THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

AN ENVIRONMENTAL PROGRESS REPORT

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Acknowledgements:

This report was made possible by grants from the German Marshall Fund and the Charles Stewart Mott Foundation. The authors are grateful for the assistance of CIEL colleagues Durwood Zaelke, David Hunter, Claudia Saladin and the CIEL staff and interns.

It is not possible to name all the individuals who contributed to this report. However, the following people were particularly helpful in its preparation and deserve special thanks: Dr. Ada Bainova, Stewart Boyle, Martin Casper, Hansel Cassadyne, Barry Coates, Zsuzsa Foltányi, Anthony Froggatt, Vanya Grigarova, Jesper Grolin, Tamar Gutman, Tim Jenkins, Dr. Andrzej Kassenberg, Eric O. Meyer, Michael Phillips, Charlotte Ruhe, Amb. James Scheuer, David Schwarzbach, Albena Simeonova, Dr. Krassen Stanchev, Tomasz Terlecki, Janos Vargha, and Phillip Weller.

The European Bank for Reconstruction and Development: An Environmental Progress Report

Printed in the United States on recycled paper by DL Printing Inc.

Cover design by Ani Rucki.

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Foreword

When the concept for a new bank to help finance the reconstruction and development of Central and Eastern Europe was first announced, many environmentalists including CIEL had the highest hopes that this would become the first "green" multilateral development bank, one that could serve as the model for the other MDBs including the World Bank. After all, the region suffered more from the environmental ravages of unregulated industrialization than it did from the poverty or lack of technical capacity found in developing countries. The widespread environmental and health problems were certainly a priority, and the development path chosen by the region, marked by heavy industry and centralized agriculture, literally screamed for an alternative, sustainable development path.

Working with Friends of the Earth, the World Wildlife Fund, the Natural Resources Defense Council and other NGOs, CIEL drafted a statement of environmental principles for the bank, drawing on the 1989 Hague Declaration and the earlier work of the Brundtland Commission. The principles were presented to Jacques Attali and to President Vaclav Havel during his February 1989 visit to Washington and New York.

While the European Bank for Reconstruction and Development did not become the green bank we envisioned, the charter establishing the EBRD was the first to include a mandate to promote sustainable development and democracy. The EBRD's charter states that the Bank is to "promote in the full range of its activities environmentally sound and sustainable development."

As this report demonstrates, however, the Bank is not yet living up to its mandate. After five years of operation, and major efforts by CIEL and many other NGOs, the Bank still lacks a coherent sustainable development policy, as well as criteria and guidelines for selecting projects that would promote such a policy. The EBRD still lags behind the World Bank in such critical areas as the information disclosure policy and the independent inspection panel.

Yet, the need for a green bank for Central and Eastern Europe and the Newly Independent States of the former Soviet Union is even greater today than it was in 1989. Sustainable development might have been a new concept in 1989 for those first involved with the Bank, but today there is no excuse for the EBRD or any other international institution not to pursue environmentally sustainable development. If the 1992 U.N. Conference on Environment and Development did nothing else, it demonstrated the international political consensus for the shift toward sustainable development. The challenge for the EBRD is to translate that political consensus into an on-the-ground change in its policies and loan portfolio.

While CIEL's report is critical of the Bank's failure to address meaningfully its sustainable development mandate, we do note some progress. And we still believe that the EBRD is in a unique position to become the environmental leader originally envisioned. We hope our report is useful to the Bank, and we offer our continuing assistance to the Bank and others in achieving sustainable development in the region.

Finally, we would like to offer our special thanks to the German Marshall Fund and the Charles Stewart Mott Foundation for their financial support, to Michael Kane for his original encouragement to make the EBRD a priority project for CIEL, and to the many people who provided us with assistance in preparing this report.

Durwood Zaelke
President
Center for International Environmental Law
November, 1995

The report also demonstrates the need for an over-sight body to review the Bank's activities and slow down or stop a project if it finds that the Bank's policies and procedures are not being followed. The report proposes that the EBRD create an Independent Inspection Panel along the lines of the World Bank Inspection Panel.

There have been some recent, positive developments at the EBRD, including the creation of an Energy Efficiency Unit and an Environmental Infrastructure Department. These new departments could have a profound impact on future lending if they are fully integrated into Bank operations. While it is too soon to evaluate their performance, they already have initiated some commendable projects.

The report makes a number of recommendations for improving the Bank's energy, transportation, and agriculture operations policies. The energy policy sets out some clear markers for sound development of the conventional energy sector, but the brief section on nuclear energy should be developed into a separate, formalized policy. The transportation and agriculture policies are almost entirely lacking in environmental considerations and need to be completely rethought.

The aim of this report is to identify ways to improve the process of delivering development aid to Central and Eastern Europe and to help ensure that the Bank fulfils its mandate to promote sustainable development. The report makes a number of specific recommendations, which can be distilled into the following five statements:

(1) The EBRD needs to formulate a sustainable development policy, criteria, and standards to guide project selection;

(2) The EBRD needs to strengthen and enforce its environmental procedures, particularly those for public participation;

(3) The EBRD needs to fully integrate environmental concerns into its decision-making process;

(4) The EBRD needs to increase the number of initiatives aimed directly at improving the region's environment; and

(5) The EBRD needs to create an independent oversight body to help ensure that its policies and procedures are followed diligently, and to provide the public with a grievance procedure when they are not.

THE EBRD ENVIRONMENTAL MANDATE

To fulfil its environmental mandate, the EBRD must have a strategy to guide its project selection. It needs a sustainable development policy, criteria, and standards to ensure that projects are chosen not merely for reasons of economic or political expediency but because they will put the region on the path to environmentally sound and sustainable development.

The Need for a Sustainable Development Policy

The Bank's failure to integrate long-term environmental goals into its operations policies undermines all other Bank efforts to promote sustainable development in Central and Eastern Europe. Without such planning, regional viability and long-term environmental integrity are in jeopardy.

EBRD financing in Slovakia demonstrates the need for sustainable development planning. By proceeding in a piece-meal, project-driven fashion, the Bank finds itself supporting Slovakia's nuclear-powered, heavy industry strategy. Desirable alternatives remain unexplored due to the Bank's lack of long-range regional planning and sectoral integration.

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AN ENVIRONMENTAL PROGRESS REPORT

EXECUTIVE SUMMARY

INTRODUCTION

The European Bank for Reconstruction and Development (EBRD) is the first multilateral development bank to have an explicit environmental mandate in its charter. The charter states that the Bank is to "promote in the full range of its activities environmentally sound and sustainable development." It also proclaims commitments to democracy and democratic institutions, rule of law, respect for human rights, and market economies. Nevertheless, some of the Bank's harshest critics have been environmentalists. They contend that the EBRD is not living up to these promises and in some respects is even less progressive in its environmental policies and procedures than other international lending institutions.

This report supports these claims. It finds that the EBRD has no overarching environmental policy or criteria to guide its project lending. As a consequence, the EBRD has financed projects that are inconsistent with its mandate to promote sustainable development. The report examines several of these projects: a heavily polluting and energy intensive aluminum smelter; a proposed nuclear power plant project that has drawn intense international criticism from governments and environmentalists; and two oil field development projects that contributed to the tragic oil spill in the Komi region of Russia.

The report finds that the EBRD has inadequate procedures for conducting environmental due diligence–environmental impact assessment, environmental audits, environmental remediation, and monitoring. Not only does the Bank need to improve its environmental procedures, but it must adhere to them more rigorously. Too often the Bank cuts corners in implementing its procedures, or fails to implement them altogether.

The EBRD's policy and procedures for public participation and information disclosure are especially weak. With its environmental mandate and commitment to democracy, the EBRD should be at the forefront among international financial institutions in promoting openness and participation. This report demonstrates, however, that the World Bank, the InterAmerican Development Bank, the Asian Development Bank, and the International Finance Corporation all have more open and participatory policies than the EBRD.

The report examines the functions of the Bank's Environmental Advisory Council (ENVAC)–a group of twelve experts that meets twice a year to advise the Bank on environmental matters–and suggests ways the EBRD could make better use of the Council's expertise. It recommends an expanded role for the ENVAC, particularly in developing the Bank's environmental policies and procedures, which should not be adopted without ENVAC approval.

The devastating oil spill in the Komi region of Russia provides especially compelling evidence of the need for a sustainable development policy. In the summer of 1994, an estimated 270,000 tons of crude oil spilled from the Kharyaga-Usinsk pipeline onto the Arctic tundra. The spill was among the largest in history–considerably larger than the Exxon Valdez disaster in Alaska. A substantial amount of the spilled oil belonged to companies financed by the EBRD, which was aware of the poor condition of the pipeline at the time the loan was approved. The Bank should not have financed these projects without thoroughly assessing the pipeline and providing financing for needed repairs. A sustainable development policy would have placed pipeline repair ahead of oil field development as a priority for EBRD financing.

Formulating such a policy will require a considerable amount of time, energy and collaboration; the policy and subsequent guidelines for implementation will not materialize overnight. The EBRD should not act unilaterally, but should encourage participation from all the Central and Eastern European countries. Government officials, NGOs, the scientific community, and the general public should be invited to participate in conferences, workshops, and roundtable discussions to develop the policy.

The Bank should integrate the policy into its country, sectoral and regional plans, as well as into project development. At present, it considers projects only on their individual economic and environmental merits. A sustainable development policy would enable the Bank to identify a long-term *program* of projects that would provide equal or greater economic benefits without further damaging the environment.

Criteria and Standards for Sustainable Development

The EBRD should also develop criteria and standards to ensure that the projects it funds are consistent with its sustainable development policy. An initial set of criteria might include the following:

- Projects should use energy and other resources in the most efficient manner.
- Projects should foster diversity of production to avoid making extreme demands on the assimilative capacity of the region.
- Projects should incorporate clean production technologies that minimize waste and prevent pollution.
- Projects that require environmentally damaging government policies, such as energy subsidies, should be avoided.
- Projects should emphasize human resource development over intensive development of natural resources.
- Projects should reflect community-based development priorities, based upon decentralized and autonomous decisionmaking.
- Projects should contribute to solving global environmental problems, such as climate change, ozone depletion, loss of biodiversity, and pollution of international waters.

The EBRD has not explicitly committed itself to a set of environmental standards, though it implies in its *Environmental Procedures* that the standards of the European Union will serve as a baseline for its projects. The EBRD does not implement this policy, however, and Bank staff have stated that projects are not routinely required to meet EU environmental standards. The *Draft Revised Environmental Procedures,* recently released by the Bank, confirm that the Bank does not intend to hold projects to EU standards. The Bank should require projects to adhere, *at a minimum*, to EU standards, and to more stringent standards in special circumstances, such as in degraded or sensitive areas, or where required by national law.

Environmental Assessment at the Bank

To help ensure sustainable development, the EBRD must analyze the environmental impacts of its actions at the project, sectoral, regional, and global levels. Environmental assessments (EAs) are the Bank's principal tools for determining the environmental impacts of its actions, but the Bank has not sufficiently utilized them. Fewer than 5% of the Bank's projects have received full EAs.

Moreover, EBRD EAs typically do not contain all the elements of a full environmental impact assessment. They routinely fail to assess alternatives to the proposed project, including the important "no-action" alternative, and indirect impacts, such as offsite impacts. They also fail to provide for adequate public participation.

Sectoral and Regional EAs are also important tools for achieving sustainable development. Although the *Environmental Procedures* state that Sectoral and Regional EAs may be performed for development plans, sector-wide programs, or multiple projects, none have been conducted to date. A Sectoral EA of Russian oil and gas development might have alerted the Bank to the imminent Komi pipeline disaster. Sectoral EAs would also be useful bases for the development and implementation of the Bank's sector operations policies.

Regional EAs should be undertaken when a number of development activities are planned or proposed for a relatively localized geographical area. A Regional EA could have examined different energy and development strategies for Slovakia, and perhaps would have identified an economically attractive alternative to continuing along the path of nuclear power and heavy-industry.

The EBRD should also consider the global impacts of its actions, including possible contributions to depletion of the ozone layer, climate change, and loss of biodiversity. Unlike the World Bank, the EBRD does not require any discussion of global impacts in its EAs.

EBRD PROJECTS

CIEL's report is based largely on three case studies. Two of the projects are located in Slovakia—the ZSNP aluminum facility and the Mochovce nuclear power plant. The third case study concerns the development of oilfields in the Timan-Pechora Basin of the Russian Federation. These projects were selected because they demonstrate the need for both a sustainable development policy and significant changes in the Bank's *Environmental Procedures*. In all the projects, political and economic pressures have caused the EBRD to deviate from its written procedures. The projects also illustrate problems with the environmental and public participation procedures.

The ZSNP Aluminum Plant, Slovakia

In September 1993 the EBRD approved a US$110 million loan and US$15 million equity investment for a new aluminum smelter in Ziar nad Hronom, Slovakia. As the region's largest employer, ZSNP provides jobs for over 6,000 people.

ZSNP is also one of the region's largest polluters. A bauxite waste site leaches heavy metals into the soil and groundwater, and the existing factory emits dust, SO_2, NO_x, CO, and fluorides far in excess of Slovak and EC air emissions standards. Off-site testing has revealed high concentrations of benzopyrene, arsenic, molybdenum, copper, nickel and chromium. Health problems, including congenital defects, allergies, and thyroid and lung diseases, are on the rise throughout the region.

Due to the highly polluting and energy-intensive nature of primary aluminum production, Slovak environmentalists favored either converting the plant to secondary aluminum

production or closing the plant altogether. They also argued that the plant made no economic sense. Ideally, for aluminum production to be economically competitive, a cheap source of energy, labor, and raw materials should be available. With the exception of cheap labor, Slovakia has little competitive advantage on the international aluminum market.

Nevertheless, the EBRD decided to pursue the project, which already had been rejected by the World Bank and a number of private investors. Despite strenuous objections from environmentalists, it was given fast track status, a protocol that is not provided for in the Bank's *Environmental Procedures*.

Most of the procedures for public participation were curtailed: formal notification of the public about the ZSNP project, public scoping, and public meetings were dispensed with. Bank staff did conduct a *pro forma* meeting with a small number of environmentalists a few days before the project was submitted to the Board, but by that time it was not likely the project would be altered.

The ZSNP project demonstrates that, when faced with financial pressures, the Bank is willing to forego at least some of its environmental due diligence. A sustainable development policy and stronger environmental procedures are urgently needed to help the EBRD withstand such pressures and ensure that each project receives the appropriate level of environmental analysis and public consultation.

The Mochovce Nuclear Power Plant

In 1993 the Slovak government approached the EBRD with a proposal to complete Mochovce, a Soviet-designed nuclear power plant, at a cost of US$1.2 billion. Approval of the project would make the EBRD the first multi-lateral lending institution to directly support nuclear power. The project has been the source of intense debate throughout Europe, with France and Germany favoring the project, and a group of smaller European countries, led by Austria, opposed.

If completed, Mochovce will be the first partially finished, Soviet-designed plant to be completed with a "retrofit" of western technology. There are serious questions whether this technology will operate according to its specifications under such conditions. VVER-440/213 reactors, similar to Mochovce, in the former German Democratic Republic were decommissioned immediately after reunification of Germany, after it was determined that retrofitting to meet German safety standards would be prohibitively expensive. In the neighboring Czech Republic, a VVER-440/213 reactor similar to Mochovce has had over 60 emergency shutdowns in just the last eight years.

Despite these concerns and the lack of a long-term spent fuel management plan, the Bank decided to pursue the project. The Bank screened Mochovce as a category A/1 project, requiring a full environmental assessment and an environmental audit. The Bank also commissioned a least-cost study to determine if there are economically viable alternatives to the Mochovce project.

The Bank's least-cost study concluded that in most scenarios Mochovce would be less expensive than any other available option. Other studies, however, made different assumptions about future fuel costs and the potential for energy efficiency to reduce Slovakia's energy needs, and concluded that cheaper alternatives existed.

From the start of Mochovce's EA process, public participation was handled poorly. The project sponsor's first attempt at scoping caused a public outcry. Scoping had to be reinitiated some months later because so many citizens interested in the project had been excluded. "Public" meetings turned out to be by invitation only. The project sponsor–Slovensky Energeticky Podnick (SEP)–initially refused to release critical decision-making documents, such as the least-cost analysis

and nuclear safety study, or to hold public meetings in the countries adjoining Slovakia.

The completed EA did not address several key issues, including crucial safety concerns, liquidation of the nuclear reactors and spent fuel from the plant, and an environmental assessment of all alternatives, including the "no-action" alternative. Nevertheless, EBRD staff continued to support and defend the project.

During the public comment period following the release of the documentation, meetings were held in Slovakia and Hungary. At these meetings, project sponsors manipulated the time available for discussion so as to limit critical comment and repeatedly refused to address questions raised by participants. One meeting in Vienna had to be canceled because the project sponsors heard how many people planned to object to the project, and refused to attend.

In early 1995 Slovakia suspended negotiations with the EBRD. It did so, not in response to pressure from environmentalists, but out of concern over the high cost of the loan and the environmental conditionality. The EBRD insisted that, as a condition of the loan, Slovakia close Bohunice-an outdated and dangerous nuclear plant-and increase its domestic energy prices by nearly one-third. The Slovak government recently signed an inter-governmental accord with Russia to provide a US$150 million loan for the completion of Mochovce's first reactor bloc.

The EBRD justified the loan for Mochovce on the grounds that, if it did not make the loan, Slovakia would obtain financing to complete the plant without the environmental safeguards required by the Bank. Any attempt by Slovakia to complete the plant without all the necessary safeguards, however, would be strongly opposed by neighboring countries and the European Union. There is also no evidence that the EBRD ever resisted Slovakia's plan, or even offered to finance alternatives.

Komi Republic Oil Field Development, Russian Federation

Polar Lights and KomiArctic are oil field development projects located in the Komi region in Russia. Both projects rely upon the severely degraded Kharyaga-Usinsk pipeline. In early 1994 the pipeline began leaking, and in August of 1994 a dike containing the leaked oil broke, spilling an estimated 270,000 tons of crude oil onto the Arctic tundra. Projects receiving EBRD support accounted for as much as 25% of the spilled oil. The Komi spill was over three times the size of the Exxon Valdez disaster, making it one of the largest releases of oil into the environment on record.

Environmental assessments and audits were commissioned by the Bank, but they only covered the project sites and excluded the pipeline. Had the EBRD assessed the pipeline, it is unlikely the projects would have been approved by the Board. CIEL's requests for copies of the EAs were denied by both the Bank and the project sponsors. CIEL could only view the Polar Lights EA at Conoco headquarters in Houston, Texas.

By supporting these projects, the EBRD has contributed to a major environmental disaster. The Bank claims it had no control over the condition of the pipeline, which was within the exclusive control of Komineft. Komineft, according to the Bank, refused to even allow inspection of the pipeline. It appears that the Bank did make efforts to include infrastructure improvement as part of the projects, but the Russian government did not consent. At that point, the EBRD should have refused to make the loans.

After receiving a request for help in January 1995, the EBRD and the World Bank agreed to jointly finance a US$140 million emergency loan to fund cleanup efforts. While the spread of the spill appears to be temporarily in check, additional ruptures have appeared in the pipeline, and the temporary containment dikes will be further tested

by seasonal floods. The Komi spill demonstrates, in the starkest terms, the need to implement the EBRD's mandate for sustainable development.

Promising New Directions in Bank Lending

In the past year the EBRD has begun several promising new initiatives. Chief among these are two new departments within the Bank, the *Energy Efficiency Department* and the *Municipal and Environmental Infrastructure Department*. The Bank has also explored some innovative financing mechanisms for environmental investments, including environmental loan guarantees and "green equity."

The Energy Efficiency Department

Despite the tremendous savings and environmental benefits that can be obtained from energy efficiency, less than 3% of the EBRD's energy sector lending has been for demand-side efficiency. The Bank has finally recognized this problem and established the Energy Efficiency Department (EED) in October of 1994, to identify and develop energy efficiency projects. In its first year of operation, the EED developed several different types of programs and projects, including direct investments in energy efficiency technology, dedicated credit lines for energy conservation and regional multi-project facilities.

The market for energy efficient technologies for the Bank's countries of operation is quite large, with estimates ranging from US$40 to 55 billion. How successful the EED will be in tapping this potential market is not clear, although projected funding levels for EED projects are encouraging. The EED is precisely the type of initiative needed for the Bank to fulfil its mandate to promote environmentally sustainable development.

Municipal and Environmental Infrastructure Department

In June of 1995 the Bank created the Municipal and Environmental Infrastructure Unit to take charge of the Bank's environmental programs. The Bank currently has two regional environmental programs, the Baltic Sea Programme and the Danube River Basin Environmental Programme. The Baltic Sea Programme is a joint effort by Baltic countries to address the sewage, industrial, and hazardous waste currently being discharged into the Baltic by investing in environmental infrastructure, environmental policy development, and institutional reform. The Danube River Basin Environmental Programme, which was formed to identify and address the heavy pollution discharge from the Danube into the Black Sea, establishes an integrated strategic management plan for improving the environment of the river basin.

The Bank has signed four water treatment projects as part of the Baltic and Danube programs: a 23.4 million ECU loan to improve water supply and waste water management in Tallinn, Estonia; a 10.6 million ECU loan to rehabilitate waste water treatment facilities in twelve other Estonian municipalities; an 11.5 million ECU loan to assist the municipal water authority in Kaunus, Lithuania; and a 22.8 million ECU loan to upgrade the water supply and waste water treatment facilities in five Romanian municipalities. The Bank has also commissioned a number of regional and sectoral studies and initiated several technical cooperation projects in the participating countries.

Environmental Financing Initiatives

Recently the Bank has used several other creative mechanisms to help finance environmental projects. It maintains the Secretariat of the *Project Preparation Committee,* which coordinates funding from donor countries and international financial institutions for environmental projects in the region. The EBRD also chairs the Working Group on Environmental Project Financing, which is investigating ways to enhance environmental investments through such innovative measures as environmental loan guarantees and "green equity."

THE EBRD ENVIRONMENTAL PROCEDURES

The EBRD *Environmental Procedures* were adopted in January of 1992. Discussions with NGOs throughout the preceding year led the Bank to strengthen the procedures in a number of areas. Still, they fall far short of what is needed to achieve sustainable development, particularly in the areas of information disclosure and public participation.

In practice, the Bank sometimes cuts corners in implementing its *Environmental Procedures* or ignores them altogether, often as a result of perceived time constraints or financial pressures on the borrower. By failing to follow its procedures, the Bank sacrifices environmental protection for expediency and undermines its own commitment to rule of law.

Purpose of the Environmental Procedures

The *Environmental Procedures* are intended to guide Bank staff in exercising environmental due diligence to ensure that each project is environmentally sound. More specifically, they aim to ensure that decisions to approve or disapprove projects are made with awareness of each project's environmental implications; to avoid potential environmental liabilities; to account for environmental costs as well as other costs and liabilities; and to identify opportunities for environmental enhancement.[1]

These aims, while important, are not adequate to ensure that Bank-financed projects will be consistent with the Bank's mandate to promote sustainable development. The *Environmental Procedures* provide no substantive guidance as to the types of projects that will contribute to sustainable development and those that should be avoided, nor do they require the integration of environmental considerations into the earliest phase of project identification, selection, and design. Rather, environmental consequences are considered on a project-by-project basis, often with little apparent regard for the cumulative and indirect effects they may have on the environment.

A review of the Bank's environmental assessment and project approval processes reveals that the Bank does not always meet even the limited aims of its *Environmental Procedures*. Relatively few projects are subjected to full EA, even when they clearly appear to fall within the Bank's list of projects requiring full EA or within similar lists in national EA laws.

Procedures for Environmental Assessment

The EA process is the principal mechanism for evaluating a project's environmental consequences and is critical for implementing the goals of sustainable development. According to the EBRD *Environmental Procedures*, the project sponsor is responsible for preparing the EA. Project sponsors frequently lack experience with EAs and may fail to develop and release important information or attempt to limit the participation of concerned citizens and NGOs.

