) requires the preparation of a Social and Environmental Assessment (“SEA”) of the project in addition to community engagement, which includes disclosure of the SEA, consultation with affected communities, and the establishment of a grievance mechanism. NSEL’s activities were deficient or non-existent for each of these requirements.

<sup>5</sup> Roundtable on Sustainable Biofuels, *supra* note 1.

<sup>6</sup> INTERNATIONAL FINANCE CORPORATION, POLICY ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (Apr. 30, 2006) at para. 5 [hereinafter PSES].

## NSEL Failed to Disclose Social and Environmental Assessment to Affected Communities

Because the IFC-funded project was expected to have social and environmental impacts,<sup>7</sup> NSEL was required to conduct an SEA, including those impacts within the project's area of influence.<sup>8</sup> Furthermore, PS1 requires that the client disclose any SEA it prepares. In cases where there are adverse social or environmental impacts, as here, the client must disclose those impacts before the project commences and on an ongoing basis.<sup>9</sup> According to the Environmental and Social Review Summary on IFC's website, NSEL prepared an environmental impact statement of the ethanol plant at the San Antonio Sugar Mill which it disclosed to the town of Chichigalpa.<sup>10</sup> Specifically, the Summary of Proposed Investment indicates that the environmental documents are available at the mayor's office in Chichigalpa.<sup>11</sup>

Several Yale students visited the mayor's office in Chichigalpa in January 2007 and were told that neither the SEA nor any environmental documents relating to the project were available. The mayor and his staff, to whom the students spoke, were not even aware that the IFC had made a loan to NSEL. The information was also unavailable at the mayor's office in León.

Similarly, PS1 requires the client to disclose the Action Plan to the affected communities.<sup>12</sup> The Action Plan was also not available at the mayor's office in Chichigalpa. Although the Action Plan is posted on the IFC website,<sup>13</sup> it is available only in English and, consequently, not readily accessible to Spanish-speaking community members.

One of the students, Olivia Kaplan, contacted staff at the IFC in November 2007 to request a copy of the SEA. Spanish language copies of the ESRS and the Action Plan were also requested from both the Agribusiness Department and the IFC environmental specialists who evaluated Project 25331. While both indicated in emails that the information would be forthcoming, neither has responded since the initial inquiry. The information the communities have regarding the IFC loan were provided by CIEL staff and the Yale students during a site visit to León and Chichigalpa in November 2007.

## Affected Communities were not Consulted

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<sup>7</sup> INTERNATIONAL FINANCE CORPORATION, ENVIRONMENTAL & SOCIAL REVIEW SUMMARY, NICARAGUA SUGAR ESTATES LIMITED SA, *available at* <http://www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/5544f327a0cb78d3852571f0006fb0cd?opendocument> (last visited Mar. 24, 2008) [hereinafter ESRS].

<sup>8</sup> INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (Apr. 30, 2006) at PS1, para. 5 [hereinafter PERFORMANCE STANDARDS].

<sup>9</sup> *Id.* at PS1, para. 20.

<sup>10</sup> ESRS, *supra* note 7.

<sup>11</sup> INTERNATIONAL FINANCE CORPORATION, SUMMARY OF PROPOSED INVESTMENT, NICARAGUA SUGAR ESTATES LIMITED SA, *available at* <http://www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/d9b9cbe94de5c288852571f10043c759?opendocument> (last visited Mar. 24, 2008) [hereinafter SPI].

<sup>12</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS1, para. 26.

<sup>13</sup> NICARAGUA SUGAR ESTATES LIMITED SA, ENVIRONMENTAL ACTION PLAN, *available at* [http://www.ifc.org/ifcext/spiwebsite1.nsf/0/5544F327A0CB78D3852571F0006FB0CD/\\$File/NSEL%20EAP.pdf](http://www.ifc.org/ifcext/spiwebsite1.nsf/0/5544F327A0CB78D3852571F0006FB0CD/$File/NSEL%20EAP.pdf) (last visited Mar. 24, 2008).

At a minimum, PS1 requires that the client engage in an on-going process of consultation with affected communities. In order for consultations to be meaningful, information regarding the impacts of the projects must be disclosed to the communities prior to consultations in a form that is readily understandable to them. For projects with significant potential adverse impacts, or potential adverse impacts in the case of projects affecting Indigenous Peoples, a process of free, prior and informed consultation leading to broad community support of the project must be undertaken.

The impacts of this project include significant, irreversible health impacts to NSEL workers and surrounding communities resulting from the exposure to chemical pesticides and herbicides applied to sugarcane fields owned or leased by NSEL. Exposure to these chemicals is either directly through their application, through consumption of well-water contaminated by agricultural runoff, and/or through inhalation of chemical-laden ash when sugarcane fields are burned prior to harvest. The project also includes potential adverse impacts to Indigenous Peoples through the leasing of land for sugarcane cultivation in the indigenous Sutiaba communities of Abangasca and Goyena. Those communities are also impacted by the depletion of drinking water wells caused by irrigation of NSEL's sugarcane fields. Accordingly, NSEL should have undertaken a process of free, prior, and informed consultation leading to broad community support of the project.

Not only did NSEL fail to undertake a process of free, prior, and informed consultation, but also, according to the individuals who are party to this complaint, no consultations were undertaken at any time prior or during the assessment period. In fact, complainants and relevant government authorities<sup>14</sup> were unaware of IFC's loan until the Yale students informed them in early 2007. Consistent with these findings, the section on Community Engagement in the ESRS contains no relevant information or documentation demonstrating that NSEL made any effort to consult with the community regarding the IFC-funded project.<sup>15</sup>

#### NSEL Does Not Have an Established Grievance Mechanism

If the client anticipates ongoing impacts to affected communities, the client must establish a grievance mechanism to respond to communities' concerns in an open and transparent way without cost or retribution.<sup>16</sup> NSEL has been the subject of numerous complaints to local and national authorities and should have anticipated that ongoing concerns would warrant the creation of a grievance mechanism. Nonetheless, former NSEL employees and community members party to this complaint attest that there is no such mechanism by which they can bring their concerns to the company. Furthermore, individuals who have made complaints, or *denuncias*, to local authorities have been harassed and even jailed on false charges. Two of the complainants, Pablo Antonio Centeno Madrigal, of the *Comite Sí al la Vida, No a la Destrucción del Medio Ambiente*, and Elías Samuel Ruiz Mendoza, of the *Asociación para el Desarrollo de la Comunidad de Abangasca*, report harassment and unjust imprisonment on false charges brought

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<sup>14</sup> Government authorities unaware of the IFC loan to NSEL include the mayor's office in the cities of León and Chichiglapa, the National Institute of Forestry in León, the Nicaraguan Ministry of the Environment and Natural Resources; and the Ministry of Agriculture, Animal Husbandry, and Forestry.

<sup>15</sup> ESRS, *supra* note 7.

<sup>16</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS1, para. 23.

by NSEL private security, including illegal burning of sugarcane fields, all of which have been dismissed.

NSEL's Social and Environmental Assessment Was Inadequate Because it Did Not Include Impacts from All Project Activities and Impacts Within the Projects' Areas of Influence

A complete SEA should include risks and impacts from all project activities and the impacts from those projects' areas of influence. The relevant definition of area of influence for this project is "the primary project site(s) and related facilities that the client (including its contractors) develops or controls."<sup>17</sup> The assessment undertaken by NSEL seemingly did not include the impacts from NSEL's sugarcane cultivation on land it owns or leases or the impacts from additional land acquisition.

The only environmental impact statement referenced in the ESRS is one for the construction of an ethanol plant at the San Antonio Sugar mill that was undertaken in 2005.<sup>18</sup> However, the construction of the ethanol plant is only one of the activities under the loan. The loan description also describes the acquisition of land, improvements in efficiency and capacity at the sugar mill, purchase of harvesting equipment, and the replacement of the irrigation systems.<sup>19</sup> These activities, particularly the acquisition of land, and their impacts should have been the subject of a social and environmental assessment. Because no environmental documents have been publicly disclosed, the exact location of the land acquired is not known. However, there is reason to believe that the land that was purchased or leased is located in the department of León, at the edge of the expanding frontier of sugarcane fields, potentially in or near the indigenous Sutiaba communities of Goyena and Abangasca. Recent expansion of sugarcane fields has occurred in the lands between the communities of Goyena and Quezalguaque.

The SEA should also include the environmental and social impacts from all sugarcane fields that NSEL develops or controls. These are part of the project's area of influence in addition to lands purchased with IFC funds. The loan is being used to construct an ethanol plant and increase the production capacity of its sugar mill in Chichigalpa, both of which depend on a large quantity of sugarcane. NSEL cultivates over 24,000 hectares of sugarcane in the departments of Chinandega and León. The application of chemical pesticides and herbicides on the sugarcane fields and the method of harvest, which entails burning the fields, have significant and adverse impacts on the sugarcane workers and the surrounding communities. Yet, the ESRS does not include any of these impacts, nor does it identify the measures NSEL will take to mitigate them, except for a passing reference to NSEL's efforts to use integrated pest management. A rigorous analysis of the impacts from its sugarcane cultivation should have been conducted.

The two most significant omissions in NSEL's ESRS are the health impacts of its operations and its impact on indigenous lands. The ESRS fails to account for, or address, over 1,000 diagnosed cases of Chronic Renal Insufficiency ("CRI")—an illness known to result from occupational exposure to pesticides, temperature stress, and persistent dehydration—since 2001 by individuals working in NSEL sugarcane fields. Also, the ESRS states that NSEL has never infringed or

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<sup>17</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS1, para. 5.

<sup>18</sup> ESRS, *supra* note 7.

<sup>19</sup> SPI, *supra* note 11.

impacted on Sutiaba indigenous lands in the state of León. However, NSEL's project description, which references lease agreements for land in the indigenous communities of Abangasca and Goyena in the department of León, demonstrate that the company does indeed have an impact on indigenous land. *See Annex G.*

A complete SEA would include all social and environmental impacts of each project activity and those caused by the cultivation of sugarcane. Additionally, separate labor<sup>20</sup> and health assessments<sup>21</sup> are warranted given NSEL's prior and current labor practices and the evidence of a CRI epidemic. Because the SEA and consultations during the assessment were deficient, the Action Plan did not include a complete set of measures to mitigate the social and environmental impacts of the project.

The following is a list of social and environmental impacts that should have been included in a complete SEA of NSEL's operations, but seemingly were not:

- The impacts and risks of air pollution and associated respiratory illnesses on people living near NSEL sugarcane fields caused by particulates and smoke from sugarcane burning and dust from barren fields after sugarcane burning;
- The impacts and risks on the livelihoods and culture of the Sutiaba indigenous people;
- The impacts and risks of contamination of community drinking water supplies and rivers and streams with pesticides, agricultural runoff, and effluents from the San Antonio Sugar Mill;
- The impacts and risks of improper disposal of excess pesticides and pesticide containers;
- The impacts and risks to community farmers of crop damage, ruined harvests, and permanent soil damage resulting from NSEL's aerial fumigation and pesticide application that affects land outside sugarcane fields;
- The impacts and risks of community livestock and cattle death from pesticide exposure on pastures proximate to sugarcane fields;
- The impacts and risks caused by the of lowering of water tables from NSEL's use of water to irrigate its sugarcane fields;
- The impacts of loss of roads connecting communities due to acquisition of land by NSEL for sugarcane harvesting;

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<sup>20</sup> GUIDANCE NOTES, *supra* note 2, at GN2, G4.