It is difficult to assess whether project sponsors withhold or fail to develop significant information about potential adverse impacts. Consultants conducting EAs have occasionally been prevented from reaching conclusions because of lack of data. Whether this is due to the haste with which some assessments have been prepared or to the deliberate withholding of information by the project sponsor, it is unacceptable.

Initiation and Screening

Initiation and screening occur at the earliest point of the environmental investigation–when the need for an environmental assessment or environmental audit is determined. During screening, the Environmental Staff should

[1] EBRD, ENVIRONMENTAL PROCEDURES (adopted Feb. 13, 1992) at iii.

ascertain the *purpose and need* for the proposed project, identify tentative alternatives, and determine the appropriate level of environmental review. Based on preliminary environmental information provided by the project sponsor, the staff must decide whether a proposed project will require full EA, some intermediate level of assessment, or no assessment at all.

During screening, the staff assigns each project an A, B, or C to designate the level of assessment the project is to receive and 0 or 1 to indicate whether an environmental audit is required. Bank staff are guided in screening by lists of specific types of projects for which the level of assessment is predetermined. These lists are intended to provide examples only and do not preclude assessment of unlisted projects.

If a project is designated to receive a different level of assessment under Bank procedures than under national law, the *Environmental Procedures* state that the more stringent of the two listings determines the level of assessment. Nevertheless, many projects have been screened into Category B even though they either are listed by the Bank as Category A-type projects or require full EA under national law. Sometimes projects are screened into Category B even when full assessment is required by *both* Bank procedures and national law.

The Environmental Staff has explained that more projects are not screened into Category A partly because many Category B projects receive environmental audits, which uncover much of the information that would be sought in an assessment. This explanation ignores the different purpose and nature of environmental assessments and environmental audits. The *Environmental Procedures* clearly state that one cannot substitute for the other. Furthermore, audits are not made public and provide no opportunity for public participation.

The difference in treatment between Category A and Category B projects is significant. Projects screened into Category B receive a lower level of assessment and do not require that the public participate in, receive information about, or even be notified about the assessment.

Scoping

Scoping is a process for creating a dialogue between the project sponsor, government officials, and the public to determine the scope of the environmental assessment. It should be an open process designed to ensure that important issues are identified early in the EA process.

The *Environmental Procedures* only require scoping for Category A projects. They identify four types of actions involved in the scoping of an EBRD EA: identifying known environmental issues; identifying the concerns of all interested parties; setting up meetings between interested parties; and preparing the Terms of Reference and selecting experts to undertake the EA. In addition, environmental assessments *should* include the analysis of environmental costs in economic terms.[2]

As illustrated by the ZSNP and Mochovce case studies, project sponsors have not consistently fulfilled these requirements. The ZSNP aluminum smelter project included no public scoping whatsoever. The project sponsor for the Mochovce nuclear power plant project made only a minimal effort to comply with the Bank's requirements by sending a draft table of contents for the EA to a number of NGOs for comment. The general public was not notified about the project and had no opportunity to comment during scoping.

Alternatives

The importance of investigating alternatives to the proposed activity cannot be overstated. In fact, most environmental assessment laws,

[2] *Id.* at 30-31.

including the laws of Central and Eastern Europe, require a thorough analysis of alternatives, including the important "no-action" alternative.

To generate alternatives, it is necessary to define, at the earliest stage of the EA, the *purpose and need* of the proposed action. All alternatives that would fulfil the *purpose and need* should be considered in the EA. The *purpose and need* should be stated broadly to avoid excluding desirable alternatives. The no-action alternative should be included to provide a baseline for comparing and contrasting the impacts of other alternatives, including the proposed action.

The EBRD's *Environmental Procedures* do not require that the EA contain a statement of *purpose and need*, and it is unclear whether the EA must identify and discuss alternatives to the proposed action. Without alternatives, EAs cannot identify the least-cost approach, which is very important in energy planning, where energy efficiency and conservation are frequently less expensive than building new generating capacity. The EAs CIEL has examined do not discuss least-cost.

The least-cost study for Mochovce was conducted independently of the EA. As a result, it did not consider all the impacts of the project, and could not account for all environmental and social costs associated with the proposed project and its alternatives.

Impacts

EAs should evaluate three types of impacts: direct, indirect, and cumulative. Indirect and cumulative impacts can be as severe as direct impacts, but are often more difficult to identify, making their consideration in the EA all the more important.

EBRD EAs do not explore all foreseeable indirect and cumulative impacts, even when they may be very significant. For example, the EAs for the KomiArctic and Polar Lights oil field development projects in Russia did not include an assessment of the Kharyaga-Usinsk pipeline, even though it was widely known that the pipeline was leaking badly and might rupture. Had the pipeline been included in the EAs, it seems highly unlikely the project would have been approved by the Board.[3] The EBRD is planning to prepare a full EA for the Chernogorskoye oil field development project in the near future. Incredibly, the Environmental Staff cannot say whether that EA will include assessment of the pipeline.

Assessment of global impacts relating to such global environmental problems as climate change and depletion of the ozone layer is now required by a growing number of countries and institutions, including the World Bank. The EBRD, however, does not require that global impacts be assessed in its EAs.

Mitigation and Remediation

Having examined all reasonable alternatives that satisfy the *purpose and need,* and their impacts, the EA must identify mitigation and remediation measures to reduce adverse impacts and enhance beneficial ones. EBRD EAs often contain detailed recommendations for mitigating identified adverse impacts and remedying existing environmental damage. The Bank appears to take these recommendations seriously, frequently requiring mitigation and remediation that should significantly improve the environmental performance of projects it finances.

Mitigation and remediation needs that are identified as necessary during environmental review may either be incorporated into loan agreements as covenants or contained in a separate remediation agreement. The ZSNP project

[3] Bank staff say the pipeline was not included in the EA because it was not within the project boundaries. But the procedures clearly state that one reason to conduct an environmental assessment is to identify impacts outside the area occupied by the project. EBRD, ENVIRONMENTAL PROCEDURES 26 (adopted Feb. 13, 1992).

involved both types of agreements. Originally, the Bank planned to sign the loan agreement and disburse the first tranche of funds for ZSNP before the remediation agreement was completed and signed. As the project sponsor would already have achieved its main objective, this would have eliminated the borrower's main incentive to undertake potentially costly mitigation and remediation measures. However, due to complications apparently unrelated to remediation, the loan agreement was delayed and was finally signed at the same time as the remediation agreement, nearly a year after approval by the Board.

The draft agreement generally responds to the environmental recommendations contained in the ZSNP environmental assessment and audit, but it lacks the specificity which is needed for proper implementation and enforcement of environmental actions. For example, the agreement stipulates that a bentonite wall must be built around the "red mud" waste pile, but it neglects to incorporate the recommendation of the assessment that it encompass the fly ash area, which is suspected of leaching arsenic.

It is also troubling that the Bank is unwilling to make the remediation agreement public, especially since the Bank proposes to include the public in post-completion monitoring of ZSNP. The Bank gave the project sponsor veto power over public dissemination of the agreement.

Environmental Audits

The EBRD uses environmental audits to determine the likelihood and extent of potential liabilities at sites with ongoing operations or which require property transfer. For existing operations, audits also assess compliance with applicable environmental laws and regulations. The decision whether an audit is necessary is made at the screening level. The *Environmental Procedures* differentiate between environmental audits and assessments, stating that "they address different concerns, and are in no way substitutes for each other." Projects frequently require both kinds of investigation.

The project sponsor must develop a Management Action Plan that addresses the conclusions and recommendations of the audit. The *Environmental Procedures* do not require the Environmental Staff to evaluate and recommend changes to the plan, however, or to monitor its implementation.

Environmental audits provide no avenues for public participation, and the Bank does not disclose audit results. There is no mechanism comparable to scoping for environmental audits, and the section of the Environmental Review Memorandum which evaluates the adequacy of public participation does not apply to environmental audits. Audits which require additional phases of investigation appear to be similar in scope to full EAs. In these cases, especially where contamination has been identified, there is no rationale for prohibiting full public disclosure and participation.

Procedures for Project Review and the Environmental Veto

Under the current *Environmental Procedures*, the Bank has two reviews during which environmental information is discussed and projects can be rejected on environmental grounds. In neither review, however, does the Environmental Staff have control over the decision. They can recommend that a project not proceed for environmental reasons, but the decision lies with the Operations Committee, the President, or ultimately the Board of Directors.

During Initial Review the Environmental Staff may recommend that the project be rejected "if there are major potential environmental concerns associated with the project which are not likely to be overcome during project preparation." This is a recommendation only; the decision whether to proceed rests with the entire Operations Committee.

At Final Review the Operations Committee examines the environmental information contained in the Investment Proposal. The Environmental Staff may recommend that the project not proceed "if the environmental issues have not been properly addressed by the project sponsor or if the potential impacts are too great."

In cases of disagreement between the Environmental Staff and the Team Leader as to whether a project should proceed, there are three levels of recourse. First, the question is discussed at a meeting between the Environmental Staff, the Senior Environmental Specialist, and the Team Leader. If they are unable to resolve the disagreement, it may be reviewed by the Operations Committee. Finally, if the disagreement persists, it may be resolved by the President of the Bank.

In the event of such an impasse, the Environmental Advisory Council (ENVAC) could play a useful role by reviewing the dispute with Bank staff and providing advice to the President. But in the end, if the projected net environmental outcome of a proposed project would result in a significant loss of environmental quality or would not promote sustainable development, the Environmental Staff should have authority to veto the project.

Procedures for Board Decisionmaking

The final decision whether to proceed with a project rests with the Board of Directors, after review by the Executive Committee. A cardinal rule of environmental assessment is that the resulting document must be available to the decisionmaker *before* decisions are made and irreversible actions are taken. Information provided to the Board is useful only if the Board has sufficient time to review it. For this reason, CIEL supports the "Pelosi Amendment," which prohibits the U.S. Director from voting to approve any project that may have substantial environmental impacts unless an EA has been made public 120 days in advance of the vote.

The Board of Directors should reject projects where corners have been cut in project preparation, where data is not available to the EA preparer or the Board, or where the *Environmental Procedures*, particularly those for public participation, have not been strictly followed.

One EBRD project–the Chernogorskoye Oil Field project in Russia–was approved by the Board before a full EA was completed. The Board approved the loan subject to the performance of a full EA, satisfactory to the Bank. However, the Board will not have an opportunity to review the EA and reject the project if the results are unsatisfactory. Moreover, by the time the EA is completed, nearly 50% of the funding for the project will have been disbursed, seriously prejudicing future decisions.

The Board should check periodically to see that EBRD staff is providing all relevant information. A key document submitted by the Environmental Staff to the Board just prior to its decision to approve the controversial ZSNP loan contained inaccurate information.

The Polar Lights and Komi projects also demonstrate the need for greater oversight of the Bank staff. Allotting more time for Board members to examine the complex and substantial amount of information submitted with each project would provide an opportunity to validate the assertions made by Bank staff and project sponsors. The establishment of an Independent Inspection Panel would give the public the opportunity to assist the Board in this supervision.

Procedures Related to Monitoring and Evaluation

The current *Environmental Procedures* for monitoring and evaluating environmental aspects of projects, if carried out diligently, will help ensure that mitigation and remediation measures are fully implemented and that projects are environmentally sound. They will also provide

important environmental data that will contribute to the design of future projects.

Monitoring and evaluation are carried out at three stages of the project cycle: during project execution, upon project completion, and for some large-scale projects, after project completion. One progressive element of the *Environmental Procedures* is the requirement that EAs contain a monitoring plan. In this respect the procedures go beyond many national EA laws. Unfortunately, it appears the Bank fails to enforce this requirement, as the EAs that we have reviewed do not contain such a plan.

If monitoring discloses that the project sponsor is not in compliance with covenants in the loan agreement, the Bank can impose penalties, which may include freezing disbursements and notifying proper authorities and other financial agencies and co-financiers. When a project is completed, the Bank's Environmental Staff must assess environmental aspects of the project. The resulting Environmental Evaluation Memorandum discusses whether the impacts of the project were adequately anticipated in the EA and evaluates the effectiveness of mitigation measures undertaken by the project sponsor.

It is not possible to assess the Bank's monitoring efforts, as the Bank does not publish monitoring plans. The bank should require a monitoring plan in every EA. The Bank should also strengthen its capacity for supervising environmental performance by withholding a portion of the loan until mitigation and remediation requirements have been fulfilled.

The Draft Revised Environmental Procedures

In August 1995, after more than a year of revision, the Bank released its *Draft Revised Environmental Procedures*. CIEL had hoped that the new procedures would mark a positive change in the Bank's commitment to sustainable development and environmental due diligence. Unfortunately, we find the *Draft Procedures* to be a disappointment. They contain a few improvements, but overall we find them to be even less stringent, detailed, and clear than the existing procedures.

Screening

Two different screening options are proposed under the *Draft Procedures*. Option 1 is similar to the current screening procedure. Option 2 would give the Environmental Staff more discretion; instead of consulting lists, the staff or project sponsor would conduct an Initial Environmental Examination to determine whether a full EA is required.

Option 1 is preferred, as the staff already exercises too much discretion in screening projects. Clear, mandatory guidelines would also be more amenable to review by an Independent Inspection Panel.

Scoping

The *Draft Procedures* merely require the project sponsor "to ensure through a scoping process that, prior to initiating environmental investigations, the key issues that need to be appraised, and the way the public will be involved in the appraisal, have been identified." They require contact with the "locally affected public" and government agencies, but the involvement of local and national organizations is optional. No mention is made of international NGOs. Scoping meetings are also optional.

These scoping procedures are far too general; they require more detail and should be mandatory. Contact should not be restricted to the locally affected public, as some impacts may be regional or global. Scoping meetings should be mandatory.

Alternatives

The *Draft Procedures* omit consideration of environmental costs of proposed projects from EAs, a critical defect. There are also some improvements. The EA must include a statement of *purpose and need* and an assessment of the "no-action" alternative.

Impacts

The *Draft Procedures* call for identification of indirect impacts, but do not mention cumulative impacts. The Environmental Screening Memorandum must identify regional and global impacts, but there is no requirement that they be considered in the environmental assessment

Mitigation and Remediation

The *Draft Procedures* provide for an Environmental Action Plan (EAP) to be developed by the project sponsor. It documents "key issues, actions to be taken to adequately address the key issues, the implementation schedule and timescale, and an estimate of the associated costs." Despite being written in permissive, rather than mandatory, language, the EAP is a welcome addition to the EBRD's *Environmental Procedures*. Unfortunately, the entire EAP process could be undermined by the failure to provide for public participation or even publication of the EAP.

Project Review

The *Draft Procedures* appear to weaken the authority of the Environmental Staff in the project approval process. There is no provision for Staff even to recommend that a project be rejected on environmental grounds. Staff should have a mandatory veto.

Board Decisionmaking

The *Draft Procedures* provide a 30 day minimum time period between the release of the EA to the public for comment and submission to the Board. This time period can be waived upon sufficient showing by the project sponsor. Thirty days is far too short a period for public comment. There should be a non-waivable minimum 90 day period for comments and the full 120 days required by the Pelosi Amendment from the date the EA is released to the time the project is submitted to the Board.

Monitoring

The *Draft Procedures* stress the importance of monitoring during and after project execution, but do not specify when projects require monitoring. No provision is made for the staff, or a third party appointed by the staff, to conduct monitoring. The sanctions for non-compliance (freezing disbursements and notifying proper authorities) have been eliminated, as has the Environmental Evaluation Memorandum. Provisions for release of monitoring information and public consultation have been added but these provisions are recommendatory only.

PUBLIC PARTICIPATION AND ACCESS TO INFORMATION

The charter of the EBRD commits the Bank to "fundamental principles of democracy, the rule of law, respect for human rights, and market economies." First and foremost among democratic principles are the rights of all citizens to be informed of, and to participate in, decisions affecting their well-being.

Disclosure of Information to the Public

The EBRD's approach to information disclosure does not reflect its stated commitment

to public participation throughout the project cycle. The Bank refuses to provide any project-specific information to the public, requiring instead that all information come from project sponsors or be released with their permission.

Reliance on the project sponsor to release information to the public has several serious defects. First, project sponsors in the Bank's countries of operation often have little or no experience managing a public participation program and have frequently shown a reluctance to release information to the public. The ZSNP project sponsor continues to block release of the remediation agreement. Initially, the Mochovce project sponsor would only release summaries of the least-cost study and the nuclear safety report. Neither made any information available during the scoping phase.

Second, the requirement in the *Environmental Procedures* that EAs of Category A projects be made available to the public is often not followed in practice. CIEL's requests for copies of the Polar Lights and KomiArctic EAs were denied.

Third, what little information project sponsors provide to the public comes too late in the project cycle to enable the public to participate effectively in the decisionmaking process. NGOs and citizens that participate in scoping or submit comments during the preparation of the EA frequently must do so only on the basis of what limited information they are able to obtain through their own resources.

Fourth, information contained in some documents, such as Environmental Screening Memoranda and Environmental Evaluation Reports is unavailable elsewhere. There is no legitimate reason for the EBRD, or its project sponsors, to withhold environmental information from the public or to fail to provide such information in a timely manner. All parties seeking Bank financing should understand this to be a requirement of the loan application. While some information may properly be considered confidential for reasons of national security or to protect commercial secrets, there should be a strong presumption in favor of releasing all information. The Board of Directors should condition the approval of all loans upon full access of the public to such information.

Other international financial institutions have begun to recognize the need for transparency. Under the new World Bank Policy on Disclosure of Information, there is a presumption in favor of disclosure. Information on World Bank activities is made available through the newly formed Public Information Center.

The guiding principle of the InterAmerican Development Bank's new policy on information disclosure is that "documents should be made available to the public on request in the absence of a compelling reason for confidentiality." It explicitly provides for frequent public notification and consultation throughout the project cycle. The Asian Development Bank's new information policy establishes a similar presumption in favor of disclosure.

The IFC, which works primarily with private companies, has committed in its information disclosure policy to "undertake its investment activities with transparency and accountability." The IFC policy presumes disclosure of information unless it would "materially harm the business and competitive interests of clients." The IFC makes this information available through the World Bank's Public Information Center.

In contrast, a proposed EBRD information disclosure policy emphasizes the importance of maintaining client confidences and protecting the integrity of Bank staff. A Project Summary Document similar to the IFC's Summary of Project Information would be made available to the public, but only *after* the project has been approved by the Board of Directors (the IFC makes its document available a minimum of thirty days before submission to the Board). It would only contain information not found to be

"confidential" or "harmful." Environmental information about Category B projects would continue to be unavailable.

This new policy would not help the public influence EBRD projects or ensure their proper development. Rather than promoting a culture of secrecy, the EBRD should vigorously implement its commitment to democracy, and become a leader, both in the region and among financial institutions, in promoting transparent and democratic decisionmaking.

Public Participation in Environmental Assessment

The Bank's current procedures for public participation are the product of more than a year of negotiation between Bank officials and NGOs. As a direct result of these efforts, citizens have the right to participate in and comment on EAs, and the Bank must take their comments into account when approving a project. Unfortunately, the *Environmental Procedures* fail to provide adequate guidance to project sponsors and omit some very important elements. The public participation requirements are written so generally that even a good faith effort by a project sponsor to comply may fall far short of what is needed.

Notification to the Public

Early notification is essential for the public to participate effectively in scoping. Notification to the public should take place at the onset of environmental assessment, so that all interested parties–citizens, involved governmental agencies, NGOs, and relevant community organizations–will have an opportunity to raise issues they feel should be addressed in the EA. More particularly, notification should occur prior to screening so that all citizens wishing to participate in the full EA process will have an opportunity to do so.

The *Environmental Procedures* only require notification when the project has been classified Category A or where required by national law. Like most aspects of EBRD environmental assessment, notification is the responsibility of the project sponsor. The procedures do not provide any guidance on how to conduct notification or determine who is sufficiently "affected" to require notification.

Notification requirements have not routinely been followed by project sponsors. The Mochovce EA commenced with virtually no notification to the public–only a few NGOs were informed of the start of the EA process. They received only a draft table of contents, with no information about the project, its *purpose and need*, or possible alternatives. The ZSNP EA process dispensed with public notification altogether.

The EBRD Environmental Staff should ensure effective notification takes place by providing a timetable and helping the project sponsor formulate a notification strategy. The strategy should identify all potentially interested parties, methods for notifying those parties, and the information needed for effective participation. Notification should include enough information to let parties know whether the project is of interest to them. At a minimum, it should describe the proposed action, its *purpose and need*, tentative alternatives and impacts, and the proposed scoping process.

Public Participation in Scoping

The *Environmental Procedures* fail to provide sufficient guidance as to what information is to be provided to the public prior to scoping and leave it to the project sponsor to determine what constitutes an "appropriate level" of public consultation. As a result, project sponsors have not involved a sufficient number of affected parties in the process; have failed to provide adequate information to ensure informed participation; have limited public comments on the scope of the EA–excluding from consideration such topics as alternatives, impacts, and

mitigation; and have not conducted effective public scoping meetings.

Project sponsors for the ZSNP and Mochovce projects virtually dispensed with public participation during scoping. The ZSNP project included no public scoping whatsoever. The project sponsor for Mochovce made only minimal efforts to comply with the Bank's scoping requirements.

In the one meeting the project sponsor held to discuss scoping of the Mochovce EA, only a few NGOs were allowed to participate. They received just one week's notice of the meeting, with no information about the agenda or the project, beyond a revised table of contents for the EA. It appears that, by the time of this meeting, the EA was well under way and that the scope of the EA had already been set by the terms of reference. In particular, the project sponsor was not prepared to discuss alternatives to the project. NGOs that attended the meeting also expressed frustration that no representatives from the EBRD were present, as a number of questions they raised could not be answered by either the project sponsor or the consultants hired to prepare the EA. The NGOs were told they should address those questions to the EBRD.

Both ZSNP and Mochovce illustrate the need to expand and clarify procedures for public participation during scoping, and to create a mechanism, such as an Independent Inspection Panel, to enforce these new requirements. The *Environmental Procedures* should be strengthened to require the project sponsor to open the public participation process to all interested parties, not just those chosen by Bank staff or project sponsors. Procedural requirements, including a minimum period for public comment, are needed to ensure that the public has both the time and opportunity to develop and express their concerns.

Receipt of Comments and Opinions from the Public

The public should have the opportunity to provide comments on a project at any point during the project cycle, but three points are particularly important: during scoping, upon release of the draft EA document, and between release of the final EA document and decision by the Board.

Scoping gives the public an opportunity to identify areas of concern, suggest alternatives, and discuss impacts and mitigation. The comment period after the draft EA document is released provides the public with an opportunity to review the document carefully and raise issues and alternatives that are not included or satisfactorily addressed. The comment period after the final document is released gives the public an opportunity to review the document to make sure it addresses all comments and resolves all outstanding issues.

The current *Environmental Procedures* provide very limited opportunity for public comment and do not require the project sponsor to respond to comments. The procedures merely state that comments and opinions expressed by the public are to be taken into account in the project approval process. No explicit provisions are made for the public to comment on either a draft or final EA, no public meetings are required, and no comment period is specified. Perhaps most troubling, the project sponsor is not required to publish the public's comments in the EA report or to respond to comments either by modifying the EA or explaining why the comments do not warrant further response.

Public comment was virtually absent during the ZSNP project cycle. The EA was not provided in draft form for comment, no public meetings were held during its preparation, and only hurried, last minute meetings were held with a select group of NGOs prior to submission of the project to the

Board. The NGOs that participated were informed of the meeting only days before it occurred and were not given documents in advance of the meeting. Consequently, they could not participate effectively.