<sup>21</sup> GUIDANCE NOTES, *supra* note 2, at GN4, Annex C.



- The impacts and risks created by NSEL flood management practices that include pumping of water from sugarcane fields into residential areas and roads;
- The adverse local economic impacts of mechanization of sugarcane harvesting; and
- Decreases in agricultural and livestock yields from project-related pollution.

## **2. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 2**

Performance Standard 2 (“PS2”) establishes the minimum labor and working protections for NSEL employees and subcontracted employees.<sup>22</sup> NSEL is not in compliance with PS2 because it fails to comply with the requirements for workers’ organizations, grievance mechanism, and occupational health and safety. In so doing, NSEL has violated core labor standards established by the International Labor Organization (“ILO”) and ILO conventions ratified by Nicaragua.

### NSEL Interfered with the Formation of an Independent Workers’ Organization

PS2 requires that IFC clients comply with national law recognizing workers’ rights to form and join workers’ organizations of their choosing without interference and to bargain collectively.<sup>23</sup> Further, PS2 prohibits IFC clients from discouraging workers from forming or joining workers’ organizations of their choosing or retaliating against workers who participate, or seek to participate, in unions and bargain collectively.<sup>24</sup> These rights are also protected by ILO Convention 87 on Freedom of Association and Protection of the Right to Organize,<sup>25</sup> ILO Convention 98 on the Right to Organize and Collective Bargaining,<sup>26</sup> and the American Convention on Human Rights,<sup>27</sup> all of which have been ratified by Nicaragua.

There are five unions at the San Antonio Sugar Mill in Chichigalpa. There is reason to believe that those unions are under NSEL control in the ways described in Annex C of Guidance Note 2 may pertain. Individuals party to this complaint allege that the company selects the leaders of those unions.<sup>28</sup> Beginning in January 2006, a group of workers at the San Antonio Sugar Mill attempted three times to form an independent union. Those attempts were contested by the existing unions. Many of the organizers were fired and several have been the subject of

<sup>22</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2.

<sup>23</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para. 9.

<sup>24</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para. 10.

<sup>25</sup> Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, *entered into force* July 4, 1950.

<sup>26</sup> Right to Organise and Collective Bargaining Convention (ILO No. 98), 96 U.N.T.S. 257, *entered into force* July 18, 1951.

<sup>27</sup> American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (Article 16 protects the right to associate freely for labor purposes).

<sup>28</sup> There have been allegations that the company makes payments to those union leaders. Annex C of Guidance Note 2 might be applicable.

harassment by the company. In an attempt to secure their rights, several of the organizers initiated lawsuits against the company. They also filed a case with the ILO's Committee on Freedom of Association Cases.<sup>29</sup> In response, the ILO sent a mission to Nicaragua to investigate the case in February 2008. The matter is also the subject of a request for precautionary measures at the Inter-American Commission on Human Rights.<sup>30</sup> *See Annex F*

### NSEL Employs Children in Dangerous Work

PS2 prohibits project sponsors from employing children under the age of 18 in work that is dangerous or harmful to their health.<sup>31</sup> Interviews conducted by the Yale students found that several of the field workers from Goyena were employed by NSEL at age 15 or younger. As described above, the exposure to intense heat and pesticides while in the sugarcane fields jeopardizes the children's health. Not only is this a violation of PS2, but also a violation of the provisions of ILO Convention 138 on Minimum Age, to which Nicaragua is a party, which prohibits the employment of children under the age of 16 under conditions that may be harmful to their health and without adequate training.<sup>32</sup>

### NSEL Has Not Established a Grievance Mechanism

PS2 requires that IFC clients provide a grievance mechanism for workers and workers' organizations to raise reasonable workplace concerns.<sup>33</sup> The grievance mechanism must be easily accessible, provide prompt feedback that addresses concerns, and should be a transparent process that does not lead to retribution or fear of retribution.<sup>34</sup> The IFC did identify that NSEL lacked a grievance mechanism and included a requirement in NSEL's Environmental Action Plan that NSEL establish one by March 2007. However, complainants attest that as of March 2008 NSEL had not established a grievance mechanism that is readily accessible to its workforce without the threat of retribution.

### NSEL Does Not Provide Workers with a Safe and Healthy Work Environment

PS2 requires that the client conform to good international industry practice and "take steps to prevent accidents, injury, and disease arising from, associated with, or occurring in the course of work by minimizing, so far as reasonably practicable, the causes of hazards."<sup>35</sup>

NSEL workers are exposed to harsh conditions in the field, applying pesticides and harvesting sugarcane in intense heat. NSEL's efforts to avoid or minimize the hazards caused by these conditions have been insufficient and inconsistent with good international industry practice. For example, NSEL is not in compliance with EHS Guidelines on Plantation Crop Production and General EHS Guidelines for Occupational Health and Safety because it fails to: use pesticides

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<sup>29</sup> Case No. 2544

<sup>30</sup> Case No. 9-108-07

<sup>31</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para. 14.

<sup>32</sup> Minimum Age for Admission to Employment Convention (ILO No. 138), *adopted* June 26, 1973, art. 3(3), 1015 U.N.T.S. 297, *entered into force* June 19, 1976.

<sup>33</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para. 13.

<sup>34</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para. 13.

<sup>35</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS2, para 16.

that are low in human toxicity; provide its employees who work in the sugarcane fields with adequate supplies of potable water to prevent severe dehydration or breaks to get relief from the heat; provide pesticide applicators and handlers with adequate and appropriate personal protective equipment, resulting in pesticide exposure from dermal contact and inhalation; and provide workers with facilities for showering to change into and out of street and work clothes. Complainants describe that respiratory protection, gloves, boots, and protective suits are either not made available, not consistently provided, or not replaced when they wear out. Several complainants attest that the pesticide containers they were provided with leaked. Because NSEL applies pesticides aerially while workers are in the field, it is not in compliance with EHS Guidelines that recommend that pre-harvest and post-treatment intervals be respected to avoid pesticide exposure.