The process for commenting on Mochovce, while better than ZSNP's, was still flawed. Problems with commenting during scoping have already been discussed. In addition, the project sponsors neglected to provide an opportunity to comment on the draft EA, and the seventy day period for comments on the final EA, least-cost study, and safety report were too short, especially since many groups received these documents late.

Public Participation in Implementation and Monitoring

Continued public consultation and monitoring is necessary both during project implementation and after the project is completed to ensure that the project sponsor complies with the environmental conditions of the loan and that otherwise unforeseen environmental consequences are properly addressed. For the public to participate effectively, it must have access to project information, loan conditions, and remediation agreements. Under the current *Environmental Procedures*, these documents are not made public. In comparison, other multilateral development banks, notably the World Bank and the IDB, continue to provide and update project information after its approval, including loan documentation and mitigation proposals.

To compensate for failing to implement its public participation procedures on the ZSNP project, the Bank proposed the creation of a Monitoring and Advisory Group to give the public a role in monitoring the project. Unfortunately, prospects for the success of this exercise appear somewhat doubtful. It started on the wrong foot. The terms of reference were drafted by the Bank without public input. Surprisingly, neither the terms of reference nor the remediation agreement will be made public. NGOs have expressed reluctance to participate, fearing their participation might be perceived as an endorsement of the project. In spite of these problems, the Monitoring and Advisory Group still has significant potential to advance public participation in monitoring.

Draft Procedures for Public Participation

Notification to the Public

Under the *Draft Procedures*, notification is only expressly required to the "affected public," and under certain unspecified circumstances, it may be waived altogether. The revised procedures should ensure that *all interested* parties are notified. The provision for waiving timely notification should be dropped.

Public Participation in Scoping

The *Draft Procedures* appear to narrow the breadth of public participation during scoping. Rather than opening the scoping process to all interested parties, the *Draft Procedures* require only that the "affected public" be consulted. They suggest that scoping meetings are optional, and when meetings are held, only those chosen by the project sponsor will be allowed to participate. Scoping should include mandatory meetings, open to any citizen that wants to participate.

Public Comment

The *Draft Procedures* provide a 30 day minimum time period between the release of the EA to the public for comment and submission to the Board. This time period apparently can be waived upon sufficient showing by the project sponsor. As already discussed, this period should be extended to 120 days and should not be waivable.

Public Participation in Monitoring

The *Draft Procedures* do not adequately address public participation in monitoring. The results of ongoing monitoring may be made available to the public, but only at the discretion

of the Bank. The *Draft Procedures* do not allow for public input into the design or implementation of the monitoring plan. There is no mechanism to inform the public of monitoring inadequacies and concerns, or to provide the public with a role in their resolution.

THE ENVIRONMENTAL ADVISORY COUNCIL

The Environmental Advisory Council (ENVAC) is an advisory board of twelve environmental experts, with a wide range of backgrounds, from Central and Eastern Europe and OECD countries. Established to "advise the Bank on critical environmental policy and strategy issues and programmes," the ENVAC provides the EBRD with expertise on environmental protection and natural resource management at the regional, national, and local level.

The ENVAC has met eight times since its inauguration in 1991, but its operations were suspended in September 1993, shortly after Jacques de Larosière took over the presidency of the EBRD. He reinstated its operations in June of 1994, after reaffirming that the EBRD needs the ENVAC's independent advice and expertise on environmental matters, particularly in the members' respective countries.

The EBRD at times has appeared somewhat ambivalent about the ENVAC, and has not always treated it as an important resource. The Bank's first two operations policies, on energy and transport, were adopted by the Board of Directors without prior ENVAC input. Some members feel they are not given adequate information and time to prepare for their meetings, which may cover a variety of difficult topics in a relatively short period of time. The crowded agenda and the short time (meetings run from one to two days) make it difficult for members to contribute more than cursory comments.

ENVAC members have had little direct impact on the EBRD's day-to-day operations. A few members have expressed a desire to play a greater role in the Bank's environmental activities, and frustration at not having had more influence in the development of EBRD's environmental policies and procedures.

ENVAC members also appear to have no direct role in Bank operations in their own countries, and have had difficulty communicating with local EBRD representatives. One ENVAC member tried on several occasions to arrange a meeting with the EBRD Resident Representative in the member's country to discuss environmental concerns about several projects. Even though the Resident Representative complained of not having a staff member to provide advice on environmental matters, he declined to meet with the ENVAC member.

The EBRD staff is aware of these problems and has proposed that communication between ENVAC members and local EBRD representatives be transmitted through the Bank staff in London. It would be better if the EBRD instructed local EBRD representatives and project sponsors to cooperate with ENVAC members requesting information or offering advice on EBRD-financed projects in their country or region.

The EBRD should develop guidelines or procedures to ensure that ENVAC consultation is thoroughly integrated into the Bank decision-making process. Neither the current *Environmental Procedures* nor the *Draft Procedures* provide any guidance as to the role of the ENVAC or how it should fit into the Bank's environmental activities, leaving it entirely to the Bank staff to determine the information the ENVAC will receive and the issues on its agenda.

While it may not be practical for the ENVAC to be directly involved in the environmental assessment process, members should have the

opportunity to comment on Category A projects and EAs before they are submitted to the Board. To assist them in their advisory role, ENVAC members should have full access to project documentation. ENVAC comments should be provided directly to the Board, as well as to the Bank staff.

The ENVAC could also help resolve disputes between the Environmental Staff and other members of the Bank regarding environmental components of projects. More generally, they might function as the EBRD's environmental "trouble-shooters." They could empanel smaller subcommittees to review and evaluate problems and controversies and advise the President.

The expertise and diverse background of the ENVAC make it well suited to provide assistance in identifying opportunities for development that will be economically and environmentally sustainable. It would be best utilized in assisting the Environmental Staff in developing a sustainable development policy, criteria, and standards; regional and sectoral policies; and regional and sectoral environmental assessments.

GAINING ACCOUNTABILITY THROUGH AN EBRD INSPECTION PANEL

In researching this report, and particularly the case studies of ZSNP and Mochovce, CIEL found that EBRD staff and project sponsors did not always follow Bank policies and procedures, especially when there was pressure to speed up the project cycle. For the Bank's environmental and other procedures to be more than mere "guidelines," there must be some mechanism for enforcing these policies and procedures, for holding Bank management responsible and accountable for compliance with the procedures, and for providing citizens with the means to protect the interests that underlie the Bank's policies and procedures.

Precisely the same concerns about accountability and responsibility, voiced by NGOs and certain donor countries, prompted the World Bank to create an Independent Inspection Panel. Other regional development banks are also moving forward to create an equivalent to the Panel. The InterAmerican Development Bank, for example, recently announced its inspection function. Both the African and Asian Development Banks are expecting to approve inspection mechanisms soon.

An EBRD Inspection Panel would empower citizens in affected countries to seek remedial action when they have been directly and adversely affected by the Bank's failure to follow its own operational policies and procedures. Any citizen or group of citizens from member countries who are adversely affected should be able to file a claim. The Panel should have clear and uncomplicated rules and procedures, including a simple form like that developed for the World Bank Inspection Panel.

Because of the EBRD's commitments to democracy and sustainable development, it should go even further than the World Bank. The EBRD's Panel should entertain claims that the Bank has failed to comply with international legal norms and the goals of its own charter, in addition to its own policies and procedures. The EBRD Panel should allow public disclosure and discussion of the Panel's pending claims and recommendations *before* the Board of Directors makes final decisions. Finally, the EBRD Panel should be given clear authority to slow the project cycle when claims are pending and to make specific recommendations for remediation.

THE EBRD OPERATIONS POLICIES

The Bank's operations policies guide its lending in a number of sectors. With the exception of the energy policy, however, they fail to address most of the environmental issues that other MDBs have already confronted in their lending operations, and fail to commit the Bank to specific actions to remedy the few problems they do identify.

The Energy Operations Policy

In the newest energy operations policy, issued in July of 1994, conservation, energy efficiency, least-cost planning, integrated resource planning, and, to a lesser extent, development of renewable energy sources play prominent roles.

The Bank's main objectives in the energy sector are: (1) supporting and accelerating establishment of competitive energy markets; (2) increasing energy efficiency and cost effectiveness, in both supply and demand; (3) improving sector environmental performance; (4) improving the safety of nuclear power plants; and (5) mobilizing private sector resources necessary to achieve these objectives. Each of these objectives, according to the EBRD, will contribute to the environmental performance of the energy sector, and most environmentalists would agree.

Perhaps the greatest strength of the new policy is its commitment to integrated resource planning. Acknowledging that the institutional resources do not yet exist to fully adopt integrated resource planning in the region, the policy calls for a phased approach to build institutional capacity and develop necessary data. Meanwhile, all energy projects should be subject, at a minimum, to a least-cost plan integrated within an environmental assessment.

Close inspection of the Bank's energy policy does raise some questions, however. For example, the policy suggests that maintaining a balance among energy sources will be a priority, despite some sources having far greater adverse environmental and health impacts, and associated costs, than others. Furthermore, the policy does not require environmental costs to be included in least-cost calculations, so decisionmakers do not receive a clear picture of the true costs of projects and alternatives.

The energy policy states that reform of energy pricing, along with institutional reform, will be the key to improving countries' energy efficiency, and a number of energy sector loans have been made contingent upon such reforms. While there is almost universal agreement that energy prices will eventually have to rise to the level of prices in market economies, the effectiveness of price reform as a near-term measure for achieving efficiency gains is not certain. Many Central and Eastern European countries have already made substantial progress in pricing, but have not experienced corresponding reductions in energy intensity.

Although most of the Bank's client states signed the Framework Convention on Climate Change, the energy operations policy does not address global warming. This is a major flaw. These states account for a significant portion of the world's energy-related greenhouse gas emissions. The EBRD should increase significantly its lending for renewable energy technologies (excluding large hydropower plants, which provide no climate benefit).[5]

The Nuclear Policy

The EBRD has been given a central role in determining the future of nuclear energy

[5] Through 1994, the EBRD spent only 50,000 ECU for solar and wind power combined.

production in Central and Eastern Europe. In addition to funding nuclear projects with its own resources, the Bank administers the Nuclear Safety Account established by the G-7 nations to help address serious safety risks in the most dangerous reactors operating in Central and Eastern Europe. Given the Bank's pivotal role on this critical issue, the energy operations policy gives surprisingly little attention to nuclear energy.

Virtually all Western experts agree that older generation Soviet-designed reactors should be shut down as quickly as possible. Moreover, few experts believe that any of the newer reactors, a number of which are under construction or have had construction halted for lack of funds, can be safely operated without substantial improvements to their safety systems. Current plans to backfit some of these plants, including Mochovce, with Western technology are untested and highly controversial.

Opportunity exists to reduce the dependency on nuclear power in Central and Eastern Europe. Studies by the World Bank and the EBRD indicate that a "low nuclear scenario" for Central and Eastern Europe would require substantially less investment than a "high nuclear scenario."

An activity as highly polluting and dangerous as nuclear energy in its present form is not sustainable in the region. Nuclear technology is inherently risky. The marriage of unreliable Soviet technology to Western technology designed for entirely different applications increases the risk. The German government reached the same conclusion in refusing to allow Soviet-designed plants backfit with Western technology to operate on German soil.

Alternatives to nuclear energy must be evaluated on a case-by-case basis and as part of an integrated resource plan. As cost effective non-nuclear options are identified, the Bank should promote them and should move expeditiously to phase out existing nuclear plants as quickly as the energy can be replaced.

The Transport Operations Policy

The Bank issued its Transport Operations Policy in March 1992, with a promise to "take a comprehensive view of the transport sector encompassing supply and demand, as well as organizational and environmental aspects." The Transport Policy also states that it will give priority to projects that contribute to environmental protection, and emphasizes balanced development of the transport system. The Policy fails, however, to consider the environmental advantages and disadvantages of these different modes. No mention is made of energy conservation, and little is said about strategies to minimize pollution.

The *Transport Sector* paper explicitly acknowledges the EBRD's mandate to promote sustainable development. It discusses implementing this mandate through internalization of environmental costs, effective uses of environmental assessments as decisionmaking tools (at least where environmental costs cannot be valued reliably in economic terms), and the need for achievable environmental standards.

Internalizing external costs through fuel taxes or other user fees would help to shift the demand away from automobiles to less environmentally damaging modes. But relying on this type of cost internalization as the only policy to address major environmental issues will lead to a serious underutilization and underdevelopment of railroads, subways, and buses, which may require subsidies or other policy interventions.

The Bank too quickly dismisses the potential for intermodalism to help create an efficient transport system in the region. Intermodal transport systems increase economic efficiency and reduce environmental impacts by using

uniform containers that are easily transferrable between trucks, railways and ships. Standardized infrastructure and cargo containers allow for the integration of various modes of transportation into the most efficient service.

Also, The Transport Operations Policy does not mention the importance of non-motorized transport. Most important in this respect is support for bicycle pathways and urban pedestrian zones. Bicycles can be a practical supplement to motorized transportation in industrial countries as evidenced by zoning prohibitions on autos in the center of cities and "bike and ride" options in a growing number of countries in Western Europe. In fact, worldwide, bicycles are the fastest growing mode of transportation. The Bank should make promotion of bicycle transport and pedestrian zones an important priority of their transport operational practices.

The Agriculture Operations Policy

The EBRD's Agricultural Operations Policy states that Bank operations will focus on the economic restructuring of the sector and the development of physical and human resources to improve agricultural management. The Bank will emphasize privatization and restructuring through the entire commodity chain "including pricing policies, licensing, distribution and marketing constraints, financing, product selection, technology improvement, hygiene and environmental standards, and quality control". Both environmental and health impacts of agricultural practices are addressed in the EBRD policy, although they are not central to any of the operational priorities.

The Bank's emphasis on economic restructuring of the sector could have important environmental benefits. For example, after elimination of subsidies, fertilizer prices will increase and fertilizer use will decrease. Similarly, the Bank's apparent sensitivity to the need to downsize agricultural operations (and not simply to privatize them) could significantly reduce soil erosion and water pollution problems that occur disproportionately in large agricultural operations.

The Policy makes few specific recommendations for how its loan practices will further sustainable environmental practices. Health concerns arising from contaminated agricultural products are given even less attention in the policy. The Bank's failure to explicitly target the environmental and health impacts of current agricultural practices is a missed opportunity to assist in the shift toward a sustainable agricultural policy in the region.

The Bank should promote organic agricultural practices and other practices that reduce dependence on fertilizers and pesticides. Technical assistance should be targeted to eliminate those agricultural practices that cause long-term environmental degradation, and to develop a market for organic and other healthy agricultural products. This would mean not only providing a preference for loans to organic farmers, but also assisting in building a demand for these products through education and research on the impacts of agricultural chemicals on human health.

CONCLUSION

When the EBRD was established, environmentalists hoped it would be a model and a guide to other international financial institutions seeking to promote sustainable development and democracy. But the EBRD has so far failed to operationalize these twin mandates in Central and Eastern Europe. To fulfil its commitment to sustainable development, the EBRD must revise its environmental and sectoral operations policies and integrate them into an overarching policy for sustainable development. The EBRD also must develop criteria and standards to ensure that each

project it funds is consistent with this sustainable development policy and relevant operations policies.

Rather than selecting projects on a case-by-case basis, as the Bank has done in the past, it should consider sectoral and regional links between projects, and identify the mix of projects that best supports sustainable development. To help with this process, the Bank should prepare sectoral and regional environmental impact assessments, as provided for in its *Environmental Procedures*.

The Bank has generally underutilized environmental assessments, even on the individual project level. Many projects that should have received full EA, under either national law or the Bank's own guidelines, have received only partial environmental analysis. This practice must change. Additionally, more time should be allotted for preparation and review of EAs, and they should not be finalized, as has sometimes happened, until all relevant data has been collected and assessed. The Bank needs to adhere strictly to its screening, scoping, and monitoring requirements, and must expand its EAs to include alternatives and indirect, cumulative, and global impacts. EAs should be released in draft for public comment at least 120 days before the project is submitted to the Board for approval.

To meet its commitment to democracy, the EBRD must substantially improve and strengthen its procedures for public participation and access to information. As other development banks have done, The EBRD needs to develop an information disclosure policy that contains a presumption in favor of disclosure of all project-related information. The EBRD should also ensure that project sponsors adhere to its requirements for public participation, including early notification about all projects. The public should have the opportunity to participate in EAs at all the key points, including during scoping and upon release of the draft and final EAs.

Finally, the EBRD needs to develop mechanisms for ensuring full compliance with its policies and procedures and for holding the Bank accountable when it derogates from them. To this end, the EBRD should establish an Independent Inspection Panel modeled after the World Bank Inspection Panel. The ENVAC could also help ensure the EBRD lives up to its environmental objectives. It should provide more guidance to the Bank staff and the Board in implementing EBRD policies and procedures.

CIEL hopes that the analysis and recommendations contained in this report are helpful to environmentalists in Central and Eastern Europe, and contribute to the EBRD's ongoing efforts to improve its environmental policies, procedures, and practices, and ultimately, to the achievement of environmentally sound and sustainable development in the region.

KEY RECOMMENDATIONS

Creation of a Sustainable Development Policy

- In cooperation with government representatives, the scientific community and the general public, the EBRD needs to develop a sustainable development policy to guide its lending in Central and Eastern Europe. A set of sustainable development criteria should be created and integrated into the Bank's project selection procedures. The EBRD should utilize Sectoral and Regional EAs as the basis for long range planning and policy development, and consider the environmental impacts of Bank activities at the global level.

The EBRD Project Portfolio

- Bank projects should reflect regional and local development priorities based on decentralized, autonomous decisionmaking. Projects that are inconsistent with the sustainable development policy should be ineligible for EBRD financing. The EBRD should undertake more projects aimed directly at improving the region's environment. The activities of the new Energy Efficiency Department and the Environmental Infrastructure Department should be fully supported and expanded.

The EBRD Environmental Procedures

- The current *Environmental Procedures* should not be replaced, but should be clarified and strengthened, as recommended. The *Environmental Procedures* should be supplemented with Project Sponsor Guidelines which in clear, mandatory language, would instruct project sponsors how and when to notify the public, conduct scoping, prepare an EA, hold public meetings, conduct monitoring, and fulfil all other Bank requirements for environmental due diligence.

Procedures for Environmental Assessment

- The EBRD should require projects to adhere, at a minimum, to EU standards, and to more stringent standards in special circumstances. Local laws and regulations, where they exist, should be strictly followed, though in many cases they will need to be supplemented by the Bank's own procedures.

- To ensure that projects receive the appropriate level of environmental scrutiny, the Bank staff should strictly adhere to the screening requirements of the *Environmental Procedures*. All information upon which screening is based should be made public and the public should be given an opportunity to review and appeal screening decisions.

- The scope of EAs should be expanded to include:

  * a statement of the purpose and need for the project;
  * identification of all alternatives to the proposed action that satisfy the purpose and need, including an assessment of the no-action alternative; and
  * an assessment of all foreseeable indirect, cumulative, regional and global impacts of each alternative.

• More time should be allotted for both the preparation and review of EAs; the EBRD staff should diligently review the EA throughout its development to ensure that it fully addresses all areas of potential concern. Where data is unavailable, procedures have not been followed, or environmental concerns have been ignored, the staff should reject the EA and stop the project until all deficiencies have been remedied.

• Environmental audits should not be used as a substitute for EAs. Environmental audits, particularly of state-owned companies, should be provided to the local environmental agencies and should be released to the public. The Bank should require remediation of any contamination discovered during the audit, as a condition of financing. Both the EBRD staff and the public should participate in project monitoring to ensure that Management Action Plans are fully implemented.

• Remediation agreements and Environmental Action Plans should provide for public review, participation, and monitoring. Loan agreements should not be signed, nor money disbursed until complete agreement has been reached in writing with the project sponsor for mitigation and remediation.

Procedures for Project Review and the Environmental Veto

• The Environmental Staff should be given a mandatory veto if the projected net environmental outcome of a proposed project would result in a significant loss of environmental quality or would not promote sustainable development as required by the Bank's charter. The Environmental Advisory Council should be given authority to review Environmental Staff recommendations and provide advice to the President, the Operations Committee, and the Board of Directors on specific projects.

Procedures for Board Decisionmaking

• EAs should be released to the public and the Board of Directors a minimum of 120 days before projects are submitted to the Board for approval. The Board should reject projects when environmental and public participation procedures have not been fully followed, or environmental information is incomplete.

Procedures For Monitoring and Evaluation

• Every EBRD EA should contain a monitoring plan. The Bank should:

* integrate public participation into all its monitoring activities;
* make Environmental Evaluation Memoranda public documents; and
* withhold a portion of the loan until all environmental mitigation and remediation requirements are met.

Public Participation and Access to Information

Disclosure of Information

• The EBRD should develop and publish an information disclosure policy and establish a Public Information Center modeled after the World Bank PIC, and those recently established at other multilateral development banks. The information disclosure policy should endorse a presumption in favor of releasing all environmental information, which should be provided to the public in a timely manner. The Board of Directors should condition the approval of all loans upon full public access to all such information.

Public Participation in Environmental Assessment

- EBRD should provide more guidance to project sponsors on how to conduct public participation, via a handbook and direct assistance from the Bank staff. Project sponsors that fail to adhere strictly to public participation procedures should not receive loans.

- Project sponsors should be required to notify the public about all projects, as early as possible in the project cycle, and at a minimum, before screening. With assistance from the EBRD staff, project sponsors should develop a notification strategy, identifying all interested parties and effective means of notifying them. Notification should include enough information about the project for citizens to determine whether it might affect them.

- The EBRD should require project sponsors to conduct public scoping on all projects requiring an environmental assessment. All potentially interested parties should:

  * have an opportunity to participate in the scoping process;
  * be provided with complete information and have the opportunity to comment on all relevant topics, especially alternatives, impacts, and mitigation;
  * be provided a minimum period of sixty days for public input into scoping;
  * be invited to public scoping meetings, and meetings with individual interest groups; and receive timely responses from the project sponsor, to all issues and proposals raised.

- The project sponsor should also provide an opportunity for public comment upon release of both the draft and final EA, at which point public meetings should be held. The project sponsor, or where appropriate the Bank, should be required to respond in writing to all comments.

- Public participation in monitoring should be mandatory for all projects requiring environmental assessment, and should be included as a covenant in loan agreements. To facilitate public involvement in project monitoring, environmental information documents, loan conditions, and remediation agreements should be made available at an EBRD public information center and in the Bank's field offices.

The Environmental Advisory Council

- The ENVAC should be given greater responsibility in developing policies and procedures. The EBRD should respect the recommendations of the ENVAC; its views on environmental matters should routinely be adopted by the Bank. EBRD representatives and project sponsors should cooperate with ENVAC members requesting information or offering advice on EBRD-financed projects in their country or region. The environmental staff should respond in writing to each ENVAC comment or recommendation, stating how the recommendation will be implemented.

- To allow time for full discussion of all important environmental issues, ENVAC meetings should be longer and occur more frequently than semi-annually.

Creation Of An Independent Inspection Panel

- The EBRD should create an Inspection Panel modeled after the World Bank's Inspection Panel, which would entertain claims based on the Bank's failure to comply with international legal norms, the goals of its charter, or its own policies and procedures.

- The EBRD Panel should:

  * permit public disclosure and discussion of the Panel's pending claims and recommendations;
  * be given the authority to slow the project cycle when claims are pending; and
  * make specific recommendations for remediation.

The EBRD Operation Policies

- The *Energy Operations Policy's* long-term commitment to integrated resource planning should be fully implemented. Specific investments in conservation and energy efficiency, particularly in the residential and transport sectors, deserve greater attention, as do benign renewable technologies, such as solar and wind. Least-cost analyses should be undertaken for all energy projects, and global environmental impacts associated with the energy sector, should be addressed.

- The EBRD must develop a detailed long-range *nuclear policy.* Until an integrated resource plan is developed for the region, the Bank should place a moratorium on funding the completion of nuclear power plants, and identify and promote non-nuclear alternatives. In comparing the costs of nuclear and non-nuclear options, the EBRD should consider the environmental and economic costs of long-term waste storage, decommissioning, and possible accidents.

- The *Transport Operations Policy* should better account for environmental and efficiency issues. Bank lending should: favor public modes of transportation that are less destructive of the environment; encourage, where appropriate, governmental subsidies for public transportation; and promote intermodalism, bicycle transport and pedestrian zones.

- The *Agriculture Operations Policy* should be re-written to include environment and health issues. Bank lending should support the removal of subsidies for agricultural chemicals, provide preferences for organic agricultural practices and those that reduce dependence on fertilizers and pesticides. Technical assistance should be targeted to eliminate those agricultural practices that cause long-term environmental degradation, and to develop a market for organic and other healthy agricultural products. The Bank should assist in building a demand for these products through education and research on the impacts of agricultural chemicals on human health.

I. Introduction

The European Bank for Reconstruction and Development (EBRD) is the first multilateral development bank to have an explicit environmental mandate in its charter. The charter states that the Bank is to "promote in the full range of its activities environmentally sound and sustainable development."[1] It also proclaims commitments to democracy and democratic institutions, rule of law, respect for human rights, and market economics.[2] Nevertheless, some of the Bank's harshest critics have been environmentalists. They contend that the EBRD is not living up to these promises and in some respects is even less progressive in its environmental policies and procedures than other international financial institutions.

This report supports these claims. The EBRD has no overarching environmental policy or criteria to guide its project lending. As a consequence, the EBRD has financed projects that are inconsistent with its mandate to promote sustainable development. The report examines several of these projects: a heavily polluting and energy intensive aluminum smelter; a proposed nuclear power plant project that has drawn intense international criticism from governments and environmentalists; and two oil field development projects that contributed to the tragic oil spill in the Komi region in Russia.

The report finds that the EBRD has inadequate procedures for conducting environmental due diligence–environmental impact assessments, environmental audits, environmental remediation, and monitoring. Not only does the Bank need to improve its environmental procedures, but it must adhere to them more rigorously. Too often the Bank cuts corners in implementing its procedures, or fails to implement them altogether.

The EBRD's policy and procedures for public participation and information disclosure are especially weak. With its environmental mandate and commitment to democracy, the EBRD should be at the forefront among international financial institutions in promoting openness and participation. This report demonstrates, however, that the World Bank, the InterAmerican Development Bank, the Asian Development Bank, and the International Finance Corporation all have more open and participatory policies than the EBRD.

The report examines the functions of the Bank's Environmental Advisory Council (ENVAC)–a group of twelve experts that meets twice a year to advise the Bank on environmental matters–and suggests ways the EBRD could make better use of the Council's expertise. It recommends an expanded role for the ENVAC, particularly in developing the Bank's environmental policies and procedures, which should not be adopted without ENVAC approval.

Citizens who are harmed, or may be harmed, by EBRD projects should have a place to bring their complaints and receive a fair hearing. The EBRD needs an oversight body to review the Bank's activities, particularly the implementation

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[1] Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, at art. 2 (vii), *reprinted in* 29 I.L.M. 1077 (1990) [hereinafter Articles of Agreement].

[2] *Id.* at preamble and art. 1.

of its policies and procedures, and slow down or stop a project if need be. The report proposes that the EBRD create an Independent Inspection Panel along the lines of the World Bank Inspection Panel.

There have been some recent, positive developments at the EBRD, including the creation of an Energy Efficiency Unit and an Environmental Infrastructure Department. These new departments could have a profound impact on future lending if they are fully integrated into Bank operations. While it is too soon to evaluate their performance, they already have initiated some commendable projects.

The report makes a number of recommendations for improving the Bank's energy, transportation, and agriculture operations policies. The energy policy sets out some clear markers for sound development of the conventional energy sector, but the brief section on nuclear energy should be developed into a separate, formalized policy. The transportation and agriculture policies are almost entirely lacking in environmental considerations and need to be completely rethought.

The aim of this report is to identify ways to improve the process of delivering development aid to Central and Eastern Europe and to help ensure that the Bank fulfils its mandate to promote sustainable development. The report makes a number of specific recommendations, which can be distilled into the following five statements:

(1) The EBRD should develop a sustainable development policy, criteria, and standards to guide its project selection and ensure that the projects it finances are consistent with its environmental mandate.

(2) The EBRD needs to strengthen its environmental procedures, particularly those for public participation and information disclosure, and ensure that the procedures are rigorously followed.

(3) The EBRD should strengthen the roles of the Environmental Appraisal Unit and the Environmental Advisory Council, to help ensure that environmental concerns are fully integrated into its decisionmaking process.

(4) The EBRD should undertake more initiatives aimed directly at improving the environment in Central and Eastern Europe. The activities of the new Energy Efficiency Unit and Environmental Infrastructure Team are an excellent start and should be expanded.

(5) The EBRD needs an independent oversight body, similar to the new World Bank Inspection Panel, to help ensure that Bank policies and procedures are followed diligently, and to provide the public with a grievance procedure when they are not.

For more than a year, the EBRD has been revising its *Environmental Procedures*, the manual that guides environmental due diligence for Bank-financed projects. It recently released a draft of the revised procedures for public comment, and will soon submit them to the Board of Directors for approval, perhaps as early as December of 1995. Based on its findings in an earlier draft of this report, CIEL made extensive recommendations to the Bank for improving its revised *Environmental Procedures*. The report discusses these new procedures and CIEL's recommendations.

It is CIEL's hope that this report will be read in the spirit in which it was written: not merely as a critique of EBRD lending efforts, but as an attempt to find ways to improve the process of delivering development aid to Central and Eastern Europe, to ensure that the EBRD fulfills its environmental mandate and commitment to democracy, and to help put the region on the path to environmentally sound and sustainable development.

II. The EBRD Environmental Mandate

On May 29, 1990, forty countries, the European Economic Community, and the European Investment Bank agreed on the charter and by-laws establishing the European Bank for Reconstruction and Development.[3] Environmentalists had high hopes that the EBRD, with its unique commitment to democracy and mandate to promote sustainable development, would herald a new era of multilateral assistance–an era in which environment and development concerns would be fully integrated.

The Agreement establishing the EBRD states that the Bank is to "promote in the full range of its activities environmentally sound and sustainable development."[4] The EBRD's environmental mandate reflects concern, both in the West and the East, about the alarming level of environmental degradation in Central and Eastern Europe.[5] The Agreement also proclaims the Bank's commitments to democracy and democratic institutions, the rule of law, respect for human rights, and market economics.[6]

The EBRD, however, has so far failed to make these commitments operational. It lacks a strategy to guide its project selection, to ensure that projects are chosen not merely for reasons of economic or political expediency but because they will put the region on the path to environmentally sound and sustainable development.

While the phrase "sustainable development" does not have a universally accepted meaning, the landmark 1987 Brundtland Commission Report, *Our Common Future*, defines it as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[7] Until recently, the loss of environmental quality was thought to be the unavoidable price of development. The Brundtland Commission's deceptively simple definition implies that economic development cannot be achieved at the expense of the environment; it is now understood that economic development and environmental protection go hand-in-hand.

Sustainable development can create profits while maintaining the integrity of ecological systems and using resources efficiently. On an operational level, sustainable development ensures

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[3] *Id.* As of December 31, 1994, EBRD membership consisted of 57 countries, the European Union, and the European Investment Bank, all of which are represented on the Board of Directors. EBRD, 1994 ANNUAL REPORT 51 (1995) [hereinafter EBRD 1994].

[4] *Id.* at art. 2 (vii).

[5] EBRD, ENVIRONMENTAL PROCEDURES (adopted Feb. 13, 1992) at Annex 1, p. 1 [hereinafter ENVIRONMENTAL PROCEDURES].

[6] Articles of Agreement, *supra* note 1, at preamble and art. 1.

[7] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (1987). The concept was further clarified by the United Nations Environment Programme 15th Governing Council to imply "progress toward international and national equity, as well as the maintenance, rational use and enhancement of the natural resource base that underpins ecological resilience and economic growth." UNEP Report of the Governing Council, U.N. GAOR, 44th Sess. No. 25, at 115, U.N. Doc. A/44/25 (1989).

that production processes do not over-exploit the production and carrying capacities of natural resources, resulting in inequities between current and future generations. It also promotes basic human freedoms and rights to participate in social, political and economic processes at the local, regional and national levels.

The Need for a Sustainable Development Policy

The EBRD needs a sustainable development policy to ensure that projects it may fund will be consistent with its mandate. The Bank's failure to integrate long-term environmental goals into its operations policies undermines all other Bank efforts to promote sustainable development in Central and Eastern Europe. Without such planning, regional economic viability and long-term environmental integrity are in jeopardy.

EBRD financing in Slovakia demonstrates the need for sustainable development planning. By proceeding in a piece-meal, project-driven fashion, the Bank finds itself supporting a nuclear-powered, heavy industry strategy. Desirable alternatives remain unexplored, due to the Bank's lack of long-range regional planning and sectoral integration.

Specifically, the EBRD has been criticized for financing the renovation and expansion of the ZSNP aluminum smelter–a plant that has already caused terrible environmental damage to the region. ZSNP is one of Slovakia's worst polluters and is its largest single consumer of electricity. Although the renovation of ZSNP will significantly improve its environmental performance, the plant will continue to emit large quantities of dust, sulfur dioxide (SO_2), arsenic, chromium, and nickel. Because of its expanded capacity, the plant will consume even more electricity than it did in the past.

ZSNP receives a substantial portion of its electricity from Bohunice, Slovakia's old and dangerous nuclear power plant. Slovakia has been under pressure from the Bank and others to close Bohunice as quickly as possible. In part to get Slovakia to shut down Bohunice, the Bank has proposed to finance the completion of Mochovce, another Soviet-designed nuclear plant. Though newer, Mochovce is also regarded by many experts as too dangerous to operate, even with the safety upgrades required by the Bank.[8]

The development strategy pursued by Slovakia should not have been encouraged by the EBRD. A sustainable development policy would have helped the Bank map out a viable, long-term alternative plan for its funding in Slovakia to help steer the country away from reliance on heavy industry and nuclear power. At the least, it would have prevented the Bank from financing a polluting, energy-intensive aluminum smelter or a potentially dangerous nuclear power plant.

The devastating oil spill in the Komi region of Russia provides especially compelling evidence of the need for a sustainable development policy. In the summer of 1994, an estimated 270,000 tons of crude oil spilled from the Kharyaga-Usinsk pipeline onto the Arctic tundra. The spill was among the largest in history–considerably larger than the Exxon Valdez disaster in Alaska. A substantial amount of the spilled oil belonged to companies financed by the EBRD at a time when the poor condition of the pipeline was well known. While the EBRD is not responsible for the poor condition of the pipeline, a sustainable development policy would have placed pipeline repair ahead of oil field development as a priority for EBRD financing.

We urge the Bank to formulate a sustainable development policy for the region. This undertaking will require a considerable amount of time, energy and collaboration. The policy and subsequent guidelines for implementation will not

[8] A plant of the same type in East Germany was closed by the German government because it was not considered feasible to upgrade it to meet Western safety standards. GLOBAL 2000, THE SLOVAKIAN NUCLEAR POWER PLANT: MOCHOVCE 3 (1994) [hereinafter GLOBAL 2000 REPORT].

materialize overnight. The EBRD should not act unilaterally, but should encourage participation from all the Central and Eastern European countries. Government officials, NGOs, the scientific community, and the general public should be invited to participate in conferences, workshops, and roundtable discussions to help develop the policy. The Bank should also solicit the participation and advice of the Environmental Advisory Council (ENVAC) and should not adopt the policy without the ENVAC's full approval.

The region is at a historical juncture which provides a unique opportunity to formulate a new and better model of development that is economically viable and environmentally sustainable. The EBRD needs to reconsider many of the assumptions underlying development choices made in the West, which also have taken their environmental toll and continue to do so. One thing is clear: Western levels of consumption are not sustainable. Per capita, Westerners consume much more than Central and Eastern Europeans. Consumption statistics alone should preclude the EBRD from modeling its development strategy strictly along Western lines.

The Bank should integrate the goals of sustainable development into country, sectoral and regional plans, as well as into early evaluations of project alternatives. At present, projects like ZSNP, Mochovce, Polar Lights and KomiArctic can only be considered on their individual economic and environmental merits. A sustainable development policy for the region would enable the Bank to identify a program of projects that, over the long term, would provide equal or greater economic benefits to the region without further damaging the environment. A sustainable development path exists for Slovakia and the other countries of Central and Eastern Europe, but it will not be found as long as the EBRD continues to fund projects like ZSNP, Mochovce, Polar Lights, and KomiArctic.

Criteria and Standards for Sustainable Development

The EBRD should also develop criteria and standards to ensure that the projects it funds are consistent with its sustainable development policy.[9] An initial set of criteria might include the following:

- ☐ Projects should use energy and other resources in the most efficient manner.
- ☐ Projects should foster diversity of production to avoid making extreme demands on the assimilative capacity of the region.
- ☐ Projects should incorporate clean production technologies that minimize waste and prevent pollution.
- ☐ Projects that require environmentally damaging government policies, such as energy subsidies, should be avoided.
- ☐ Projects should emphasize human resource development over intensive development of natural resources.
- ☐ Projects should reflect community-based development priorities, based upon decentralized and autonomous decisionmaking.
- ☐ Projects should contribute to the solution of global environmental problems, such as climate change, ozone depletion, loss of biodiversity, and pollution of international waters.[10]

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[9] In fact, the EBRD *Environmental Procedures* provide for regional environmental assessments for the purpose of, *inter alia*, formulating criteria for environmentally sustainable development in a region. ENVIRONMENTAL PROCEDURES, *supra* note 5, at 33.

[10] These sustainable development criteria are supported in many international and regional agreements. *See* DAVID HUNTER, et al., CONCEPTS AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: AN INTRODUCTION (1994); *see also*, Chris A. Wold & Durwood Zaelke, *Promoting Sustainable Development and Democracy in Central and Eastern Europe: The Role of Development*, 7 Am. U.J. of Int'l L. & Pol'y 559, 584-585 (1992).

Presently, the Bank does not appear to hold projects to these, or any other, specific environmental criteria. Had ZSNP, Mochovce, Polar Lights, and KomiArctic been evaluated according to these criteria, they probably would not have been considered for EBRD financing.

While the EBRD has not explicitly committed itself to a particular set of environmental standards, it implies in its *Environmental Procedures* that the standards of the European Union will serve as a baseline for its projects.[11] In some circumstances, for example, in heavily polluted or ecologically fragile areas, the *Environmental Procedures* state that more stringent standards should be applied.[12] In practice, however, the EBRD does not implement this policy, and Bank staff have admitted that projects are not routinely required to meet EU environmental standards.

The *Draft Revised Environmental Procedures* recently released by the Bank confirm that the Bank does not intend to hold projects to EU standards or higher. Instead, the new procedures would, *generally*, require compliance with the lawfully adopted standards and regulations in its countries of operation. Where standards do not exist, it would require "good industry practice and the use of BATNEEC (Best Available Technologies Not Entailing Excessive Costs)." In some cases, if regulatory authorities agree, the Bank may accept environmental standards *below those included in the regulations of the particular country*, provided they equate with good industry practice.[13]

It is not appropriate for the Bank to permit projects to meet standards lower than those required by national law. Rather, the Bank should require projects to adhere to EU standards at a minimum, and higher standards in special circumstances, such as in degraded or sensitive areas, or where required by national law.

Expanding the Role of Environmental Assessment

To help ensure sustainable development, the EBRD must analyze the environmental impacts of its actions at the project, sectoral, regional, and global levels. Environmental assessments (EAs) are the Bank's principal tools for determining the environmental impacts of its actions, but the Bank has underutilized them.[14] Only twelve of the 251 projects approved through 1994 were screened Category A, requiring full EA. Even projects listed in the EBRD's *Environmental Procedures* as *requiring* full EA do not always receive one. Moreover, EBRD EAs typically do not contain all the elements of a full environmental impact assessment. They routinely fail to assess alternatives to the proposed project, including the important "no-action" alternative, and indirect impacts, such as offsite impacts. They also fail to provide for sufficient public participation.

Sectoral and Regional EAs are also important tools for achieving sustainable development, and the Bank should start using them. Although the *Environmental Procedures* provide that Sectoral

[11] "The Bank plans to promote the adoption of a sound environmental policy taking as its basis the principles of the European Community delineated in Article 130 of the Treaty of Rome, as amended by the Single European Act in 1987. The transnational nature of environmental issues, combined with expected regional integration, call for a coherent set of environmental principles, standards and monitoring systems throughout the Continent." ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 1, p. 2.

[12] *Id.*

[13] EBRD, DRAFT REVISED ENVIRONMENTAL PROCEDURES 37 (Aug. 21, 1995) [hereinafter DRAFT PROCEDURES].

[14] Environmental audits are also very important for analyzing the possible environmental consequences of projects, but as discussed later in this report, are designed more to discover environmental problems resulting from past and current activities than to assess the environmental impacts of future activities.

and Regional EAs may be undertaken for development plans, sector-wide programs, or multiple projects, none has been performed to date.[15] Sectoral EAs should be used to examine the cumulative impacts of multiple projects planned in the same sector.[16] A Sectoral EA of Russian oil and gas development would have alerted the Bank to the imminent Komi pipeline disaster. Sectoral EAs would be useful bases for the development and implementation of the Bank's sector operations policies, reviewed in Chapter VIII. These operations policies generally lack depth and clarity in dealing with environmental issues. With one important exception–the *Energy Operations Policy*–most Bank operations policies treat environmental issues superficially and generally.

Regional EAs should be undertaken when a number of development activities are planned or proposed for a relatively localized geographical area.[17] A Regional EA would have provided an opportunity to examine different energy and development strategies for Slovakia, and perhaps would have identified an economically attractive alternative to continuing along the path of nuclear power and heavy-industry.

The EBRD should also consider the global impacts of its actions, including possible contributions to depletion of the ozone layer, climate change, and loss of biodiversity. Unlike the World Bank, which at least encourages consideration of adverse global impacts,[18] the EBRD's policy does not require any discussion of global impacts in its EAs. These impacts should be investigated on a project-by-project basis in project-specific EAs, a sector-wide basis in sectoral EAs, and on a regional basis in regional EAs.

Recommendations:

- ***The EBRD needs a sustainable development policy to guide its lending in Central and Eastern Europe and fulfil its commitment to promote sustainable development in all its activities.***

- ***The EBRD should develop a set of sustainable development criteria to guide its project selection and ensure that the projects it funds are consistent with its sustainable development policy.***

- ***The EBRD should require projects to adhere, at a minimum, to EU standards, and to more stringent standards in special circumstances.***

- ***The EBRD should increase substantially the percentage of projects for which it requires full environmental assessment.***

- ***The EBRD should also analyze the environmental impacts of its activities at the sectoral, regional, and global levels.***

- ***Projects that are inconsistent with the EBRD's sustainable development policy should not be eligible for EBRD financing.***

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[15] A study commissioned by the EBRD of Albania's occupational health and air pollution, while not actually an EA (it does not assess any proposed Bank activities), has many of the elements of a sectoral or regional EA. R.T.Z. CONSULTANTS LTD., REVIEW OF RESOURCES AND REQUIREMENTS FOR OCCUPATIONAL HEALTH AND AIR POLLUTION CONTROL IN ALBANIA (1992).

[16] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 33.

[17] *Id.*

[18] World Bank, OPERATIONAL DIRECTIVE 4.01, at 3 (1991) [hereinafter WORLD BANK OPERATIONAL DIRECTIVE].

III. EBRD Projects

This chapter examines the Bank's lending profile during its first four years of operation and some specific projects that sharply illustrate the need for both policy guidance and stronger environmental procedures. It also highlights some activities and policies that we hope portend a new direction for Bank lending.

With its explicit mandate to promote environmentally sustainable development and multiparty democracy, the Bank has a unique opportunity to foster fundamental change in Central and Eastern Europe. But lacking a sustainable development policy to guide it, the Bank has repeatedly found itself supporting projects that are "bankable" but that do not advance sustainable development in the region.

Under its charter, the EBRD must commit at least 60% of its funding either to private sector

EBRD Approved Financing by Sector, 1991-1994[19]

Sector	1991-92		1993		1994		1992-1994	
	%	ECU	%	ECU	%	ECU	%	ECU
Agribusiness	8	125.1	8	182.7	2	54.7	6	362.5
Construction/Property	11	164.2	14	316.1	2	34.7	8	515.0
Energy/Power Generation	14	207.9	8	189.6	8	196.6	9	594.1
Environment	-	-	-	-	2	46.2	1	46.2
Finance	4	61.0	22	509.0	37	893.0	24	1,463.0
Manufacturing	12	179.4	14	325.3	8	187.8	11	692.5
Multi-Sector	11	164.4	1	15.6	7	175.1	6	355.1
Natural Resources/Extractive Industries	6	90.1	18	409.4	5	116.2	10	615.2
Telecommunications	32	484.3	8	173.5	9	211.5	14	869.3
Transport	2	24.0	7	154.9	20	493.0	11	671.9
Totals	100	1,500.4	100	2,276.1	100	2,408.8	100	6,184.8

[19] Table based on EBRD Annual Reports 1992, 1993, and 1994.

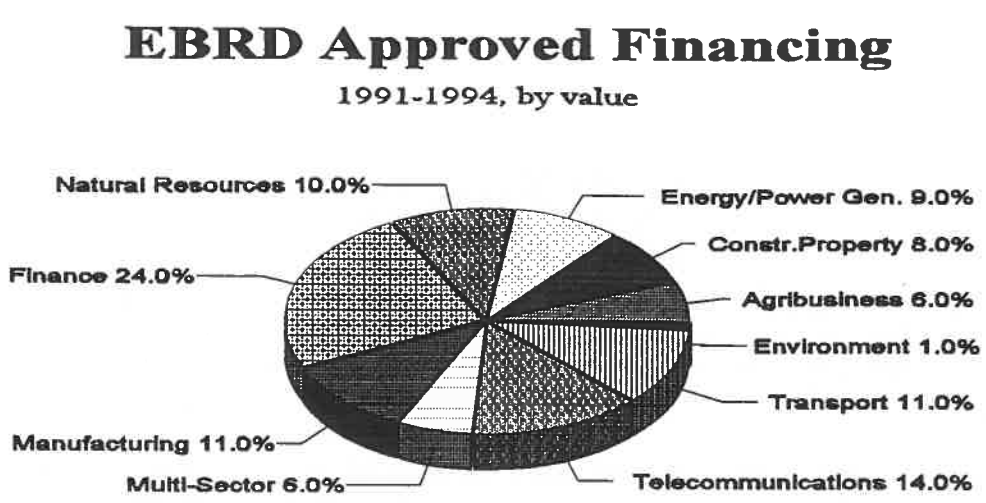

Chart based on EBRD Annual Reports, 1992, 1993, and 1994.

enterprises or to state-owned enterprises implementing a program to achieve private ownership and control.[20] The Bank's capitalization also prevents it from providing non-reimbursable financing. While these restrictions may limit the number of public environmental projects eligible for Bank funding, they do not prevent the Bank from assuring that each project it supports is consistent with the principle of sustainable development.

Profile of the EBRD's Investment Portfolio

Through its first four years of operation, the Bank has approved 251 project loans, totaling over 5.7 billion ECU.[21] The 591 million ECU disbursed by the EBRD in 1994 represented over half of the total amount disbursed since the EBRD's inception.

The Bank has apparently begun moving away from large projects directly funded by the Bank to smaller, locally run projects and investments. Increasingly, the Bank relies on local financial intermediaries to channel Bank funds to emerging small and medium enterprises. This helps establish and train vital private sector financial institutions, which can continue to support local entrepreneurial and privatization efforts. Over 40% of the Bank's commitments in 1994 involved financial intermediaries.[22]

Despite this increase, only a limited percentage of EBRD funding has been directed toward environmental and energy conservation projects. Through 1994, environmental projects

[20] Articles of Agreement, *supra* note 1, at art. 11, para. 3(I).