NSEL's practices are not even consistent with those of other large sugar companies. In October 2007, the IFC signed a loan agreement with Monte Rosa, S.A.,<sup>36</sup> a company that owns and operates sugarcane fields and a sugar mill in the department of Chinandega, not far from NSEL's San Antonio mill. At least in its ESRS, Monte Rosa purports to have "OHS supervisors who ensure that workers are properly hydrated during their working hours and who provide first aid."<sup>37</sup> Field visits described in Monte Rosa's ESRS confirmed that usage of personal protective equipment was good.<sup>38</sup> The ESRS for NSEL contains no such information, and individuals to this complaint attest that NSEL does not provide, or does not provide in sufficient quantity, water or protective gear for those working in the sugarcane fields.

### **3. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 3**

Performance Standard 3 ("PS3") establishes pollution and abatement requirements to avoid or, where avoidance is not possible, to minimize or reduce the project's adverse impacts on human health and the environment.<sup>39</sup> Through its use of toxic pesticides, improper disposal of hazardous waste, and air pollution, NSEL violates these requirements and contributes to the toxic load of an area that has been in cultivation—first with cotton and now sugarcane and peanuts—for generations. This pollution also interferes with the internationally recognized right to health and to a healthy environment of the people of Chinandega and León.<sup>40</sup>

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<sup>36</sup> IFC Project number 26009.

<sup>37</sup> INTERNATIONAL FINANCE CORPORATION, ENVIRONMENTAL & SOCIAL REVIEW SUMMARY, MONTA ROSA SUGAR, *available at* <http://www.ifc.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/b192835894c8c84e852572ea00809933?opendocument> (last visited Mar. 24, 2008) [hereinafter ESRS MONTE ROSA].

<sup>38</sup> *Id.*

<sup>39</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS3, para. 3.

<sup>40</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (Article 12 protects the right to health, which the Committee on Economic, Social, and Cultural Rights in its General Comment No. 14, interpreted to require Parties to "formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.") [hereinafter ICESCR].

### NSEL Landfills or Burns its Used Pesticide Containers

NSEL does not satisfy PS3 because it does not treat, destroy, and dispose of its hazardous and non-hazardous waste in an environmentally sound manner.<sup>41</sup> The EHS Guidelines on Plantation Crop Production advise that contaminated pesticide containers should be handled as hazardous waste and disposed of properly.<sup>42</sup> Although the ESRS notes that NSEL will implement new measures to dispose of municipal solid waste, there is no mention of how NSEL disposes of used pesticide containers. The Ministry of the Environment and Natural Resources (“MARENA”) and complainants describe a “toxic cemetery” on NSEL property where the company previously buried used pesticides containers. Complainants attest that NSEL’s current practice is to burn pesticide-laden waste with the sugarcane prior to harvest.

### NSEL Uses Highly and Moderately Hazardous Pesticides

The large-scale use of pesticides is critical to NSEL’s operations. Pesticides are applied to its sugarcane fields manually and via aerial spraying. Accordingly, NSEL should have included in its SEA information on its need to use the pesticides, proposed use, and the nature and degree of associated risks.<sup>43</sup>

Furthermore, NSEL uses pesticides that are high in human toxicity and that are classified by the World Health Organization as highly hazardous and moderately hazardous, contrary to PS3 and EHS Guidelines on Plantation Crop Production.<sup>44</sup> Complainants attest that NSEL uses Warfarin, a WHO Class 1b rodenticide. Gramoxone, or paraquat dichloride, a WHO Class II chemical, is applied by employees without proper training or protective equipment.

NSEL also violates PS3 in applying pesticides in a manner inconsistent with international standards. Specifically, NSEL violates the Food and Agriculture Organization’s International Code of Conduct on the Distribution and Use of Pesticides which requires “the avoidance of pesticides whose handling and application require the use of personal protective equipment that is uncomfortable, expensive or not readily available, especially in tropical climates.”<sup>45</sup>

### NSEL’s ESRS Did Not Include the Requisite Information on its Greenhouse Gas Emissions

In order to determine whether it must implement measures to reduce or offset greenhouse gas (“GHG”) emissions required by PS3, the client must first assess to what extent its operations emit GHGs.<sup>46</sup> NSEL’s ESRS does not include any information on its GHG emissions, but there is reason to believe that they are significant as defined by PS3, or 100,000 metric tons of carbon

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<sup>41</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS3, para. 5.

<sup>42</sup> INTERNATIONAL FINANCE CORPORATION, ENVIRONMENTAL, HEALTH, AND SAFETY GUIDELINES FOR PLANTATION CROP PRODUCTION, at 5 (Apr. 30, 2007).

<sup>43</sup> GUIDANCE NOTES, *supra* note 2, at GN3, G36.

<sup>44</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS3, paras. 6,15.

<sup>45</sup> UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION, INTERNATIONAL CODE OF CONDUCT ON THE DISTRIBUTION AND USE OF PESTICIDES (REVISED), *adopted by the Hundred and Twenty-third Session of the FAO Council in November 2002*, art. 3.5, available at <ftp://ftp.fao.org/docrep/fao/005/y4544E/y4544E00.pdf>.

<sup>46</sup> GUIDANCE NOTES, *supra* note 2, at GN3, G30.

dioxide.<sup>47</sup> The ESRS for the Monte Rosa sugar mill estimates that emissions from its cogeneration facility will exceed that limit.<sup>48</sup> NSEL should also include in its assessment of carbon dioxide emissions from burning its sugarcane fields prior to harvest.