[21] EBRD 1994, *supra* note 3, at 77.

[22] *Id.* at 20.

had received only 0.8% of Bank funds.[23] Energy efficiency initiatives had received less than 3% of energy sector funding.

Projects that Conflict with EBRD's Mandate

The EBRD continues to fund projects that are not consistent with its environmental mandate. As discussed below, the ZSNP and Mochovce projects perpetuate the nuclear-powered, heavy industry development strategy inherited from Slovakia's communist planners. The KomiArctic and Polar Lights projects demonstrate the potential for catastrophic environmental destruction when internationally recognized standards of environmental due diligence are not followed.

The ZSNP Aluminum Plant, Slovakia

In September 1993 the EBRD approved a US$110 million loan and US$15 million equity investment for a new aluminum smelter in Ziar nad Hronom, Slovakia. The new smelter is designed to replace the state-run Zavod Slovenskeho Narodneho Povstania (ZSNP) aluminum smelter built in the 1950s as part of the communist plan to industrialize central Slovakia. ZSNP is the region's largest employer, providing jobs for over 6,000 people. The plant is also one of the region's largest polluters. A mountain of bauxite waste 45 meters high and covering 40 hectares leaches arsenic, cadmium, and mercury into the soil and groundwater.[24] The factory emits dust, SO_2, nitrogen oxides $_x$(NO), carbon monoxide, and fluorides far in excess of Slovak and EU air emissions standards.[25] Soil and groundwater tests in adjacent areas have detected high concentrations of benzopyrene, arsenic, molybdenum, copper, nickel and chromium.[26] Health problems, including congenital defects, allergies, and thyroid and lung diseases, are on the rise throughout the region.[27]

Because primary aluminum production is highly energy-intensive and polluting, Slovak environmentalists had favored either the conversion of the plant to secondary aluminum production or the closing of the plant altogether. Ideally, for aluminum production to be economically competitive, a cheap source of energy, labor, and raw materials should be available. With the exception of a cheap labor force, Slovakia is not well suited to compete on the international aluminum market. Lacking bauxite–the raw material for aluminum, Slovakia will have to import it from Ireland and Sardinia. As discussed in the following section, current plans call for the Mochovce nuclear power plant to provide the additional energy needed to operate the new aluminum plant.

Given the state of the world aluminum market and the competitive handicaps faced by Slovakia, the plant seemed to make little economic sense. The World Bank and several private investors had already rejected the project, but the EBRD decided the project was viable and commissioned an environmental assessment in 1993.

Because of financial pressures, ZSNP was given "fast track" status. This meant that some environmental procedures, particularly those for public participation, would be curtailed, although the project was screened Category-A by Bank staff, requiring the highest level of environmental analysis. Such a truncated "fast track" process is not provided for in the Bank's *Environmental Procedures*.

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[23] *Id.* at 71-77.

[24] HASKONING, ENVIRONMENTAL AUDIT AND ASSESSMENT OF ZSNP, ZIAR NAD HRONOM, SLOVAK REPUBLIC 55 (Aug. 1993) [hereinafter ZSNP EA].

[25] *Id.* at 28.

[26] *Id.* at 46.

[27] Sybbe Visser, Milieukontakt Oost-Europa, Proposal For Ziar nad Hronom 2 (1991).

Public participation in the ZSNP project was conducted in a perfunctory fashion, leaving an impression that the main goal was merely to allow the staff to claim that, technically, they had met the Bank's procedural requirements. But in fact they had not. There was no formal notification of the public; the public was not included in scoping the EA; meetings with a handful of environmentalists were conducted on extremely short notice and with no advance information provided. The last of these meetings took place only four days before the project was approved by the Board.[28]

The ZSNP project demonstrates that, when faced with financial pressures, the Bank is willing to forego at least some of its environmental due diligence. A sustainable development policy and stronger environmental procedures are urgently needed to help the EBRD withstand such pressures and ensure that each project receives the appropriate level of environmental analysis and public consultation.

The Mochovce Nuclear Power Plant

In 1986 the communist government of Czechoslovakia began building a Soviet designed 4x440MW VVER-213 type nuclear power station at Mochovce, 150 km east of Bratislava. When work was halted in 1991 due to a shortage of funds, Unit 1 was about 90% complete, Unit 2 was about 70% complete, and Units 3 and 4 were about 50% complete.[29]

In 1993 the Slovak government approached the EBRD with a proposal by three Western European companies, Electricite de France (EdF), Bayernwerke, and PreussenElektra.[30] They proposed to complete the plant with Western technology at a cost of US$1.2 billion. Their proposal included an EBRD loan of approximately US$300 million, which would make their project the single largest ever undertaken by the Bank. It would also make the EBRD the first multi-lateral lending institution to directly support nuclear power. The project has been the source of intense debate throughout Europe, with France and Germany in favor of the project, and a group of smaller European countries, led by Austria, opposed.[31] The European Parliament held special hearings on Mochovce, which resulted in a resolution calling for a six-month delay to allow further safety and economic analyses to be performed.[32]

If completed, Mochovce will be the first partially fabricated Soviet-designed plant to be finished with a "retrofit" of Western technology. There are serious questions whether this technology will operate according to its specifications under such conditions. VVER-440/213 reactors similar to Mochovce in the former GDR were decommissioned immediately after the reunification of Germany, after it was determined that retrofitting to meet German safety standards would be prohibitively expensive.[33] In the neighboring Czech Republic, a VVER-440/213 reactor similar to Mochovce has had over 60 emergency shutdowns in just the last eight years, including a major transformer fire and

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[28] Letter from Antony Froggatt, Greenpeace UK, to CIEL (Sept. 21, 1993).

[29] EBRD, Board Information Session, Mochovce Nuclear Power Plant, Slovak Republic 3 (July 28, 1993).

[30] *Id.* PreussenElektra later withdrew from the project.

[31] European countries opposed to Mochovce include Austria, Denmark, the Netherlands, Luxembourg, Norway, and Portugal.

[32] *Slovakia: Still No Decision on Mochovce Nuclear Power Plant*, European Information Service, Euro East, April 22, 1995, sec. 32.

[33] *German Environmentalists Against Czech Energy Supplies*, CTK National News Wire, Aug. 8, 1993.

a hydrogen tank explosion.[34] To make matters worse, Mochovce was apparently not designed to withstand a serious earthquake, despite its location in a seismically active zone.[35] In addition to inherent design problems, the workmanship and materials that went into the original construction were found to be substandard by the Slovak Atomic Inspection Office, resulting in fines being assessed against the building contractor.[36]

Despite these concerns and the lack of a long-term spent fuel management plan, the Bank decided to pursue the project. Following an information session for the Board of Directors in July of 1993, the EBRD agreed to further review the project. Bank support had three conditions: (1) a finding that Mochovce is the least-cost alternative for Slovakia's energy needs; (2) the closure of Units 1 and 2 of the Bohunice VVER-230 nuclear power plant; and (3) completion and operation of Mochovce at the level of international nuclear safety standards. The Bank screened Mochovce as a Category A/1 project subject to a full environmental assessment and an environmental audit. The Bank also commissioned a least-cost study to determine if there are economically viable alternatives to the Mochovce project.

From the beginning of the EA process, public participation was handled poorly. The project sponsor's first attempt at public "scoping" caused a public outcry, and scoping had to be reinitiated some months later because so many citizens interested in the project initially were excluded. "Public" meetings turned out to be by invitation only. The project sponsor–Slovensky Energeticky Podnick (SEP)–initially refused to release critical decisionmaking documents, including the least-cost analysis and nuclear safety study. SEP also refused, initially, to hold public meetings in the countries adjoining Slovakia.

After considerable pressure from Slovak, Austrian, and U.S. NGOs, as well as from the ENVAC, the Bank agreed to release, on "an exceptional basis," the least-cost study and nuclear safety report, if the project sponsor did not object. The Bank also announced that public meetings could be held outside Slovakia if the governments of those countries requested them, and that a public participation audit would be held to review the project sponsor's compliance with the EBRD *Environmental Procedures*.

The investigative phase of the project generated voluminous documentation, totaling over 1,500 pages. Still, several key issues were not addressed, including crucial safety concerns, liquidation of the nuclear reactors and spent fuel from the plant, and an environmental assessment of all alternatives, including the "no-action" alternative. Nevertheless, EBRD staff continued to support and defend the project primarily on the grounds that if the Bank did not provide the funding, the Slovak government would finish the plant themselves, but without the Western safety modifications or the closure of Bohunice.

The least-cost study concluded that, in most scenarios, Mochovce is less expensive than combined-cycle gas turbine technology, the next cheapest option. However, had more optimistic assumptions been made about the potential for demand side management to reduce Slovakia's energy needs, a combination of demand side management and combined-cycle gas turbine technology might have emerged as the least-cost option. The least-cost study acknowledges that Mochovce's 5% advantage will disappear if future electricity demand and non-nuclear fuel costs turn

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[34] *See* GLOBAL 2000 REPORT, *supra* note 8, at 3.

[35] *Id.*

[36] *Expert Study Exposes Mochovce Defects*, CTK National News Wire, January 18, 1995, News Section.

out to be lower than estimated.[37] Other least-cost analyses reach similar conclusions.[38]

During the public comment period following the release of the documentation, meetings were held in Slovakia and Hungary. At these meetings, project sponsors limited the time available for discussion and repeatedly refused to address questions raised by participants.[39] One meeting, to be held in Vienna, had to be canceled because the project sponsors, upon hearing how many people planned to voice their objection to the project, refused to attend.[40]

The project sponsors then offered to attend a hearing in Austria, provided the size of the meeting was limited to two hundred participants and no experts were present.[41] Ultimately, a "private information session" was held in Vienna, with the number of participants limited to 300 invited guests.[42] Representatives from the Austrian government refused to attend, to protest the closed manner in which this "public" meeting was being held. In addition, members of environmental NGOs were removed from the meeting, after requesting the project sponsors to acknowledge that the meeting did not meet the EBRD's requirement for a public meeting.[43]

In early 1995 Slovakia suspended negotiations with the EBRD. It did so, not in response to pressure from environmentalists, but out of concern over the high cost of the loan and the environmental conditionality. The EBRD insisted that, as a condition of the loan, Slovakia close Bohunice and increase its domestic energy prices by nearly one-third. The Slovak government recently signed an inter-governmental accord with Russia which will provide a US$150 million loan for the completion of Mochovce's first reactor bloc.

The EBRD justified the loan for Mochovce on the grounds that, if it did not make the loan, Slovakia would obtain financing to complete the plant without the environmental safeguards required by the Bank. Any attempt by Slovakia to complete the plant without all the necessary safeguards, however, would be strongly opposed by neighboring countries and the European Union. There is also no evidence that the EBRD ever resisted Slovakia's plan, or even offered to finance alternatives.

Komi Region Oil Field Development, Russian Federation

The EBRD has currently approved funding for seven different oil and gas projects in the former Soviet Union, with loans totaling over US$300 million. Two of these projects, Polar Lights and

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[37] PUTNAM, HAYES & BARTLETT, LEAST-COST ANALYSIS 2 (1994) [hereinafter Mochovce Least-Cost Analysis].

[38] An unreleased study by the European Investment Bank for the European Commission reportedly concluded that Mochovce could be justified economically only if the price of natural gas rises significantly and remains at a high level and electricity demand in Slovakia, which has been in decline and has potential for significant energy savings, resumes a pattern of marked growth. *Investment Report Dampens Outlook for Mochovce Loan*, Nucleonics Week, April 20, 1995. Another least-cost analysis by the Öko-Institute recommends building smaller gas powered plants as Slovakia's energy needs increase. Öko-Institute, Statement Concerning the Least-Cost Study for the Public Participation Programme Related to the Project "Completion of the Mochovce NPP," Feb. 10, 1995, at 5.

[39] The Mochovce Nuclear Power Plant Slovakia-Summary of NGO Criticism and Comments, Global 2000, Feb. 25, 1995. By SEP's own admission, only 25% of the questions asked at the Budapest meeting were answered. Comments and Answers to the Documentation Submitted to the Public 7, SEP (Feb. 1995).

[40] *New Mochovce Dispute Over Public Debate*, CTK National News Wire, Jan. 12, 1995.

[41] *Id.*

[42] *Closed Mochovce Debate Passes Calmly After Stormy Opening*, CTK National News Wire, February 14, 1995.

[43] *Id.*

KomiArctic, involve development of oil fields in the Timan-Pechora basin, located in the Komi Republic. Both Polar Lights and KomiArctic rely upon the severely degraded Kharyaga-Usinsk pipeline. In early 1994 the pipeline began leaking, and in August 1994 a dike containing the leaked oil broke, spilling thousands of tons of crude oil onto the Arctic tundra.

Polar Lights is a company formed by Conoco and Komineft, the state-owned regional oil company, to develop oil and gas fields in the northern Timan-Pechora Basin. The project involves drilling twenty-four new wells, building a treatment plant, and installing a thirty-five mile pipeline. The EBRD has approved a US$90 million loan to the joint venture, to be supplemented by loans of US$60 million and US$50 million, from IFC and OPIC respectively. In August of 1994, shortly before the dike broke, the project began producing oil at the estimated rate of 1,500 tons per day. A full EA and audit were commissioned by the Bank, but the EA only covered the project itself and not the Kharyaga-Usinsk pipeline, which it would use to get the oil to market. Both the Bank and Conoco have refused to release the EA to CIEL.[44]

KomiArctic Oil (KAO) is jointly owned by Komineft (40%), British Gas (50%), and Ukhtaneftegazgeologiya (10%). Gulf Canada originally owned a 25% stake in KAO, but decided to sell its interest in February 1995 to British Gas. KAO is currently engaged in oil production in the Timan-Pechora Basin, producing approximately 1,700 tons per day. In 1994 the EBRD approved a loan to KAO of US$80 million for oil field development. Both an EA and environmental audit were performed, and subsequently made available for review at KAO offices, and at a local school and library in Usinsk. Like the Polar Lights EA, the KomiArctic EA does not cover the Kharyaga-Usinsk pipeline.

In early 1994, the southern section of the Kharyaga-Usinsk pipeline began leaking. The spill was largely contained to a limited area by Komineft, the owner and operator of the pipeline, through the use of temporary dikes. However, in August of 1994, heavy rains in the region caused the dikes to give way, releasing the oil into the Kolva River, and causing serious damage to downstream communities. This release was followed by a series of additional failures in the pipeline in August and September, and again in January 1995. The U.S. Department of Energy estimates the size of the total spill to be 270,000 tons of oil, over three times the size of the Exxon Valdez spill, making it one of the largest releases of oil into the environment on record.[45]

During the winter months, the spill was kept in check by frozen rivers and the solidifying effect the temperatures had on the oil itself. However, as the region thawed, the oil threatened to escape and wash into the Kolva, Usa, and Pechora rivers and enter the Barents Sea. Although the southern section of the pipeline, where most of the leaks occurred, has been largely replaced, leaks continue to be discovered. More leaks are expected, as the middle section has begun to show signs of the internal corrosion found previously in the southern section.

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[44] CIEL was permitted to *view* the EA, however, at Conoco's headquarters in Houston, Texas.

[45] *Energy and Environmental Implications of the Komi Oil Spills in the Former Soviet Union: Joint Hearing before the Senate Committee on Energy and Natural Resources and Environment and Public Works, 106th Cong.*, 1st Sess. (1995 (Committee Staff Memorandum). Unfortunately the Komi spill is not the only major spill in the former Soviet Union, just the most recent and visible of the approximately 700 major pipeline leaks that occur each year. Although it is not known how much oil is released by these leaks, senior Russian environmental officials estimate that each day as much as 900,000 barrels is lost, one in every ten barrels produced. *Id.*

The spill threatens downstream communities, which rely on the river for most of their freshwater requirements. The releases could damage commercial and domestic fisheries and wildlife habitat in stream valleys. Two of the oil spill sites straddle one of the major north-south migration corridors for reindeer and presents a significant challenge to long-term management of the herds.[46]

The threat posed by the spill is not only from the oil. The pipeline also carries large quantities (up to 35%) of corrosive salt water. This salt water could have a profound effect on vegetation, fisheries, and wildlife in the region, and may intrude into local surface waters and aquifers. The salt water also greatly complicates the clean-up and bioremediation efforts.[47]

Although the EBRD has denied any responsibility for the Komi spill, projects receiving EBRD support account for as much as 25% of the 13,000 tons per day of oil passing through the pipeline, and consequently, that which is released into the environment. While the EBRD and international oil companies repeatedly stated their intention to rehabilitate the crumbling infrastructure of the Russian oil fields, they have continued to use it largely as is.

The corrosion of the pipeline was apparently well known, but because of the way the projects were structured, the loss of oil was not of *financial* concern to the EBRD or the project sponsors. International oil companies receive credit for each barrel of oil as it enters the pipeline. This credit can be redeemed, barrel for barrel, at the refinery at the pipeline's end, even if the oil never actually gets there. These companies have also been granted tremendous tax concessions by the Russian government. The foregone tax revenue could have helped Komineft finance pipeline maintenance.

By lending its support to these projects, the EBRD has contributed to a major environmental disaster. The Bank claims it had no control over the condition of the pipeline, which was within the exclusive control of Komineft. Komineft, according to the Bank, refused to even allow inspection of the pipeline. It appears that the Bank did make efforts to include infrastructure improvement as part of the projects, but the Russian government did not consent. At that point, the EBRD should have refused to make the loans.

After receiving a request for help in January 1995, the EBRD and the World Bank agreed to jointly finance a US$140 million emergency loan to fund cleanup efforts.[48] Despite tremendous logistical problems, these efforts have managed so far to keep the oil from escaping into the major river systems and the Barents Sea. While the spread of the spill appears to be temporarily in check, additional ruptures have appeared in the pipeline, and the temporary containment dikes will be further tested by the fall floods. The Komi spill demonstrates, in the starkest terms, the need for the EBRD to implement its mandate for sustainable development.

Promising New Directions in Bank Lending

In the past year the EBRD has begun several promising new initiatives. Chief among these are two new departments within the Bank, the *Energy Efficiency Department* and the *Municipal and Environmental Infrastructure Department*. The Bank has also investigated some innovative means of generating environmental investment financing,

[46] The World Bank, Technical Annex, Russian Federation Emergency Oil Spill Recovery and Mitigation Project, Report No. T-6578-RU, April 5, 1995, at 1-2.

[47] *Id.* at 7.

[48] Compare this sum to the US$2.5 billion spent on the Exxon Valdez cleanup.

such as "green equity,"[49] environmental loan guarantee schemes, and technical cooperation funds.

The Energy Efficiency Department

Despite the tremendous savings and environmental benefits that can be obtained from energy efficiency, little money has been allocated to date. The EBRD, along with the World Bank and other MDBs, has focused primarily on generating greater energy supply to meet the demands of the region rather than trying to make more efficient use of the existing supply. While the EBRD has spent over 2.87 billion ECU on the energy sector, less than 3% of these funds had been spent on demand efficiency.[50]

The Bank has finally recognized this problem and established the Energy Efficiency Department (EED) in October of 1994, to identify and develop energy efficiency projects. Recent revisions to the *Energy Operations Policy* also reveal a greater awareness of the potential for energy efficiency initiatives. To its credit, the Bank appears to be taking the lead among MDBs in incorporating energy efficiency considerations into its project development. The EED staff works with potential clients to help them identify and prioritize least-cost energy efficiency strategies and projects.

In its first year of operation, the EED began developing several different types of programs and projects, including direct investments in energy efficiency technology, dedicated credit lines for energy conservation, and regional multi-project facilities. Its first project was an 18.6 million ECU loan for the rehabilitation of the district heating network in Moldova to reduce heat transfer losses, which had ranged from 60-80%.[51] Other direct investment projects include a 240 million ECU loan for the installation of energy efficient technology and energy recovery equipment in a Russian steel plant, the saving from which will allow the loan to be repaid within seven years.[52]

The EED established dedicated credit lines for energy efficiency and conservation projects in Romania and the Czech and Slovak Republics.[53] These credit lines give local banks the ability to provide short and long-term financing for energy efficiency and conservation projects at low interest rates. In the Czech and Slovak Republics, these credit lines are supplemented by interest-free loans from other sources.[54] Another initiative undertaken by the EED utilizes the Bank's new regional multi-project facility. The EED has formed a joint-venture arrangement with a large multinational company to establish and operate meter manufacturing facilities in several companies.[55]

The market for energy efficient technologies for the Bank's countries of operation is quite large, with estimates ranging from US$40 to 55 billion.[56] The EED's own estimate is at the upper end of this range: a potential market of US$55 billion, requiring an investment of US$6.3 billion per

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[49] "Green equity" is a financing instrument that provides risk capital for environmentally beneficial, revenue generating investments in Central and Eastern Europe. It differs from conventional lending in that the investor is not guaranteed repayment. Instead, the investor relies on the project to generate revenue and disburse profits.

[50] Pollution in Eastern Europe, International Institute for Energy Conservation-Europe 7 [hereinafter IIEC report]. Similarly, less than 5% of the World Bank energy sector lending has been spent on demand side energy efficiency. *Id.*

[51] EBRD Press Release, May 19, 1995.

[52] Innovative Energy Efficiency Financing Questions, Prepared for Riga ENVAC meeting, September 1995.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] IIEC Report, *supra* note 50, at 5.

year.[57] How successful the EED will be in tapping this potential market is not clear, although projected funding levels for EED projects are encouraging.[58] The EED is precisely the type of initiative needed for the Bank to fulfill its mandate to promote environmentally sustainable development.

Municipal and Environmental Infrastructure Department

The Bank created the Municipal and Environmental Infrastructure Unit in June of 1995.[59] This new department will take charge of the Bank's environmental projects, currently organized on a regional and project-specific basis.[60]

Regional Level

The Bank currently has two regional environmental projects, the Baltic Sea Programme and the Danube River Basin Environmental Programme. The Baltic Sea Programme is a joint effort by Baltic countries to address the sewage, industrial, and hazardous waste currently being discharged into the Baltic, by investing in environmental infrastructure, environmental policy development, and institutional reform.[61]

The other regional program supported by the Bank is the Danube River Basin Environmental Programme, which was formed to identify and address the heavy pollution discharge from the Danube into the Black Sea. It establishes an integrated strategic management plan for improving the environment of the river basin. The Bank has commissioned a number of regional and sector studies and has initiated several technical cooperation projects in the countries along the Danube.[62]

Project Level

On the project level, the Bank has signed four environmental projects to date, all part of the Bank's contribution to the Baltic and Danube programs. The Tallinn Water and Sewerage Municipal Enterprise project in Estonia involved a 23.4 million ECU loan to improve water supply and waste water management in the capital city of Tallinn. The project includes the construction of a new biological waste water treatment plant and rehabilitation of existing sewer lines, which should significantly reduce the amount of pollution discharged into the Baltic.[63] Two other environmental projects support the Baltic Sea Programme: a 10.6 million ECU loan to rehabilitate waste water treatment facilities in twelve other Estonian municipalities;[64] and an 11.5 million ECU loan to assist the municipal water authority in Kaunus, Lithuania.[65]

The Romanian Municipal Utilities Development Programme is a 22.8 million ECU loan to upgrade the water supply and waste water

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[57] *Id.*

[58] EED loans are projected to be 50 million ECU in 1995, increasing to 100 million ECU in 1996. E-Notes (newsletter of the International Institute of Energy Conservation), June 1995.

[59] Originally named the Environmental Infrastructure Unit.

[60] Environment in Eastern Europe-From Shock into Action and Partnership, The Role and Focus of the EBRD, EBRD Workshop on Stand-Alone Environmental Projects. May 18, 1995.

[61] Environments in Transition 5 (Summer 1994).

[62] Environments in Transition 10-11 (Spring 1995).

[63] *Id.* at 7.

[64] Estonia: Small Municipalities Environmental Project, The 3rd Joint Session of the Task Force and Project Preparation Committee (PPC), Paris, June 14, 1995.

[65] EBRD Press Release, September 7, 1995.

treatment facilities in five Romanian municipalities to reduce pollution into the Danube.[66] Other elements of this project include initiatives to increase water conservation and provide support for the corporatization of the local water utilities.[67]

Environmental Financing Initiatives

Recently the Bank has used several other creative mechanisms to help finance environmental projects. The EBRD's countries of operation generally are unable to provide sufficient public funding to solve infrastructure and pollution control problems. The Bank is attempting to address this need by working with such organizations as the *Project Preparation Committee* and the *Working Group on Environmental Project Financing.*

The Project Preparation Committee was established by the European Environment Ministers to facilitate financing of environmental investment projects in Central and Eastern Europe. The Committee coordinates financing from donor countries with funds available from international financial institutions for environmental projects in the Central and Eastern Europe. The Secretariat of the Project Preparation Committee is located at the EBRD.

The Working Group on Environmental Project Financing was established in 1994 following the Conference of Ministers on Softening of Loans for Investments in Environmental Protection in Central and Eastern Europe. Chaired by the EBRD, its task is to investigate ways and means to enhance environmental investments in Central and Eastern Europe. The working group is recommending innovative measures, such as environmental loan guarantees and "green equity."

Although prohibited by its charter from making concessionary loans, the Bank has instituted a *Technical Cooperation Funds Programme*, which works to promote access to Bank financing primarily through project preparation support, project implementation and institutional development. In 1994, 87.6 million ECU were committed to 311 technical cooperation projects, bringing total commitments of technical cooperation funds for the 1991-94 period to 220 million ECU for 872 operations. Environmental sector commitments of technical cooperation funds have been limited, however, comprising only 4.7% in 1994, and 7.3% from 1991-94.[68]

Recommendations:

- ***The EBRD should perform regional and sectoral environmental assessments before undertaking any future large-scale development projects.***

- ***The EBRD should develop its projects within a sustainable development policy. Projects that are not consistent with this policy should be ineligible for EBRD financing.***

- ***EBRD projects should reflect regional and local development priorities based on decentralized, autonomous decisionmaking.***

- ***The EBRD should undertake more projects aimed directly at improving the region's environment. The activities of the new Energy Efficiency Department and the Environmental Infrastructure Department are an excellent start and should be expanded.***

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[66] Environments in Transition 9 (Spring 1995).

[67] *Id.*

[68] EBRD 1994, *supra* note 3, at 34. Bank officials maintain this figure misrepresents attention given to environmental issues under TCFP, as many of TCFP operations contain environmental due diligence components.

IV. The EBRD Environmental Procedures

The EBRD *Environmental Procedures* were adopted in January of 1992. Discussions with NGOs throughout the preceding year led the Bank to strengthen the procedures in a number of areas.[69] Still, they fall short of the requirements necessary to achieve sustainable development, including in the area of public participation.[70] In practice, the Bank sometimes cuts corners in implementing its environmental procedures or ignores them altogether, often as a result of perceived time constraints or financial pressures on the borrower.[71] By failing to follow its procedures, the Bank sacrifices sustainable development for expediency and undermines its own commitment to the rule of law.

In August 1995, after more than a year of revision, the Bank released its *Draft Revised Environmental Procedures*. CIEL had hoped that the new procedures would mark a positive change in the Bank's commitment to sustainable development and environmental due diligence. Unfortunately, we find the *Draft Procedures* to be a disappointment. While they contain some specific improvements, in other areas they have been weakened. Overall, we find them to be even less stringent, detailed, and clear than the existing procedures.

It is critical that the EBRD *Environmental Procedures* be clear and precise, so that they will be readily understood by Bank staff, project sponsors, and the public. In shortening its procedures, the Bank has eliminated much important detail. Even worse is the tendency to evade strict responsibility by replacing mandatory provisions with permissive phrases, such as "should require," "typically will," and "as the need arises."

The remainder of this chapter details problems we have identified with the *Environmental Procedures* and their implementation. We believe much of the difficulty with implementation results from project sponsors' lack of familiarity with the EA process and public participation, in general, and with the EBRD *Environmental Procedures* in particular. To help remedy this, we suggest the Bank develop detailed Project Sponsor Guidelines, to provide project sponsors with step-by-step guidance to the EA process, including public participation, from initiation through monitoring and evaluation.

Recommendations:

- ***The current Environmental Procedures should not be replaced, but should be clarified and strengthened in specific areas, as detailed in the remainder of this report.***

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[69] Wold & Zaelke, *supra* note 10, at 567.

[70] *See* Letter from 41 environmental organizations to Jacques de Larosière, President of EBRD (Mar. 21, 1994); *see also* Chapter V discussing Public Participation.

[71] Partially or substantially completed projects are sometimes presented to the Bank when they are in a state of near collapse. ZSNP is a prime example of this. The Bank was told that money was needed immediately or the contractor would abandon the project and all prior investments would be wiped out. As it turned out, although the first tranche of money was not provided by the Bank until a year after the project was approved, the predicted financial crisis did not occur.

- ***Project Sponsor Guidelines should be developed to supplement the Environmental Procedures. In clear, mandatory language they should tell the project sponsor how and when to notify the public, conduct scoping, prepare the EA, hold public meetings, conduct monitoring, and fulfill all other Bank requirements for environmental due diligence.***

Purpose of the Environmental Procedures

The *Environmental Procedures* include procedures for conducting environmental investigations, project review, mitigation and monitoring, and public participation. According to the Bank, the procedures are intended to guide Bank staff in exercising environmental due diligence to ensure that each project is environmentally sound.[72] More specifically, they aim to ensure that decisions to approve or disapprove projects are made with awareness of each project's environmental implications; that potential environmental liabilities are avoided; that environmental costs are estimated along with other costs and liabilities; and that opportunities for environmental enhancement are identified.[73]

Unfortunately, the *Environmental Procedures* are not designed to promote sustainable development as required by the Bank's charter. They provide no substantive guidance as to the types of projects that will contribute to sustainable development and those that should be avoided, nor do they require the integration of environmental considerations into the earliest phase of project identification, selection, and design. They only require that environmental consequences be considered on a project-by-project basis, often with little apparent regard for the cumulative and indirect effects projects may have on the environment.

A review of the Bank's environmental assessment and project approval process reveals that the Bank does not always meet even the limited aims of its *Environmental Procedures*. Relatively few projects are subjected to full EA, even when they clearly fall within the Bank's list of projects requiring full EA or within similar lists in national EA laws.[74] The EAs reviewed by CIEL do not take account of environmental costs, generally do not assess whether the project is the least-cost approach to accomplishing the proposal's *purpose and need*, and do not adequately assess alternatives.[75]

Recommendation:

- ***The clearly stated purpose of the EBRD Environmental Procedures should be to ensure that every project promotes the goal of sustainable development. Environmental and sustainable development expertise should be incorporated in the earliest stages of project selection and design.***

Environmental Assessment

The EA process is the principal mechanism for evaluating a project's environmental consequences and is critical for ensuring that

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[72] ENVIRONMENTAL PROCEDURES, *supra* note 5, at iii. They also state that "[e]nvironmental procedures need to be followed throughout the life of *every* Bank project," and "[e]nvironmental issues should be addressed early in the life of a project so that *alternatives* may be considered and mitigation measures may be incorporated into project design *prior to project approval*." *Id.* at 1 (emphasis added).

[73] *Id.* at iii.

[74] Where projects fall both within the Bank and national government lists, they will be assessed according to the more stringent of the two listings. *Id.* at 28.

[75] To our knowledge, only one project–Mochovce–has included least-cost analysis as part of the assessment process. The Mochovce least-cost analysis was performed separately from the EA and did not thoroughly examine all available options. In particular, it gave only cursory consideration to supply and demand-side energy conservation and did not consider the environmental impacts of Mochovce or their associated costs. Mochovce Least-Cost Analysis, *supra* note 37.

projects promote sustainable development. According to the EBRD *Environmental Procedures*, the project sponsor is responsible for preparing the EA. Project sponsors frequently lack experience with EAs and may fail to develop and release important information or attempt to limit the participation of concerned citizens and NGOs. Indeed, as discussed below, procedures for public participation have not been fully implemented, and conscientious efforts by citizens and NGOs to participate in the assessment process have frequently been stymied.

It is difficult to assess whether project sponsors withhold or fail to develop significant information about potential adverse impacts.[76] Most EAs are performed by independent consultants selected by the project sponsor with Bank approval. There is no clear evidence that potential impacts are intentionally not investigated, although consultants have on occasion been prevented from reaching conclusions because of lack of data.[77] This may be due to the haste with which some assessments have been prepared rather than to withholding of information by the project sponsor.[78]

Recommendations:

- ***The EBRD staff should diligently review the EA throughout its development to ensure that it fully addresses all areas of potential concern, that all relevant data is provided to the preparer and the Bank, and that all procedures are followed.***

- ***More time should be allotted for preparation of EAs, to ensure that all relevant data is collected and evaluated.***

- ***Where environmental concerns have been ignored, data is unavailable, or procedures have not been followed, the staff should reject the EA and stop the project until all deficiencies have been remedied.***

- ***When the staff is satisfied that no steps have been omitted from the EA, the Bank should formally adopt the assessment and assume full responsibility for its scope and content.***

- ***Local laws and regulations, where they exist, should be strictly followed, though in many cases they will need to be supplemented by the Bank's own procedures.***

Initiation and Screening

Initiation and screening occur at the earliest stage of the environmental investigation–the point at which the need for an environmental assessment or environmental audit is determined. During screening, the responsible party–in the EBRD's case the Environmental Staff–should ascertain the *purpose and need* for the proposed project, identify tentative alternatives, and determine the appropriate level of environmental review.[79] Based on preliminary environmental information provided by the project sponsor, the staff must

[76] On occasion the Environmental Staff have required project sponsors to submit supplementary information about projects.

[77] *See, e.g.*, ZSNP EA, *supra* note 24, at 13, 15, 20, 28; *see also* HASKONING, REPORT ON ENVIRONMENTAL ASSESSMENT OF SLOVALCO FACILITY, ZIAR NAD HRONOM at 2, 21, 28 (1993) [hereinafter SLOVALCO EA].

[78] Consultants have occasionally made unwarranted comments in the EA favorable to the developer. For example, the EA for the ZSNP aluminum smelter states that the proposed upgrade will meet all European Community standards, despite the fact that it identifies specific EC standards that will not be met. The consultant subsequently admitted the statement was not correct and should not have been made.

[79] CIEL, ENVIRONMENTAL IMPACT ASSESSMENT: IMPROVING DEVELOPMENT DECISIONS WITH ENVIRONMENTAL INFORMATION IV.B (1993) [hereinafter *CIEL EIA Materials*]; U.S. Environmental Protection Agency, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY SOURCEBOOK FOR ENVIRONMENTAL ASSESSMENT (EA) 2.1.1 (draft 1992) [hereinafter *EA Sourcebook*].

decide whether a proposed project will require full EA, some intermediate level of assessment, or no assessment at all.

The EBRD *Environmental Procedures* use a combination of two types of screening: discretionary and categorical.[80] Projects may need an environmental assessment, according to the Bank, if they:

- ☐ will develop a "greenfield" site;
- ☐ will expand onto undeveloped land;
- ☐ are public infrastructure projects;
- ☐ could cause offsite environmental impacts; or
- ☐ are required by law.[81]

During project identification, project sponsors are asked to provide relevant information concerning the project, including environmental information, to enable the environmental staff to screen the project.[82] During screening, the staff assigns two codes to each project: A, B, or C to designate the level of EA the project is to receive and 0 or 1 to indicate whether an environmental audit is required.[83] An explanation of these codes is given in the table below.

Bank staff are guided by lists of specific types of projects which have predetermined levels of assessment.[84] These lists provide examples only and do not preclude assessment of unlisted projects.

If a project is designated to receive a different level of assessment under Bank procedures than under national law, the *Environmental Procedures* require that the more stringent of the two listings determines the level of assessment.[85] The Bank not only has failed to follow this rule; it sometimes screens projects into Category B even when full EA is required by both Bank procedures *and* national law. For instance, both thermal power plants and motorways are listed by the EBRD as Category A projects and both require full EA under Bulgarian Law. Nevertheless, The Maritza East Power Project and the Bulgaria Transit Roads Project were screened into Category B.[86] The International Road Corridor Project,

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[80] Under the categorical approach, the proposed activity is compared to pre-determined lists of project-types to determine the appropriate level of EA; under the discretionary approach, the proponent decides on the appropriate level of EA. *EA Sourcebook*, *supra* note 79, at 2.1.5.

[81] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 26. The Bank must perform assessments at least as stringent as those required under national law. *Id.* at 28. Its obligations under international law are less clear. Many of the Bank's client states are signatories to the UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, *reprinted in* 30 I.L.M. 1330. When this treaty enters into force, countries that are party to the treaty will be bound by international law, and, presumably, national law to abide by its provisions. The Bank has stated that it will apply the principles of the treaty "as appropriate" to projects which may have a significant adverse environmental impact on a regional scale. ENVIRONMENTAL PROCEDURES, *supra* note 5, Annex 1, at 11.

[82] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 1.

[83] *Id.* at 16.

[84] *Id.* at Annex 1, pp. 11-12.

[85] *Id.* at 28.

[86] Republic of Bulgaria, Ministry of the Environment, Reg. No. 1 of Dec. 1992, Art. 1, para. 2 and Annexes 1 and 2 [hereinafter BULGARIAN REGULATION NO. 1].

Screening Categories

A	Projects with potentially significant environmental effects that cannot be readily identified and quantified and for which remedial measures cannot easily be prescribed	full environmental assessment
B	Projects with potentially significant impacts that can be readily identified and for which remedial measures can be prescribed without the need of a full EA	partial environmental analysis
C	Projects with no apparent environmental impact	no environmental analysis
0	Projects involving transfer or lease of property or modifications to existing operations	audit required
1	Projects not involving transfer or lease of property or modifications to existing operations	no audit required

screened into Category B by the Bank, should have received full EA under both EBRD procedures and Slovakian law.[87] Although extractive industry projects and highway projects are subject to mandatory EA under both Romanian law and EBRD procedures,[88] the Petroleum Pilot Project and the European roads project were screened into Category B.

The rationale offered by the Environmental Staff for not screening more projects into Category A is that many Category B projects receive environmental audits, which uncover much of the information that would be sought in an assessment.[89] The *Environmental Procedures* clearly state, however, that EAs and audits serve different purposes, and one cannot substitute for the other.[90] Assessments are prospective and intended to discover and avoid or mitigate potential adverse environmental impacts, while audits are largely retrospective and intended mainly to discover existing problems in order to remedy them and/or avoid potential liability.[91] Furthermore, audits are not made public and provide no opportunity for public participation.

The difference in treatment between Category A and Category B projects is significant. Projects

[87] NATIONAL COUNCIL OF THE SLOVAK REPUBLIC, Act on the Assessments of Effects on the Living Environment 1, sec. 2, April 29, 1994, at para. 1 and part A of Appendix No. 1 [hereinafter SLOVAK ACT].

[88] Romania Ministry of the Environment Decision No. 113/28.11.1990, Annex 2.

[89] Meeting with EBRD Environmental Staff, Aug. 23, 1993.

[90] *Id.* at 4 (stating that environmental assessments and environmental audits "address different concerns, and are in no way substitutes for each other.").

[91] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 30 and 34.

Draft Procedures for Screening

Two different screening options are proposed under the *Draft Procedures*. Option 1 is similar to the current screening procedure, with each project screened Category A, B, or C to indicate the level of environmental assessment required and 1 or 0 to indicate whether an environmental audit is necessary. But projects on the Category A list receive full EA only if they are "greenfield or major extension or transformation projects," and are not "equity financing or modernization" projects.

Option 1 has no Category B list. Instead, all greenfield or major extension investment projects not included in the A-list would receive B-level environmental analysis unless location, scale or other factors require a full EA to be undertaken. Such "other factors" might include location of a project in an environmentally protected or sensitive location, such as a national park or conservation area.

Option 2 would give the Environmental Staff more discretion in screening decisions. It does away with project lists altogether. Instead, the staff or project sponsor would conduct an Initial Environmental Examination to determine whether a full EA is required. This will, "*normally*, require a site visit and discussions, *where possible*, with the operators of the existing facility, with environmental regulators, and *where appropriate*, with the locally affected population and local interest groups." Option 2 does away with partial environmental analysis of projects that do not require a full EA.

CIEL prefers categorical screening because we believe the staff needs more guidance, not more discretion, in making screening decisions. Because we support the creation of an Independent Inspection Panel, which would have the power to review screening decisions, we favor clear, unambiguous guidelines for screening projects.

The restriction of Category A to greenfield or major extension or transformation projects, and the exclusion from Category A of equity financing and modernization projects, is far too limiting. Listed projects can have severe impacts even when they are not greenfield projects, and the fact that a project may be debt- rather than equity-financed is completely irrelevant to the issues of environmental impact and due diligence.

screened into Category B receive a lower level of assessment and have few, if any, requirements for public participation. Project sponsors are not required to provide the public or government officials with information about Category B projects or even to notify them that the project is occurring.[92] The World Bank's categorical screening procedure is similar to the EBRD's, but it provides for early public notification of all screening decisions, not just for projects classified Category A.[93] This allows affected citizens and

[92] In one instance, a highly-placed official in the Environmental Assessment Office of the Environment Ministry complained that the office had not been given a copy of an EBRD partial environmental analysis, even though the office had provided assistance in preparing the analysis and would be involved in the government's decision whether to proceed with the project.

[93] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at Annex D, para. 2.

NGOs time to participate in the project or appeal an improper classification to the World Bank Inspection Panel. The EBRD, in contrast, provides no mechanism for the public to appeal screening decisions and does not release the information underlying the decision.

Recommendations:

- ***The Bank staff should strictly adhere to the screening requirements of both the EBRD Environmental Procedures and national laws.***

- ***Where a question exists as to the proper level of review, projects should normally be screened into the higher category.***

- ***All information underlying screening decisions should be made public and the public should be given an opportunity to review and appeal screening decisions.***

- ***Environmental audits, particularly of state-owned companies, should be provided to the local environmental agencies and should be released to the public.***

- ***The EBRD should create an Independent Inspection Panel with the power to review screening decisions.***

Scoping

Scoping is a process for creating a dialogue between the project sponsor, government officials, and the public to determine the scope of the environmental assessment.[94] It is an open process designed to ensure that important issues concerning a proposed project are identified early in the EA process.[95] During scoping, formal and informal opportunities should be provided for the public and government officials to voice their concerns, raise new issues, suggest modifications to proposed actions, and present additional alternatives for study.[96]

The *Environmental Procedures* require scoping for Category A projects only.[97] They identify four types of actions involved in the scoping of an EBRD EA:

☐ Identifying the environmental issues which are known at the start of the study;

☐ Identifying the concerns of all interested parties affected by the project;

☐ Setting up meetings between interested parties; and

☐ Preparing the Terms of Reference and selecting experts to prepare the EA.[98]

In addition, *where appropriate*, EAs should include the analysis of environmental costs in economic terms.[99]

As illustrated by the ZSNP and Mochovce case studies, project sponsors have not consistently fulfilled these requirements. The ZSNP aluminum smelter project included no public scoping whatsoever. The project sponsor for the Mochovce nuclear power plant project

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[94] *CIEL EIA Materials, supra* note 79, at IV.C; *see also EA Sourcebook, supra* note 79, at part 2.1, p. 1. The objectives of scoping are: (1) to identify the affected public and government concerns; (2) to facilitate an efficient EA process; (3) to define issues and alternatives that need to be examined in the EA; and (4) to save time by ensuring the draft EA adequately addresses relevant issues. Memorandum from the U.S. Council on Environmental Quality entitled *Scoping Guidance* 1 (Apr. 30, 1981).

[95] *CIEL EIA Materials, supra* note 79, at IV.C.

[96] *EA Sourcebook, supra* note 79, at part 2.1, p. 1.

[97] ENVIRONMENTAL PROCEDURES, *supra*, note 5, at 30-31.

[98] *Id.*

[99] *Id.*

made only a minimal effort to comply with the Bank's requirements by sending a draft table of contents for the EA to a number of NGOs for comment. The general public was not notified about the project and had no opportunity to comment. The resulting criticism prompted the project sponsor to organize a meeting to discuss the scope of the EA and public participation. This meeting also was not public–it was limited to the few NGOs who had commented on the draft table of contents–and it came too late in the EA process to have any substantial impact on the scope of the EA.

Other multilateral development banks have recognized the importance of public participation at the earliest stages of the project cycle. The World Bank and the IFC mandate public consultation immediately following the categorization of a project. Both institutions require the project sponsor to provide relevant information to the public *prior* to the consultations, "in a timely manner, and in a form that is meaningful and accessible." [100] At a minimum, the borrower must provide a summary of the project description and objectives, and its potential impacts. [101]

The scope of EBRD EAs generally does not meet broadly accepted standards for environmental impact assessment. EAs should identify the *purpose and need* for the project, and should include an examination of three types of actions–connected actions, cumulative actions, and similar actions;[102] three types of alternatives–the "no-action" alternative, other reasonable courses of action, and mitigation measures not in the proposed action;[103] and three types of impacts–direct, indirect, and cumulative.[104] EAs should also strive to identify the least-cost alternative, estimating environmental costs along with other costs and liabilities, and opportunities for environmental enhancement.[105] These standards have gained wide acceptance in EU countries and have recently spread to several Central and Eastern European countries.[106]

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[100] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at 5-6, para. 20-21; International Finance Corporation, Environmental Analysis and Review of Projects 14 (Sept. 1993) [hereinafter IFC Environmental Procedures].

[101] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at 6, para. 21.

[102] Actions are "connected actions" if they: (1) automatically trigger other actions which may require environmental assessments; (2) cannot proceed unless other actions are taken previously or simultaneously; (3) are interdependent parts of a larger action. "Cumulative actions," when viewed with other proposed actions, have cumulatively significant impact. "Similar actions," when viewed with other foreseeable or proposed action, have similarities that provide a basis for evaluating their environmental consequences together. Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. §§ 1500-1508.28, 1508.25 (1986) [hereinafter NEPA Regulations].

[103] *See infra* notes 110-116 and accompanying text. EBRD EAs generally consider mitigation, but do not assess the no-action alternative or other alternatives to the proposed project.

[104] *See infra* note 118-122 and accompanying text.

[105] *See infra* notes 108 and 113, and accompanying text.

[106] EU environmental assessments are to include a description of "the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project." EC Directive, Annex III. Similarly, Romanian environmental assessments must include the "evaluation of important direct and indirect, cumulative and synergetic, short medium and long term, permanent or temporary, positive or negative effects...the proposed development might exert." Order No. 619, § 4.3.3, of the Ministry of the Environment. *See also* Czech National Council Act on Environmental Impact Assessment, Act No. 244/1992 S.B., Apr. 15, 1992, Appendix 3, part C(III.A) [hereinafter CZECH ACT NO. 244]; Bulgaria Environmental Protection Law, Oct. 2, 1991, sec. 21(4).

To generate alternatives, it is necessary to define, at the earliest stage of the EA, the *purpose and need* of the proposed action.[111] Every alternative that would satisfy the *purpose and need* should be considered in the EA. The *purpose and need* should be stated broadly enough to include desirable alternatives. For example, if the *purpose and need* for a proposed electric power plant is stated as "to increase the supply of electricity," the alternatives may be limited to types of power plants. But if it is stated as "to expand energy services to consumers," such alternatives as increased energy efficiency and conservation may be considered. Because critical environmental implications flow from the definition of *purpose and need*, the definition should be reviewed by environmental or sustainable development experts.