#### **4. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 4**

NSEL did not evaluate the impacts to the health and safety of the affected community from its operations, as required by Performance Standard 4 (“PS4”), much less take steps to avoid or mitigate those impacts. Complainants from the affected communities of Goyena, Abangasca, and Chichigalpa attest that they are exposed to toxic substances as a result of NSEL’s operations and that their natural resources are being overexploited and contaminated. These impacts also constitute a violation of the communities’ right to health guaranteed by international law.<sup>49</sup>

##### NSEL Failed to Assess the Impacts of its Operations on Affected Communities

IFC clients should, as part of the SEA, assess the impacts to local communities from “project-related activities in the community within the project’s area of influence.” As described previously, the area of influence for NSEL’s project includes the sugarcane fields it cultivates to supply its sugar mill and ethanol plant. Impacts from the cultivation of sugarcane include the use of water for irrigation of the fields and the exposure to chemicals applied to those fields either through direct contact or indirectly through water and soil contamination.

NSEL’s ESRS describes only its emergency response plans and security measures. By contrast, the ESRS for the Monte Rosa project admits that the most significant impact to local communities is from aerial spraying of pesticides.<sup>50</sup> NSEL also uses aerial spraying of pesticides to its fields located in the department of Chinandega,<sup>51</sup> contrary to the EHS Guidelines on Plantation Crop Production, but NSEL’s ESRS does not evaluate this or any impact to the community through its operations.

##### NSEL Does Not Satisfy the Hazardous Materials Safety Requirement

PS4 requires IFC clients to “prevent or minimize the potential for community exposure to hazardous materials that may be released by the project.”<sup>52</sup> NSEL is not in compliance with this requirement because the communities of Goyena, Abangasca, and Chichigalpa are exposed to chemical pesticides directly and through contaminated soil and water. According to documentation NSEL submitted to MARENA in León, NSEL applies paraquat dichloride, commonly known as Gramoxone, to its fields, a chemical classified as highly toxic in the United States, moderately hazardous by the WHO, and known to cause acute renal failure when ingested.<sup>53</sup> NSEL’s workers are exposed to these chemicals through inhalation and dermal

<sup>47</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS3, n.10.

<sup>48</sup> ESRS MONTE ROSA, *supra* note 37.

<sup>49</sup> ICESCR, *supra* note 40, at art. 12.

<sup>50</sup> ESRS MONTE ROSA, *supra* note 37.

<sup>51</sup> The department of León has prohibited the aerial spraying of chemicals.

<sup>52</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS4, para. 7.

<sup>53</sup> Material Safety Data Sheet, Paraquat Dichloride Hydrate Pestanal (Jan. 29, 2006).

contact during manual application, and their families are secondarily exposed through residues left on work clothing. NSEL's aerial application of pesticides on its sugarcane fields in the department of Chinandega, contrary to the recommendation in the EHS Guidelines on Plantation Crop Production, also exposes the settlements of surrounding communities and employees working in the NSEL's sugarcane fields to pesticides that cause acute and chronic health effects. Further, NSEL's agricultural wastewater and stormwater management practices fail to adequately collect and treat runoff from sugarcane fields that contain pesticides, which complainants believe contaminates groundwater and surface waters. As described previously, NSEL does not properly dispose of used pesticide containers, which can cause ground and water contamination. NSEL's method of burning the sugarcane prior to harvest, contrary to the recommendations included in the EHS Guidelines on Sugar Manufacturing, exposes communities to pesticides through airborne particulates. NSEL's erosion management practices leave soils exposed after burning, allowing wind to lift and carry the pesticide-laden topsoil into those community areas that are not protected by sufficient vegetative buffers.

#### NSEL Activities Overexploit Water Resources, Contaminate Soil and Water

PS4 requires IFC clients to "avoid or minimize adverse impacts due to project activities on soil, water, and other natural resources in use by the affected communities."<sup>54</sup> NSEL's irrigation of its sugarcane fields depletes communities' drinking water wells, and its use of pesticides is believed to contaminate wells, rivers, and soils. Though not all of the agricultural contaminants are the result of NSEL's activities, the Performance Standards require that the client address incremental or cumulative impacts especially in tenuous health situations,<sup>55</sup> as here.

NSEL's use of local groundwater to irrigate its sugarcane fields is lowering the water table in the region. Residents observe a reduction in available drinking water that they attribute to NSEL's irrigation practices. The community of Quezalguaque, located near Goyena and Abangasca, was so concerned that its city council passed a resolution in which it asserted that, due to NSEL's activities, its water source, the Quezalguaque River, would run dry within four to five years. *See Annex D for the letter from the mayor of Quezalguaque to MARENA.*

NSEL depletes local topsoil by burning sugarcane fields and leaving the barren soils exposed and susceptible to erosion. During tropical depression Barbara in May 2007, NSEL exacerbated the flooding by pumping water from sugarcane fields into public roads and residential areas.

According to complainants, NSEL discharges untreated agricultural effluents containing nutrients and pesticides from sugarcane fields into surface waters, leading to the contamination of communities' drinking water and destroying the ecological integrity of rivers, streams, and oceans.<sup>56</sup> NSEL's soil management program also contaminates rivers by increasing sediment loads that contain pesticides and nutrients. Not only do the sediment loads kill freshwater organisms due to toxicity, but the sediment deposition in streams caused by NSEL's cultivation practices also embeds cobble, gravel, and pebble substrate with sand and fine sediment destroying macroinvertebrate habitat and spawning grounds for fish.

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<sup>54</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS4, para. 9.

<sup>55</sup> GUIDANCE NOTES, *supra* note 2, at GN4, G15.

<sup>56</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS3, para. 4.

## **5. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 5**

It is not clear if the requirements on land acquisition and involuntary resettlement in Performance Standard 5 apply because NSEL did not undertake or disclose the necessary Social and Environmental Assessment,<sup>57</sup> which would have identified the location of the land acquired with IFC funds, the owner, and the conditions under which it was acquired.

## **6. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 6**

Performance Standard 6 (“PS6”) seeks to ensure that the project activities do not threaten biodiversity or use renewable natural resources in an unsustainable manner. NSEL’s assessment of its impacts on habitat and its management of natural resources is deficient. NSEL’s use of land for sugarcane cultivation has converted modified habitat, and its water and soil management is unsustainable.

### NSEL Converts Abandoned Agricultural Fields to Sugarcane

PS6 requires IFC clients to minimize conversion of modified habitat, including agricultural areas.<sup>58</sup> However, NSEL destroys and degrades modified habitat, such as re-vegetated abandoned cotton and other agricultural fields, through expansion of its sugarcane cultivation. For example, when NSEL expanded its cultivation into the indigenous community of Abangasca in 2003, it removed a secondary-growth stand of 400 mango trees.<sup>59</sup>

### NSEL’s Use of Soil and Water Resources are Unsustainable

PS6 requires the IFC client to manage renewable natural resources, such as air, water, and soil ecosystems, in a sustainable manner.<sup>60</sup> NSEL fails to achieve this requirement through its unsustainable use of soil and water resources, thereby interfering with the internationally recognized rights to food and water of the people of Chinandega and León.<sup>61</sup>

NSEL’s pesticide application and soil management erode topsoil, degrade soil fertility, and contaminate community soils adjacent to its sugarcane fields. NSEL’s soil management practices erode topsoil by leaving fields barren after harvest and subsequent burning, without implementing best management practices to prevent soil loss. Land adjacent to NSEL’s sugarcane fields is contaminated through aerial pesticide application and via wastewater and storm water runoff.

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<sup>57</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS5, para 4.

<sup>58</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS5, para. 5.

<sup>59</sup> Comite Si a la Vida, No a la Destruccion del Medio Ambiente, Informe (2004) (translated by Jean Silk and Stacy A. Davis of the New Haven-Leon Sister City Project).

<sup>60</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS6, para. 14, n.7.

<sup>61</sup> ICESCR, *supra* note 40, at arts. 11-12; *See also* Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, E/C.12/2002/11 (Jan. 20, 2003).

NSEL's agricultural practices deplete and are believed to contaminate groundwater. As described previously, many communities are concerned about the decreasing water table. The city council of Quezalguaque issued a resolution predicting that its source of water, the Quezalguaque River, will run dry in four to five years due to NSEL's activities. Complainants have observed and report that NSEL discharges untreated agricultural effluents containing nutrients and pesticides from sugarcane fields into rivers and groundwater, contaminating the drinking water of the communities of Goyena, Abangasca, and Chichigalpa. In addition, according to MARENA-León, the effluent from NSEL's shrimp farm in PoneLOYa has had profound impacts on the quality of the aquatic ecosystem.

## **7. The IFC Failed to Assure Itself that NSEL is in Compliance with Performance Standard 7**

NSEL failed to recognize the impacts of its sugarcane cultivation on the indigenous Sutiaba communities of Abangasca and Goyena. Consequently, it is not in compliance with any of the requirements in Performance Standard 7 ("PS7") to avoid, minimize, mitigate, or compensate for project impacts on Indigenous Peoples.

### NSEL Failed to Recognize Impacts on Communities of Indigenous Peoples

PS7 requires IFC clients to identify communities of Indigenous Peoples who may be affected by the project within the project's area of influence.<sup>62</sup> As described previously, the area of influence for NSEL's project includes the sugarcane fields that it owns or leases. As demonstrated by documentation submitted to MARENA (*See Annex G*), NSEL has leased land for sugarcane cultivation near the community of Abangasca, an indigenous community of Sutiaba. This and other indigenous communities<sup>63</sup> are affected by NSEL's agricultural practices through, *inter alia*, depletion of groundwater from irrigation, soil and water contamination from chemical pesticides applied to the sugarcane fields, and flooding from waters pumped off the fields after rain events. The sale and lease of Sutiaba lands to NSEL also fragments the community. However, NSEL does not recognize these impacts. Indeed, NSEL falsely claims in its ESRS that its activities have never infringed on, impacted, or involved the acquisition of Sutiaba indigenous lands.<sup>64</sup>

### NSEL Did Not Undertake a Process of Free, Prior, and Informed Consultation with the Sutiaba

PS7 requires IFC clients whose project adversely impacts communities of Indigenous Peoples to engage in a process of free, prior, and informed consultation.<sup>65</sup> Because NSEL failed to recognize the impacts on the Sutiaba communities, it did not undertake any consultation process with the communities of Goyena and Abangasca, members of which are parties to this complaint.

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<sup>62</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS7, para. 7.

<sup>63</sup> MARÍA YANIREE ÁLVAREZ OLIVAS ET AL., ESTUDIO TÉCNICO JURÍDICO DE LA PROPIEDAD EN LA COMUNIDAD INDÍGENA ABANGASCA SUR, SUTIABA, LEON (2006).

<sup>64</sup> ESRS, *supra* note 7.

<sup>65</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS7, para. 9.