While the project sponsor should identify an initial set of alternatives during the initiation stage, the public, NGOs, and governmental agencies may suggest additional alternatives during scoping and even at later stages of the EA process. The no-action alternative should be included to provide a baseline for comparing and contrasting the impacts of other alternatives, including the proposed action.

Unfortunately, the EBRD's *Environmental Procedures* do not require that the EA contain a statement of *purpose and need*, nor is it clear whether the EA must identify and discuss alternatives to the proposed action. The *Environmental Procedures* state that the EA *should* compare and quantify "[a]lternative approaches and options to the design, technology, location, size and operations."[112] In addition to not being mandatory, the Bank appears to interpret this statement as a requirement to identify alternative ways of accomplishing the proposed activity, not alternatives *to* the proposed activity, as required under most EA laws. The *Environmental Procedures* also do not require consideration of the no-action alternative.

The EBRD *Energy Operations Policy* requires that all energy projects receive least-cost analysis.[113] Identifying the least-cost approach is very important in energy planning, where energy efficiency and conservation are frequently less expensive than building new generating capacity. Without alternatives, however, EAs cannot identify the least-cost approach, and the EAs CIEL has examined do not discuss least-cost.[114]

Slovak law, the competent authority should require a comparison of proposed alternatives and selection of the best alternative to the proposed project, and one requirement of any environmental assessment is that "the plan must contain at least two variant implementations of the activity (variant of the plan), as well as the variant for the situation that would arise if the plan were not implemented (null variant)." SLOVAK ACT, *supra* note 87, at §7. Under proposed Romanian Draft Law, the project sponsor must include in the environmental impact statement "all the alternatives, including that of taking no action." Draft Romanian Environmental Protection Law, Chapter 2, § 1, Art. 11 (e). *See also* InterAmerican Development Bank Draft Environmental Procedures, Annex III.A, para. ii [hereinafter IDB Draft Environmental Procedures].

[111] NEPA Regulations, *supra* note 102, at §1502.10. *See also* Order No. 113, Appendix 1, of the Romanian Ministry of the Environment, calling for the "Need and Justification" in the contents of an EA; and Asian Development Bank Environmental Assessment Requirements and Environmental Review Procedures, Appendix 3 [hereinafter ADB EIA Requirements].

[112] ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 5, para. 2(vii).

[113] EBRD, ENERGY OPERATIONS POLICY 2 (1994).

[114] *Compare* World Bank Environmental Procedures, which state that for each alternative, "the environmental costs and benefits should be quantified to the extent possible, and economic values should be attached where feasible. WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at Annex B, para. 2(f). Similarly, Asian Development Bank procedures call for a cost-benefit analysis of all benefits and all costs in each EIA. ADB EIA Requirements, *supra* note 111, at Appendix 3, sec. F.

Draft Procedures for Scoping

The *Draft Procedures* are even less detailed in their description of scoping than the current procedures. They merely require the project sponsor "to ensure through a scoping process that, prior to initiating environmental investigations, the key issues that need to be appraised, and the way the public will be involved in the appraisal, have been identified." They require contact with the "locally affected public" and government agencies, but the involvement of local and national organizations is optional. No mention is made of international NGOs. Scoping meetings apparently are also optional.

The *Draft Procedures* make two significant improvements to the scope of the EA. The Standard Report Format, which determines the scope of the EA, calls for identification of the project's *purpose and need* and requires assessment of impacts resulting from the no-action alternative.

The EBRD's *Environmental Procedures* do not require its EAs to meet these well established standards. EBRD EAs routinely do not examine connected, cumulative, or similar actions, nor do they consider indirect or cumulative impacts. They fail to adequately assess alternatives to the proposed project, and although the *Environmental Procedures* call for "analysis of environmental costs in economic terms,"[107] they do not estimate environmental costs or routinely identify the least-cost alternative.[108] Consequently, the scope of most EBRD EAs do not appear to meet the national legal standards of many of the countries in Central and Eastern Europe, despite the requirement that projects listed both by the Bank and under national law receive the more stringent assessment required by the two listings.[109]

Recommendations:

- ***The Bank should require project sponsors to conduct full public scoping, including notification and public meetings, for all projects requiring an environmental assessment.***

- ***The scope of EAs should be expanded as detailed in subsequent sections of this report.***

- ***For projects listed by national law as requiring EA, the scope of the EA should include, at a minimum, all the elements required by the national law.***

Alternatives

The section of the EA document containing alternatives and their impacts is the "heart" of the EA. The importance of investigating alternatives to the proposed activity cannot be overstated. In fact, most environmental assessment laws, including the laws of Central and Eastern Europe, require a thorough analysis of alternatives, including the important "no-action" alternative.[110]

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[107] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 31.

[108] A least-cost analysis was performed for Mochovce, but not as a part of the EA.

[109] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 28.

[110] Under Czech law, alternatives may be required by the competent authority and, if required, must be compared and the "best alternative" selected. CZECH ACT NO. 244, *supra* note 106, at art. 3(b). In Bulgaria, the EIA must examine alternative means of implementing the project for each area in which an impact has been identified. BULGARIAN REGULATION NO. 1, *supra* note 86, at Annex III. Under

Draft Procedures for Alternatives

The *Draft Procedures* do not depart significantly from the current procedures in their treatment of alternatives, although there are minor changes, both positive and negative. Under both Option 1 and Option 2, A-Level EAs are to include "an environmental comparison, *where appropriate*, of project options such as alternative sites, technologies and designs."

The current *Environmental Procedures* recommend, but not require, estimates of the environmental costs of projects. This vital information has been omitted from the *Draft Procedures*. Two significant improvements in the *Draft Procedures* already have been noted: inclusion of the "no-action" alternative and identification of *purpose and need* in the EA Standard Report Format.

The Bank conducted a least-cost study for the Mochovce nuclear power plant in Slovakia, but the study was performed independently of the EA. The Bank stated at the outset that only if the least-cost study identified alternatives that were less expensive than Mochovce would the EA be expanded to include those alternatives.[115] The flaw in this approach is that, if the least-cost study is conducted separately from the EA, it cannot consider all the impacts, hence it cannot account for all environmental and social costs associated with the proposed project and its alternatives.

Another reason to include the least-cost study in the EA is to ensure its publication. Originally, the Bank planned to release only a summary of the Mochovce least-cost study, thereby shielding it from public scrutiny and criticism of its methodology or conclusions. After an appeal by environmentalists and the ENVAC,[116] the Bank relented and agreed, *on this occasion only*, to make the least-cost study public.[117]

Recommendation:

EAs should contain:

- ***a statement of the purpose and need for the project;***
- ***an assessment of all alternatives to the proposed action that satisfy the purpose and need;***
- ***an assessment of the no-action alternative; and***
- ***an analysis of the environmental costs of all reasonable alternatives.***

Impacts

EAs should evaluate three types of impacts: direct, indirect, and cumulative.[118] Indirect and

[115] Letter from Jacques de Larosière, EBRD President, to Antony Froggatt (August 30, 1994) [hereinafter Larosière letter]. *See* full discussion in Mochovce case study, *infra*, at Annex 3, n. 46-48 and 67-82, and accompanying text.

[116] Letter from Antony Froggatt on behalf of ten environmental organizations to Jacques de Larosière, President of EBRD (Aug. 22, 1994) [hereinafter Froggatt letter].

[117] Larosière letter, *supra* note 115.

[118] Direct impacts are caused by the same action and occur at the same time and place. Indirect impacts are caused by the same action, but are later in time or farther removed in

cumulative impacts can be as severe as direct ones, but are often more difficult to identify, making their consideration in the EA all the more important.[119] Assessment of global impacts relating to such global environmental problems as climate change and depletion of the ozone layer is now required by a growing number of countries and institutions, including the World Bank.[120]

Unfortunately, the EBRD *Environmental Procedures* do not expressly require assessment of indirect, cumulative, or global impacts. As a result, EBRD EAs frequently fail to explore indirect and cumulative impacts, even when they may be very significant. For example, the EAs for the KomiArctic and Polar Lights oil field development projects in Russia did not include any assessment of the Kharyaga-Usinsk pipeline, even though it was widely known that the pipeline was leaking badly and might rupture. Had the pipeline been included in the EAs, it seems highly unlikely the project would have been approved by the Board.[121] The EBRD is planning to prepare a full EA for the Chernogorskoye oil field development project in the near future. Incredibly, the Environmental Staff cannot say whether that EA will include an assessment of the pipeline.

Similarly, the ZSNP EA fails to consider the indirect and cumulative impacts caused by the extreme energy demands of the new aluminum smelter. Aluminum smelting is a highly energy-intensive operation and the ZSNP facility already accounts for 11% of Slovakia's total consumption of electricity. Early on, NGOs pointed out that building the new ZSNP plant could require either the continued operation of Bohunice, an extremely dangerous nuclear power plant, the completion of Mochovce, a potentially dangerous new nuclear plant, or possibly both. However, this issue is not discussed in the ZSNP EA. The Mochovce EA neglects a significant indirect impact: long-term storage of the plant's spent nuclear fuel.[122]

Draft Procedures for Impacts

The *Draft Procedures* call for identification of indirect impacts, a notable improvement. Unfortunately, however, they do not mention cumulative impacts. The *Draft Procedures also require that* the Environmental Screening Memorandum identify regional and global impacts.

distance. Cumulative impacts are impacts which result from incremental impacts of the action when added to past, present, and reasonably foreseeable future actions. NEPA Regulations, *supra* note 102, at §1508.8.

[119] Slovakia requires every EIA "to make an overall investigation, description and evaluation of the direct and indirect effects of the plan on the living environment...(I)ncluding phenomena that have a cumulative, parallel or irreversible effect." SLOVAK ACT, *supra* note 87 at §§ 4 and 5(a). Bulgarian EA's require an assessment of direct and indirect impacts as well as cumulative effects. BULGARIAN REGULATION NO. 1, *supra* note 86, at §20.

[120] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at para. 11; *see also* IDB Draft Environmental Procedures, *supra* note 110, Annex III.A, para. ii; Hungarian Law on the Protection of the Environment, § 89 (5); Order No. 619 of the Romanian Ministry of the Environment, para. 1.3; Slovenian Law on Environmental Protection, § 37 (2).

[121] Bank staff say the pipeline was not included in the EA because it was not within the project boundaries. But the procedures clearly state that one reason to conduct an environmental assessment is to identify impacts outside the area occupied by the project. ENVIRONMENTAL PROCEDURES, *supra* note 5, at 26.

[122] The Mochovce EA merely recognizes the need for the development of a long-term storage facility for the spent nuclear fuel within the first five years of the plants operation. SAFETY UPGRADE AND COMPLETION OF UNITS 1 AND 2 OF THE MOCHOVCE NUCLEAR POWER PLANT, ENVIRONMENTAL IMPACT ASSESSMENT, Chapter 3, para. 3.126-8, pp. 43-44.

Recommendations:

- ***All EBRD EAs, both partial and full, should identify and assess all foreseeable indirect and cumulative impacts, whether onsite or offsite.***

- ***EAs should also identify and assess all regional and global impacts.***

Mitigation and Remediation

Having examined all reasonable alternatives that satisfy the *purpose and need,* and their impacts, the EA must identify mitigation and remediation measures to reduce adverse impacts and enhance beneficial ones.

EBRD EAs often contain detailed recommendations for mitigating identified adverse impacts and remedying existing environmental damage, even when the recommended approaches would significantly increase the cost of the project.[123] The Bank appears to take these recommendations seriously, frequently requiring mitigation and remediation that should significantly improve the environmental performance of projects it finances.

Mitigation and remediation that are identified as necessary during project preparation and environmental assessment may either be incorporated into loan agreements as covenants or contained in a separate remediation agreement. The ZSNP project involved both types of agreements. Originally, the Bank planned to sign the loan agreement and disburse the first tranche of funds for ZSNP before the remediation agreement was completed and signed. This could have resulted in a weakened agreement, as the borrower would already have achieved its main objective. By signing the loan and disbursing the funds the Bank would have eliminated the borrower's main incentive to undertake potentially costly mitigation and remediation. But due to complications apparently unrelated to the remediation agreement, the loan agreement was delayed and was ultimately signed at the same time as the remediation agreement, nearly a year after approval by the Board.[124]

It is also troubling that the Bank is unable to make public the remediation agreement. The Bank has given the project sponsor a veto over publication, which the project sponsor continues to exercise. Nevertheless, CIEL was able to obtain a draft of the agreement. The draft agreement is generally responsive to the environmental recommendations contained in the ZSNP environmental assessments and audit. With regards to reductions of SO_2 and NO_x emissions, the agreed-upon measures appear even more stringent than those recommended by the consultant.

In some cases, however, the agreement lacks the specificity needed for proper implementation and enforcement of environmental actions. For example, the agreement stipulates that a bentonite wall must be built around the "red mud" waste pile, but it neglects to incorporate the recommendation of the assessment that it encompass the fly ash area, which is suspected of leaching arsenic.[125] Similarly, requirements for

[123] National laws in Central and Eastern Europe also require assessments to contain mitigation measures. For example, the Slovakian law requires each EIA to "determine measures that will prevent or reduce pollution and damage to the living environment, direct or indirect." SLOVAK ACT, *supra* note 87, at §§ 4(a) & 5(b). Under Bulgarian law, for each impact identified in the EIA, measures must be identified for reducing harm of the impact. BULGARIAN REGULATION NO. 1, *supra* note 86, at Annex 3, para. 4. Under Czech law, the EIA must propose measures to reduce, eliminate or compensate for adverse environmental impacts. CZECH ACT NO. 244, *supra* note 106, at Annex III.

[124] *See* ZSNP/SLOVALCO Case Study in Annex 2 for full discussion of EBRD participation in the project.

[125] *See* ZSNP EA, *supra* note 24, at 58.

Draft Procedures for Mitigation and Remediation

The *Draft Procedures* provide for an Environmental Action Plan (EAP) to be developed by the project sponsor. The EAP is essentially a combined remediation agreement and monitoring and reporting plan. It documents "key issues, actions to be taken to adequately address the key issues, the implementation schedule and time scale, and an estimate of the associated costs." It addresses short term issues (health and safety risks, non-compliance), long-term issues (harmonization with EU and other international standards and practices), and opportunities to improve the project's environmental efficiency and performance.

If the project is currently out of compliance with permits or regulatory requirements, proposed actions and schedules for achieving compliance *should* be reviewed and agreed to by the competent environmental, safety, and health authorities. A Draft EAP *should* be reviewed by the Environmental Staff prior to final review. The Final EAP *should normally* be completed in time to be included when the project is submitted to the Board, but at the latest, prior to the loan agreement being signed. The EAP *should* be subject to regular review and revisions satisfactory to Bank staff and, where compliance is an issue, to regulatory authorities.

Despite all the permissive language, the EAP is a welcome addition to the EBRD's *Environmental Procedures*. If carried out as suggested, it should improve the environmental performance of Bank-financed projects. The monitoring and reporting requirements are crucial, and should be emphasized. Unfortunately, the EAP procedures do not provide for public participation or even publication of the EAP. A cloak of secrecy could undermine the whole EAP process.

soil and groundwater tests exclude a number of sites identified in the ZSNP EA.

A number of concerns are ignored all together–most notably the recommendation to pour an impermeable layer of concrete at the temporary hazardous waste storage site.[126] There is no provision for department-wide programs for oil recapture or spill prevention.[127] Additionally, the agreement lacks any explicit language about the collection of data concerning waste flows and NO_x emissions–data which is noticeably absent from the environmental assessments and audit.

[126] *See* SLOVALCO EA, *supra* note 77, at 20.

[127] *See* ZSNP EA, *supra* note 24, at 69.

Recommendations:

- ***The EBRD should not sign loan agreements or disburse money until complete agreement has been reached in writing with the project sponsor for mitigation and remediation.***

- ***Remediation agreements and Environmental Action Plans should provide for public review, participation, and monitoring.***

Environmental Audits

Environmental audits determine the likelihood and extent of potential liabilities at sites with ongoing operations or which require property

transfer.[128] For existing operations, they may also assess compliance with applicable environmental laws and regulations. The decision whether an audit is necessary is made at the screening level. The *Environmental Procedures* differentiate between environmental audits and assessments, stating that "they address different concerns, and are in no way substitutes for each other."[129] Projects frequently require both kinds of investigation.

An environmental audit is required when a project involves property transfer or is an ongoing operation.[130] The audit proceeds in two possible phases. The first phase is a mandatory general audit. It includes a site visit, on-site interviews and review of environmental records. It evaluates present conditions against a set of predetermined criteria. A report summarizing the findings is circulated to the Bank for review by the environmental staff. A more intensive second phase investigation may be required if "environmental contamination or unacceptable emissions/discharges are suspected."

The project sponsor must develop a Management Action Plan that addresses the conclusions and recommendations of the audit report.[131] The *Environmental Procedures* do not require the Bank's environmental staff to evaluate and recommend changes to the plan, however, or to monitor its implementation. The Bank should require remediation of any contamination discovered during the audit, as a condition of financing.

Environmental audits provide no avenues for public participation, and the Bank does not disclose audit results. There is no mechanism comparable to scoping for environmental audits, and the section of the Environmental Review Memorandum which evaluates the adequacy of public participation does not apply to environmental audits. Audits which require additional phases of investigation appear to be similar in scope to full EAs. In these cases, especially where contamination has been identified, there is no rationale for prohibiting full public disclosure and participation.

Recommendations:

- ***The EBRD Environmental Staff should evaluate audit reports and Management Action Plans to ensure that all actual and potential environmental problems are addressed.***

- ***The Bank should require remediation of any contamination discovered during the audit, as a condition of financing.***

- ***The Staff should monitor to ensure that Management Action Plans are fully implemented.***

- ***Audit reports should be made public, and at least sixty days should be provided for public comment.***

- ***The public should participate in monitoring the project sponsors' implementation of Management Action Plans.***

Project Review and the Environmental Veto

The *Environmental Procedures* provide for two reviews during which environmental information is discussed and projects can be rejected on environmental grounds. In neither case, however, does the Environmental Staff make the decision. They can recommend that a project not proceed for environmental reasons, but the

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[128] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 51.

[129] *Id.* at 4.

[130] *Id.* at 51.

[131] *Id.* at 35-37. Preparation of the Management Action Plan, as well as the preceding steps of an environmental audit, are discussed in detail in this 13-step guideline for project sponsors.

decision lies with the Operations Committee, the President, or ultimately the Board of Directors.

Initial Review

During Initial Review the Operations Committee discusses environmental issues associated with the project on the basis of information contained in the Environmental Screening Memorandum. The Deputy Vice President responsible for the Environmental Appraisal Unit–the Operations Committee member responsible for the environment–may recommend rejection of the project "if there are major potential environmental concerns associated with the project which are not likely to be overcome during project preparation."[132] The decision whether to proceed rests with the entire Operations Committee. This puts decisions about environmental protection and sustainable development in the hands of people not trained in resource management or environmental protection.

Final Review

At Final Review the Operations Committee examines the environmental information contained in the Investment Proposal. The Environmental Staff may recommend that the project not proceed "if the environmental issues have not been properly addressed by the project sponsor or if the potential impacts are too great."[133]

Recourse in Cases of Disagreement

If the Environmental Staff disagrees with the Team Leader as to whether a project should proceed, there are three levels of recourse. First, the question is discussed at a meeting between the Environmental Staff, the Senior Environmental Specialist, and the Team Leader. If they are unable to resolve the disagreement, it may be discussed at Initial or Final Review with the Operations Committee. Finally, if the disagreement persists, it may be resolved by the President of the Bank.[134]

This process places a lot of pressure on the Environmental Staff. If they persist through the first two levels of recourse, the decision is taken from them and given to the President. In the event of such an impasse, the Environmental Advisory Council (ENVAC) could play a useful role by reviewing the dispute with Bank staff and providing advice to the President.[135]

Draft Procedures for Project Review

The *Draft Procedures* appear to weaken further the authority of the Environmental Staff in the project approval process. There is no provision for staff to recommend that a project be rejected on environmental grounds, although presumably the Bank President may still reject projects for environmental reasons.

Recommendations:

- ***The Environmental Staff should be given a mandatory veto if the projected net environmental outcome of a proposed project would result in a significant loss of environmental quality or would not promote sustainable development as required by the Bank's charter.***

[132] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 6.

[133] *Id.*

[134] *Id.* at 7.

[135] *See* discussion of ENVAC in Chapter VI, *infra*.

- ***The Environmental Advisory Council should be given authority to review Environmental Staff recommendations and provide advice to the President, the Operations Committee, and the Board of Directors on specific projects.***

Board Decisionmaking

The final decision whether to proceed with a project rests with the Board of Directors, after review by the Executive Committee.[136] A cardinal rule of environmental impact assessment is that the resulting document must be available to the decisionmaker *before* decisions are made and irreversible actions are taken. This rule seems so intuitively obvious that is hard to imagine it could be violated. However, at least one project–the Chernogorskoye Oil Field project in Russia–was approved by the Board *before the full EA was completed.*

An EA was completed for the first phase of the project, but not the second phase. The Board approved the loan subject to the performance of a full EA, satisfactory to the Bank, prior to disbursement of Phase 2 funds. However, the Board will not have an opportunity to review the full EA and reject the project if environmental impacts, remediation, the EA, or public participation procedures are not satisfactory. Moreover, by the time the EA is completed, nearly 50% of the funding for the project will have been disbursed, seriously prejudicing any future decisions that might be taken with regard to project completion.[137]

Information provided to the Board is useful only if the Board has sufficient time to review it. Because an environmental assessment is a lengthy, data-filled document, a substantial amount of time must be provided after its release, and prior to project approval, for the Board, government officials, and the public to examine it thoroughly. For this reason, the U.S. Executive Director is precluded by the U.S. "Pelosi Amendment" from voting to approve any EBRD project that may have substantial environmental impacts unless an EA has been made public 120 days in advance of the vote.[138] The Bank staff has stated candidly that the EBRD disregards the Pelosi Amendment requirements, and in fact, neither the ZSNP nor the Mochovce EA processes conformed to Pelosi.[139]

The Board of Directors should reject projects where corners have been cut in the *Environmental Procedures*, where data is not available to the EA preparer or the Board, or where public participation procedures have not been strictly followed. To ensure that it is receiving complete environmental information, the Board must check periodically to see that EBRD staff is providing all relevant information.[140]

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[136] Articles of Agreement, *supra* note 1, at 27(b); *see also* ENVIRONMENTAL PROCEDURES, *supra* note 5, at 48.

[137] It has not been decided yet whether the EA will assess the condition of the pipeline.

[138] 22 U.S.C. §262M-7(A)-(F)(1988).

[139] The EA for ZSNP was released in August and submitted to the Board in September 1993; the seventy day public comment period provided for the Mochovce project documentation (including the EA, least-cost study, and safety report) began on December 8, 1994, although many groups did not receive the project documentation for several weeks, and ended on February 17, 1995. Requests to extend the comment period in light of these delays were denied by the Bank. Mochovce Public Participation Audit: Assessment of Comments & Responses, U.K. CEED, April 2, 1995, at 23 [hereinafter CEED Report].

[140] A key information document submitted by the Environmental Staff to the Board just prior to its decision to approve the controversial ZSNP loan contained inaccurate information. A table in the document purports to show that the new anode plant complies with all EC standards. A similar table in the EA clearly shows, however, that the plant fails to comply in emissions of condensed tar. Similarly, the document claims a proposed landfill will meet EC standards, whereas the EA states that the landfill will *not* meet EC standards. The document states that the new facility will generate 3,000 tons of hazardous waste, although the EA gave a conservative estimate of 8,000 tons. The document

The Mochovce, ZSNP, and Komi projects all demonstrate the need for greater oversight of the Bank staff. Allotting more time for Board members to examine the complex and substantial amount of information submitted with each project would provide an opportunity to validate the assertions made by Bank staff and project sponsors. The establishment of an Independent Inspection Panel would give the public the opportunity to assist the Board in this supervision (as discussed in Chapter VIII).