## **8. The IFC Failed to Assure Itself that NSEL was and is in Compliance with Applicable National Laws**

The PS explicitly requires that “clients must comply with applicable national laws, including those laws implementing host country obligations under international law.”<sup>66</sup> NSEL’s activities have been the subject of numerous citizen complaints, resolutions, and administrative orders by government agencies for its violations of domestic law. Included in Annex I are copies of relevant laws. There is reason to believe that NSEL is in violation of: General Law on Environment and Natural Resources,<sup>67</sup> Occupational Health Law,<sup>68</sup> Environmental Crimes Law,<sup>69</sup> Environmental Impact Assessment regulation,<sup>70</sup> Emergency Law on Sustainable Use of Forests,<sup>71</sup> Regulation on the Use of Pesticides and other Toxic and Dangerous Substances,<sup>72</sup> and Decree on Water Contamination.<sup>73</sup>

Specifically, Article 4 of Emergency Law on Sustainable Use of Forests requires a 200-meter buffer zone of vegetation between agricultural fields and rivers and streams that provide water for irrigation or municipal purposes. The Yale students found that in the community of Goyena, the sugarcane fields are less than 200 meters from river and stream beds. Further, Under the General Law on the Environment and Natural Resources and the regulation on environmental impact assessments, individuals who clear five acres or more of forested land must submit an Environmental Impact Document containing an Environmental Impact Study to the Ministry of the Environment (MARENA). In expanding its sugarcane cultivation in and around the communities of Goyena and Abangasca, NSEL cleared more than five acres, in total, of forested land without submitting the necessary documentation to MARENA.

### **B. IFC Did Not Comply with its Obligations Under IFC’s Policy on Social & Environmental Sustainability and its Environmental & Social Review Procedures**

#### **IFC Miscategorized the Project by Failing to Recognize the Severity of its Social and Environmental Impacts**

According to the criteria set forth in the PSES, the IFC should have found that NSEL’s project was a Category A project. The PSES defines Category A projects as projects “with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented.”<sup>74</sup> The PSES defines Category B projects as projects “with potential limited adverse social or environmental impacts that are few in number, generally site specific, largely

<sup>66</sup> PERFORMANCE STANDARDS, *supra* note 8, at Introduction, para. 3.

<sup>67</sup> Ley No. 217, Ley General Del Medio Ambiente y Los Recursos Naturales (1996).

<sup>68</sup> Ley No. 456, Ley de Adición de Riesgos y Enfermedades Profesionales a la Ley 185, Código del Trabajo 08-VII-2004 (2004)

<sup>69</sup> Ley No. 559, Ley Especial de Delitos Contra el Medio Ambiente y Los Recursos Naturales (2005).

<sup>70</sup> Decreto 45-94, Reglamento de Permiso y Evaluación de Impacto Ambiental (1994).

<sup>71</sup> Decreto 235, Ley de Emergencia Sobre Aprovechamiento Racional de los Bosques (1976).

<sup>72</sup> Decreto 49-98, Reglamento de la Ley No. 274, Ley Basica para la Regulación y Control de Plaguicidas, Sustancias Toxicas, Peligrosas y Otras Similares (1998).

<sup>73</sup> Decreto 33-95, Disposiciones para el Control de la Contaminación Proveniente de las Descargas de Aguas Domesticas, Industriales y Agropecuarias (1995).

<sup>74</sup> PSES, *supra* note 6, at para. 18.

reversible and readily addressed through mitigation measures.”<sup>75</sup> The activities financed by IFC’s \$55 million loan to NSEL include the expansion of the capacity and efficiency of its sugar mill and to expand its cultivation of sugarcane through land acquisition. These activities have an overwhelming diversity of severe, irreversible, and unprecedented environmental and social impacts that span the departments of, and adversely affect communities and workers in, Chinandega and León.

The impacts from NSEL’s cultivation of 24,000 hectares of sugarcane in the states of León and Chinandega are neither limited nor site specific. The exposure to chemicals applied to the sugarcane plantations has adversely impacted the health of NSEL employees and members of the surrounding communities. Specifically, there is an epidemic of chronic renal insufficiency among NSEL employees and members of the surrounding communities. Studies have found that CRI is most prominent in states where sugarcane is the primary cultivar.<sup>76</sup> In Chinandega, incidence of CRI is four times greater than the national average. The Nicaraguan Ministry of Health conducted a study in 2002 of 144 sugarcane workers with CRI, and found that 30% of the victims were between the ages of 16 and 25, an age group that characteristically does not experience renal failure.<sup>77</sup> At the San Antonio Sugar Mill alone, there have been over 1,000 cases of CRI in the last ten years. Members of communities in the states of León and Chinandega believe they are at risk of developing CRI due to drinking water contaminated with pesticides from NSEL’s sugarcane fields. There has been no definitive study linking CRI with NSEL’s operations, however NSEL workers are exposed to many the factors that cause CRI, including occupational exposure to pesticide, temperature stress, and consistent dehydration.

The impact on surface and groundwater from NSEL’s operations is also significant. As described previously, the quantity of water NSEL uses to irrigate its sugarcane fields is unsustainable and jeopardizes the ability of the surrounding communities to access sufficient drinking water. Irrigation water, laden with pesticides and nutrients, contaminates groundwater supplies and rivers, rendering ground and surface water unavailable for human use and consumption, while harming the ecological integrity of each system. NSEL’s operation also includes a shrimp farm, with unknown environmental impacts to mangrove forests and marine water quality.

Additional impacts from NSEL operations include air pollution from sugarcane burning and aerial application of pesticides, which have potentially widespread health effects. The Sutiaba community is also fragmented when NSEL purchases or leases land for sugarcane cultivation that was traditionally occupied by members of the Sutiaba community. The diversity of these impacts and the irreversible and unprecedented nature of many of the health impacts dictate that Project 25331 should have been designated as a Category A Project, and should be reclassified as such. Accordingly, NSEL should be held to the more rigorous review criteria required for Category A projects.<sup>78</sup>

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<sup>75</sup> PSES, *supra* note 6, at para. 18.

<sup>76</sup> ORGANIZACIÓN PANAMERICANA DE LA SALUD, *supra* note 3, at 3; Jesús Marín Ruiz, *Epidemia de Enfermedad Renal Crónica en la Región Occidental de Nicaragua*, Presentation (2006).

<sup>77</sup> Resumen de las Actividades Efectuadas por el MINSA ante la Problemática de los Enfermos con IRC, Presentation (2002).

<sup>78</sup> PSES, *supra* note 6, at para. 18; PERFORMANCE STANDARDS, *supra* note 8, at PS1.

### The IFC Did Not Assess Whether NSEL had Achieved Broad Community Support Through a Process of Free, Prior, and Informed Consultation

When the IFC client is required to undertake a process of free, prior, and informed consultation, IFC must make a determination, prior to approval of the project by the IFC Board of Directors, of whether broad community support for the project was achieved.<sup>79</sup> A process of free, prior, and informed consultation must be undertaken for projects that have significant adverse impacts,<sup>80</sup> or, in the case of projects that impact communities of Indigenous Peoples, adverse impacts.<sup>81</sup> This requirement should have applied to NSEL because impacts of NSEL's activities under the IFC loan are both significant and adverse, as described above, and adversely affect the indigenous Sutiaba communities of Goyena and Abangasca. However, NSEL did not engage in any consultation process with affected communities. Consequently, IFC should have made a determination that NSEL did not achieve the necessary broad community support for the project. From the information available on the IFC website, it does not appear that the IFC reviewed NSEL's engagement process or assessed whether it had achieved broad community support for the project.

### The IFC Failed to Ensure the Local Disclosure of the SEA by NSEL

The IFC failed to ensure the local disclosure of NSEL's environmental and social information as required under the IFC Disclosure Policy and the Environmental and Social Review Procedures (ESRP). The ESRP requires that the IFC "verify that the client has disclosed material locally in an appropriate manner."<sup>82</sup> The complainants attest that they were unaware of the IFC loan to NSEL until the Yale students informed them. Further, attempts by the Yale students to review NSEL's environmental documentation at the mayor's office in Chichigalpa, where the SPI said it could be found, were unsuccessful. It is unclear on what basis the IFC could have determined that NSEL had disclosed its environmental and social documentation.

### The IFC Failed to Conduct the Necessary Due Diligence on NSEL's Environmental and Social Track Record Prior to Loan Approval as Required Under the ESRP

The IFC failed to conduct the necessary due diligence on NSEL's environmental and social track record as required under the PSES and the ESRP. Such an assessment would have demonstrated that NSEL could not be expected to comply with the Performance Standards, which, in turn, would have indicated that the IFC should not have approved the loan, at least not without significant mitigation and remediation measures to ensure compliance with the Performance Standards.

The PSES requires the IFC to conduct an Environmental and Social review of: "(i) the social and environmental risks and impacts of the project as assessed by the client; (ii) *the commitment and*

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<sup>79</sup> PSES, *supra* note 6, at para 20.

<sup>80</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS1, para. 22.

<sup>81</sup> PERFORMANCE STANDARDS, *supra* note 8, at PS7, para. 9.

<sup>82</sup> INTERNATIONAL FINANCE CORPORATION, ENVIRONMENTAL & SOCIAL REVIEW PROCEDURES (July 31, 2007) at para. 4.2.8 [hereinafter ESRP].

capacity of the client to manage these expected impacts, including the client's social and environmental management system; and (iii) the role of third parties in the project's compliance with the performance standards."<sup>83</sup> Further, the ESRP requires the IFC to review, *inter alia*, "The client's track record in [social and environmental] management to date."<sup>84</sup> In addition, the Guidance Notes for PS2 state that: "As part of IFC due diligence, IFC reviews the overall performance of the client, including its labor and employment practices, in order to ascertain whether there are any risks to the project and to IFC from such practices."<sup>85</sup> In the event that the IFC discovers that the client has had problems with any of the requirements in PS2, it can request that the client conduct a labor assessment.<sup>86</sup>

Depending on the results of its review of the client's track record, the IFC decides whether to proceed with the loan and if so, what conditions will apply. The PSES specifically provides that the IFC does not finance new business activity that cannot be expected to meet the performance standards over a reasonable period of time.<sup>87</sup> However, where the IFC determines that the client can meet the performance standards, despite historical social or environmental impacts associated with the project, it can require the client to take remediation measures.<sup>88</sup>

NSEL's sugarcane production and processing has had a long history of adverse social and environmental impacts on its employees and in the surrounding communities. Articles have appeared in the local and international press describing the plight of former NSEL workers suffering from CRI. *See Annex H*. They have held demonstrations at the National Assembly in Managua and are currently protesting in front of the entrance to the San Antonio Mill in Chichigalpa. *See Annex E for photos*. Further evidence can be found at the MARENA office in León. Over the last several years, members of the communities have submitted complaints, or *denuncias*, against NSEL for environmental contamination. *See Annex C*. NSEL has been the subject of several administrative resolutions issued by MARENA for violations of environmental laws. *See Annex C*. This ample evidence and the absence of any commitment to mitigation or remedial action by NSEL should have been an indication to the IFC that NSEL was not a good candidate to comply with the Performance Standards. Yet, nothing in the information made publicly available demonstrates that the IFC took NSEL's history of severe adverse social and environmental impacts into account when appraising the project for loan approval. Nothing in NSEL's Action Plan or the Social and Environmental Review Summary suggests that the IFC has worked with NSEL to develop remediation measures to redress the historical social and environmental damages caused by its sugarcane cultivating activities.

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<sup>83</sup> PSES, *supra* note 6, at para. 15 (emphasis added).

<sup>84</sup> ESRP, *supra* note 82, at para. 3.2.3.

<sup>85</sup> GUIDANCE NOTES, *supra* note 2, at GN2, para. G4.

<sup>86</sup> GUIDANCE NOTES, *supra* note 2, at GN2, para. G4.

<sup>87</sup> PSES, *supra* note 6, at para. 17.

<sup>88</sup> PSES, *supra* note 6, at para 13. "When there are significant historical social or environmental impacts associated with the project, including those caused by others, IFC works with its client to determine possible remediation measures."

## **Annex B: Community Support Team**

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