Draft Procedures for Board Decisionmaking

The *Draft Procedures* provide a 30 day minimum time period between the release of the EA to the public for comment and submission to the Board. This time period may be extended for complex projects and apparently can be waived upon sufficient showing by the project sponsor.

Thirty days is far too short a period for public comment. In most cases, members of the public do not receive the EA on the day of its release, so the comment period for most citizens will be even shorter. Citizens need time to conduct their own research, consult with other interested parties, and then prepare their comments. CIEL supports a minimum of 90 days for comments and the full 120 days required by the Pelosi Amendment from the date the EA is released to the time the project is submitted to the Board.

Recommendations:

- ***Projects requiring EA should not be submitted to the Board for approval prior to completion of the EA.***
- ***More time should be allotted for preparation of EAs.***
- ***The Board should reject projects when environmental information is incomplete or when environmental and public participation procedures have not been meticulously followed.***
- ***EAs should be released to the public and the Board of Directors a minimum of 120 days before projects are submitted to the Board for approval.***

Monitoring and Evaluation

The current *Environmental Procedures* for monitoring and evaluating environmental aspects of projects, if carried out diligently, will help ensure that mitigation and remediation measures are fully implemented and that projects are environmentally sound. They will also provide important environmental data that will contribute to the design of future projects.

Monitoring and evaluation is carried out at three stages of the project cycle: during project execution, upon project completion, and for some large-scale projects, after project completion. The *Environmental Procedures* require that EAs contain a monitoring plan.[141] In this respect the procedures go beyond many national EA laws. Unfortunately, it appears the Bank fails to enforce this requirement, as the EAs that we have reviewed do not contain such a plan.

gives a figure of 200 tons/year of waste sludge from water treatment; the EA says 2500 tons/year. The document also neglected to mention that the landfill would contain toxic waste, for which the Ministry for the Environment had refused to issue a permit.

[141] ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 5, para. 2(viii,x) (requiring the project sponsor to submit a plan to monitor environmental impacts during and after project implementation and performance of mitigation measures included in any mitigation plan).

Monitoring During Project Execution

Project sponsors are "normally" required to conduct monitoring during the execution of projects that have potential environmental impacts. They may be required to provide regular reports to Bank staff, which also may conduct its own monitoring or appoint a third party to conduct monitoring.

The Bank staff supervises the project sponsor's implementation of the environmental measures contained in the loan agreement, including all environmental mitigation, enhancement, and monitoring activities. Where the project sponsor is not in compliance with covenants in the loan agreement, the Bank can impose penalties, which may include freezing disbursements and notifying proper authorities and other financial agencies and co-financiers.[142]

Evaluation Upon Project Completion

When a project is completed, the Bank's Environmental Staff must assess environmental aspects of the project. The resulting Environmental Evaluation Memorandum discusses whether the impacts of the project were adequately anticipated in the EA and evaluates the effectiveness of mitigation measures undertaken by the project sponsor. It discusses problems which have occurred and specifies further requirements for monitoring and the need for supplementary environmental information.[143]

Monitoring After Completion

Large-scale Category A and B projects may require monitoring after completion to determine whether the environmental review process was successful in predicting and mitigating environmental problems, and to help the Bank in its design of future projects and procedures.[144]

It is too early to evaluate the Bank's monitoring of projects reviewed in this report. The Bank has apparently not published monitoring plans for these or any other projects. As noted, EAs that we have reviewed do not contain the required monitoring plans. The Bank has proposed a public participation component in monitoring of the ZSNP project, but this plan has not been implemented.

Public participation should be integrated into all the Bank's monitoring activities. It should be mandatory, not at the discretion of the project sponsor. An approach that has been used in at least one World Bank project is to set up an independent evaluation committee made up of local community representatives and NGOs. The committee, which is funded by the project sponsor, monitors the project sponsor's compliance with environmental conditions in the loan agreement and implementation of the environmental remediation plan.[145]

The Bank should support public participation in monitoring by making Environmental Evaluation Memoranda public documents. A monitoring plan should, as required, be included in every EA. The Bank should also strengthen its capacity for supervising environmental performance by withholding a portion of the loan until mitigation and remediation requirements have been substantially fulfilled.

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[142] *Id.* at Annex 1, p. 8.

[143] *Id.* at 49.

[144] *Id.* at Annex 1, p. 8.

[145] Rondonia Natural Resources Management Project, Project Agreement Between the Federative Republic of Brazil and the International Bank for Reconstruction and Development, §2.08, Loan# 3444 BR (Sept. 19, 1992).

Draft Procedures for Monitoring

While the *Draft Procedures* stress the importance of monitoring during and after project execution, they do not specify which projects will require monitoring. The role of the staff has been somewhat reduced–no provision is made for the staff, or a third party appointed by the staff, to conduct monitoring. The sanctions for non-compliance (freezing disbursements and notifying proper authorities) are gone. Should a project sponsor fail to comply with environmental conditionality, the Environmental Appraisal Unit "may undertake site visits on a routine or occasional basis in order to investigate the causes for concern and make recommendations for corrective action."

The Environmental Evaluation Memorandum has been eliminated. In its place, the *Draft Procedures* suggest that activities for evaluating other aspects of completed projects–such as financial appraisals and tests to confirm that the loan was used for the purpose intended–could include an "environmental component or perspective." Provisions for release of monitoring information and public consultation have been added but these provisions are recommendatory only.

The revised procedures should specify which projects will require monitoring. The Environmental Staff or a third party appointed by the staff should have the authority to conduct monitoring. The sanctions for non-compliance (freezing disbursements and notifying proper authorities) and the Environmental Evaluation Memorandum should be reinstated. Release of monitoring information and public consultation should be compulsory.

Recommendations:

- ***Every EBRD EA should contain a monitoring plan.***
- ***Public participation should be integrated into all the Bank's monitoring activities.***
- ***The Bank should support public participation in monitoring by making Environmental Evaluation Memoranda public documents.***
- ***A portion of the loan should be withheld until all environmental mitigation and remediation requirements are met.***

V. Public Participation and Access to Information

Democratic Principles and the EBRD

The Articles of Agreement commit the EBRD to "fundamental principles of democracy, the rule of law, respect for human rights, and market economies."[146] First and foremost among democratic principles are the rights of all citizens to be informed of decisions affecting their well-being, and to participate in such decisions.[147] Open and informed citizen participation has been a driving force for protecting the environment in the United States and other Western countries. The countries of Central and Eastern Europe, in contrast, have a long history of government secrecy, and principles of participatory democracy have only recently begun to take hold. The EBRD has a duty to promote the transformation to democracy in these countries by sharing information and consulting the public in the projects it supports, in both the public and private sectors.

For the Bank to fulfil its commitment to democratic principles, significant strengthening of the EBRD's *Environmental Procedures* is needed to ensure not only that the public is given an opportunity to voice its concerns about Bank-supported projects, but that project sponsors and Bank staff listen and give proper consideration to these concerns. Unfortunately, the new *Draft Procedures* make the public participation process more restrictive in scope and more discretionary in application. The Bank's procedural retreat from a firm commitment to public participation and transparency contrasts sharply with the increasing openness of other multilateral development banks. The following discussion of the EBRD policies on public participation and access to information focuses primarily on the requirements of the current *Environmental Procedures* and their implementation to date. Each section ends with a discussion of proposed changes under the *Draft Procedures*.

Disclosure of Information to the Public

Inadequate Procedures and Practices

Access to information is essential for ensuring effective public participation and instilling principles of democracy. The Bank's current procedures and practices on information disclosure do not reflect its stated commitments to democracy and to public participation throughout the project cycle.[148] Unlike other multilateral development banks, the EBRD has no written policy on disclosure of information. While the Bank does make general information on its operations available,[149] it refuses to provide any project-specific information to the public, insisting

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[146] Articles of Agreement, *supra* note 1, at preamble.

[147] *See* Rio Declaration on Environment and Development, Principle 10, (1992); *see also* Wold & Zaelke, *supra* note 10, at 581-82.

[148] ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 4, p. 1.

[149] Examples of such information include the Bank's Annual Report, Sector Operational Policies, General Financial and Environmental bulletins, and requirements for obtaining Bank funding. Unlike such institutions as the World Bank, however, the EBRD declines to publish its operations manual, making it difficult for outsiders to understand how projects are managed within the Bank.

instead that all information come from project sponsors or be released with their permission. The only specific document project sponsors are normally required to make available is the EA report, and that applies only to the small set of projects classified Category A. Information on Category B projects is generally not available at all, even though such projects may have quite significant social or environmental impacts.[150]

Reliance on the project sponsor to release information to the public has several serious defects:

First, project sponsors in the Bank's countries of operation often have little or no experience in managing a public participation program and have frequently demonstrated their reluctance to release information to the public. The Mochovce project sponsor stated initially that it would only release summaries of the least-cost study and the nuclear safety report.[151] The ZSNP project sponsor continues to block release of the remediation agreement. In neither project was any information made publicly available during the scoping phase.

Second, the requirement in the *Environmental Procedures* that EAs of Category A projects be made available to the public is often not followed in practice. CIEL's requests to the Bank and the project sponsor for a copy of the EA of the Polar Lights oil development project in the Komi Republic, a Category A project, were refused. Instead, CIEL was invited to *view* the EA in the office of the project sponsor in Houston, Texas or at the local library in Usinsk, Russia, where a copy was allegedly available in Russian. Requests to the Bank for several other EAs relating to Category A oil development projects in the Russian Federation were also denied.

Third, what little information project sponsors provide to the public comes too late in the project cycle to enable the public to participate effectively in the decisionmaking process. Environmental information should be provided to the public as soon as it becomes available to the Bank or the project sponsor. NGOs and citizens that participate in scoping or submit comments during the preparation of the EA frequently must do so only on the basis of what limited information they are able to obtain through their own resources. The Bank has stated that an operative right to access environmental information prior to release of the EA should be determined as a matter of national law in the country of operation.[152] Reliance on national laws, which are, at best, inconsistent in their requirements for disclosure of information, will not ensure that the public has adequate information to participate effectively in the EA process.[153]

Fourth, some information contained in Bank documents may be unavailable elsewhere. Environmental Screening Memoranda which discuss possible environmental impacts of proposed projects and the rationale for staff screening decisions are unobtainable. This information would help citizens form their own opinions early in the project cycle and, where warranted, would provide a basis to appeal screening decisions. Similarly, environmental audits may uncover information about potential, or actual, environmental or health hazards.

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[150] The project sponsor must make publicly available any EA it has been required to carry out, "in accordance with national legislation in the country concerned." ENVIRONMENTAL PROCEDURES, *supra* note 5, at 10. The Bank apparently does not interpret this to require release of information on Category B or C projects.

[151] At the urging of the ENVAC, EBRD President Larosière subsequently reversed this position in a letter to NGOs, stating that the EBRD would permit the entire least-cost study to be made public, but made it clear that this was not a requirement of the Bank's procedures and would not be a precedent for the future. *See* Letter from Jacques de Larosière, President of EBRD, to David Schwarzbach, Natural Resources Defense Council (Sept. 27, 1994).

[152] EBRD, RESPONSE TO COMMENTS (May 14, 1991).

[153] Wold & Zaelke, *supra* note 10, at 592-93.

Disclosure of this information would allow citizens to take steps to remedy, or at least avoid, the danger.[154]

There is no legitimate reason for the EBRD, or its project sponsors, to withhold environmental information from the public or to fail to provide such information in a timely manner. All parties seeking Bank financing should understand this to be a requirement of the loan application. While some information may properly be considered confidential for reasons of national security or to protect commercial secrets, there should be a strong presumption in favor of releasing all environmental information.[155] The Board of Directors should condition the approval of all loans upon full access of the public to such information.

Other MDB Policies

The World Bank's public participation policy recognizes that, as a publicly owned and financed institution, it has an obligation to be open and transparent in the development process, and responsive to the concerns of its shareholders.[156] Under the new World Bank Policy on Disclosure of Information, there is a *presumption* in favor of disclosure. Information on Bank activities is made available through the newly formed Public Information Center. Basic information on projects under consideration can be found in Project Information Documents. While Project Information Documents released to date have not been perfect, they provide the public with some fundamental project information at an early point in the project cycle, which should lead to more effective public consultation during the scoping phase.

The World Bank also makes country economic and sector reports available through the Public Information Center. Environmental data sheets, which provide basic environmental information on all projects currently in the lending program, can be obtained through the Public Information Center, which also maintains its own Internet site. The Environmental Analysis of Category B projects, as well as country "environmental action plans", which identify the major environmental problems of a country and what is needed to address them, can also be obtained from the Public Information Center.

The guiding principle of the IDB's new policy on information disclosure is that "documents should be made available to the public on request in the absence of a compelling reason for confidentiality."[157] This new policy explicitly provides for frequent public notification and consultation throughout the project cycle. The policy states that "[i]nformation provided to the public...should be made available in a form and at a time which permits substantive assessment of the project and enables adequate time for comment."[158] Project Documents, similar to the World Bank's Project Information Document, are to be made available at the beginning of the

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[154] The Bank staff also argues that releasing audits could harm loan applicants, which would be particularly unfair to applicants whose loan application was subsequently denied. It is unclear, however, why it may be "fairer" to protect the financial health of the borrower than the physical health of the general public. There is even less reason to keep audits and other information private when the project sponsors are publicly owned, state-run entities.

[155] *Id.*

[156] WORLD BANK, THE WORLD BANK POLICY ON THE DISCLOSURE OF INFORMATION 2 (1994); *see also* InterAmerican Development Bank, Policy on Disclosure of Information, para. 2.3 [hereinafter IDB Disclosure Policy].

[157] IDB Disclosure Policy, *supra* note 156, at para. 9.1.

[158] *Id.* at para. 3.2(iii).

project cycle, and updated repeatedly throughout.[159]

The IFC, which works primarily with private companies, has committed in its information disclosure policy to "undertake its investment activities with transparency and accountability."[160] The IFC policy presumes disclosure of information unless it would "materially harm the business and competitive interests of clients."[161] It makes a Summary of Project Information available a *minimum* of 30 days before the project is submitted to the Board. EAs must be released a minimum of 60 days before Board consideration. For Category B projects, the IFC releases an Environmental Review Summary not later than when project documents are submitted to the Board. The IFC makes this information available through the World Bank's Public Information Center.

The Asian Development Bank's new information policy, which borrows heavily from the World Bank and IFC policies, establishes a similar presumption in favor of disclosure.[162] This policy calls for the release of a Project Profile describing the main elements of a proposed project, including environmental and social information, and dates for public consultation. The Profiles for public projects are to be released "at the earliest possible time", and are to be updated each time major changes occur in the project design.[163] PP for private sector projects are to be released no later than thirty days prior to consideration of the project by the Board of Directors.[164] The information policy also calls for the release of Country and Sector policy papers, as well as EIAs and Initial Environmental Examinations for all Category A and Category B projects with significant environmental impacts.

The EBRD's Proposed Policy

A paper submitted by Bank President Larosière to the Board of Directors, "Public Access and Disclosure of Information," recommends the adoption of a very restrictive information disclosure policy.[165] It emphasizes the importance of maintaining client confidences[166] and protecting the integrity of Bank staff,[167] and gives only passing consideration to the importance of maintaining public trust in the EBRD by providing information to the public about Bank projects.[168] The Bank's approach to information

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[159] "[F]rom the point when a project is sufficiently defined that the project profile is approved by the Manager of the Regional Department, the text of the project profile would be made available to the public." *Id.* at para. 4.1(a)(I).

[160] IFC, POLICY ON DISCLOSURE OF INFORMATION, 1 (1994).

[161] *Id.* at 4.

[162] "The Bank's policy should be to provide the greatest possible degree of transparency and disclosure in all areas of the Bank's operations...the Bank should instill among its staff a `presumption in favor of disclosure of information.'" Asian Development Bank: Confidentiality and Disclosure of Information, August 18, 1994, at paras. 26 & 27 [hereinafter ADB Information Policy].

[163] Usually "[A]t the concept clearance of the loan concerned...and invariably precedes the fact-finding mission for the loan." ADB Information Policy, *supra* note xx, at para 34, n. 9.

[164] *Id.*, at para. 43.

[165] *Public Access and Disclosure of Information*, Jacques de Larosière, EBRD President, April 26, 1995.

[166] "There is a very real possibility that private sector operations would be impeded by a blanket requirement on the part of the Bank to disclose information concerning its projects." *Id.* at 5.

[167] "The effectiveness of both the Board of Directors and Bank staff would be seriously hampered if there was a policy of making internal documents available, which could discourage new and radical thinking." *Id.* at 4.

[168] "[L]ocal participation in the eventual formulation of strategy tends to enhance the perception of the Bank as a responsible agent of transition as well as the end product of the Bank's intervention." *Id.*

disclosure, both as proposed and as currently practiced, gives less weight to the public's need to be informed than to the borrower's desire to maintain confidentiality. Although the EBRD is a public institution, funded by taxes paid by the public of member nations, it appears to regard itself more as a private merchant bank.

Under the information disclosure policy proposed by EBRD President Larosière, a Project Summary Document similar to the World Bank's Project Information Document and the IFC's Summary of Project Information would be made available to the public, but only *after* the project has been approved by the Board of Directors. It would only contain information not found to be "confidential" or "harmful." Under the *Draft Procedures*, EAs could be released as late as 30 days before the project goes to the Board. Environmental information about Category B projects would continue to be unavailable. These new policies would not help the public influence EBRD projects or ensure their proper development. Rather than promoting a culture of secrecy, the EBRD should be a leader, both in the region and among financial institutions, in promoting transparent and democratic decision-making.

Recommendations:

- ***The EBRD should develop and publish an information disclosure policy and establish a Public Information Center modeled after the World Bank Public Information Center.***

- ***The guiding principle of the policy should be a strong presumption in favor of releasing all environmental information, except in rare cases involving national security or commercial secrets.***

- ***Bank documents, including Environmental Screening Memoranda, Project Summaries, environmental assessments of Category A and B projects, environmental audits, and environmental action plans should be available through the Public Information Center and on the Internet.***

- ***All environmental information on both Category A and Category B projects should be provided to the public in a form and at a time that permits substantive assessment of the project and enables adequate time for comment–ideally, as soon as the information becomes available to the Bank.***

- ***A Project Summary containing a description of the project, its location, project sponsors, cost, environmental data, tentative alternatives, impacts, and other relevant information should be published prior to screening.***

Public Participation in Environmental Assessment

The Bank's current procedures for public participation are the product of more than a year of negotiation between Bank officials and NGOs.[169] Working with their Central and Eastern European counterparts, a number of Western groups–including CIEL, Friends of the Earth, and Greenpeace–argued for adequate citizen access to information and a meaningful process for participating in and reviewing EAs.[170] As a

[169] Wold & Zaelke, *supra* note 10, at 567.

[170] *Id.* at 569, n. 52. Specifically, CIEL argued that the EBRD and its loan recipients must:
(1) begin with the premise that all information, regardless of the project type, must be accessible;
(2) disseminate such information in all cases, except where such dissemination would jeopardize national security or, in certain extreme cases, commercial or industrial secrecy;
(3) notify citizens, involved governments, and NGOs of any lending activity as soon as the EBRD undertakes a proposal for such activity;
(4) invite comments from citizens, governments, and NGOs as to significant issues concerning a proposed action and alternatives to such proposed action;
(5) provide a two month period, prior to the completion of the EA, for submission of written comments;

result, citizens have the right to participate in and comment on EAs, and the Bank must take their comments into account when approving a project.[171] However, as detailed below, the public participation procedures do not provide adequate guidance to project sponsors.

The problem of obtaining meaningful public input on projects with significant environmental impacts is made all the more difficult by project sponsors' general lack of experience with, and frequent resistance to, public participation. This is particularly true when dealing with projects involving partnerships with state-run industries, which have traditionally operated without regard to the concerns of the public and lack the experience to effectively run the type of public participation needed for the large scale projects the Bank has frequently supported. The EBRD public participation requirements are written so generally that even a good faith effort by a project sponsor to comply may fall far short of what is really needed.[172]

(6) provide for a public hearing, during the scoping stage of the EA, at which interested citizens, governments and NGOs are given an opportunity to present oral testimony on the proposed action; and
(7) incorporate comments received from citizens, governments and NGOs in the final EA, and provide meaningful responses to these comments.

[171] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 10. This requirement is to be carried out "in accordance with national legislation in the country concerned," a qualification that could have a number of different meanings. It is not clear, for example, whether the project sponsor is only required by the Bank to release the EA to the public when national law so requires.

[172] *See generally*, CEED Report, *supra*, note 139. "The Bank's Environmental Procedures provided the Sponsors with little practical guidance. Their ambiguity is such that opponents of a project could claim that it had failed to fulfill their requirements, almost no matter how good the program was. Equally, a project could claim compliance on the basis of a totally inadequate program. The Procedures need revision." *Id.*

Recommendation:

- ***The EBRD's procedures for public participation should be elaborated in clear, detailed, and mandatory language.***

Procedures for Notifying the Public

Early notification is essential for the public to participate in screening and scoping. Notification to the public should take place prior to the onset of environmental assessment, so that all interested parties–citizens, involved governmental agencies, NGOs, and relevant community organizations–will have an opportunity to raise issues they feel should be addressed in the EA.[173] More particularly, notification should occur prior to screening, so that citizens wishing to provide information about the project will have an opportunity to do so.

The World Bank and IFC require the borrower to provide relevant information to the public *prior* to consultations, "in a timely manner, and in a form that is meaningful and accessible." [174] To facilitate public input at the earliest stages of the project cycle, the IDB requires its screening memorandum, the Environmental Brief, to be made available to the public as soon as it has been approved by its Environmental Committee. [175] The IDB also provides translations of the Environmental Brief on request. [176]

The *Environmental Procedures* only require notification when the project has been classified

[173] ENVIRONMENTS IN TRANSITION 7 (Winter 1993).

[174] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at 5-6, para. 20-21; IFC Environmental Procedures at 14.

[175] IDB Draft Environmental Procedures, *supra* note 107, at 9, sec. V(B)(I).

[176] *Id.*

Category A or where required by national law.[177] Like most aspects of EBRD environmental assessment, notification is the responsibility of the project sponsor.[178] Under the current *Environmental Procedures*, the project sponsor must comply with all national requirements for notification and, for all Category A projects, must notify "*affected* citizens and relevant governments and NGOs" of the nature of the project.[179] The method of notification required depends upon geographical, political, and cultural differences and available media.[180] The procedures do not provide any guidance on how to conduct notification or determine who is sufficiently "affected" to require notification.

For Category A projects, notification must take place immediately after Initial Review,[181] presumably to ensure that interested parties will have the opportunity to participate in scoping. However, Bank procedures do not specify what information the project sponsor must provide with the notification. For Category B projects the Bank does not require the project sponsor to notify the public at all, even though the project may have significant environmental impacts.[182]

Even these minimal notification requirements have not routinely been followed by project sponsors. The Mochovce and ZSNP projects clearly illustrate this point. The Mochovce EA commenced with virtually no notification to the public–only a few NGOs were informed of the start of the EA process. After the EA apparently had already commenced, notices were placed in newspapers informing the public about the project. The few parties that were notified prior to commencement of the EA received only a draft table of contents, with no information about the project, its need and purpose, or possible alternatives. When "official" scoping was held several months later, only the NGOs who had participated during the "informal" round were given a chance to participate. The ZSNP EA process dispensed with public notification altogether.

The EBRD Environmental Staff should ensure effective notification takes place by providing a timetable and helping the project sponsor formulate a notification strategy. The strategy should identify all potentially interested parties, methods for notifying those parties, and the information needed for effective participation.[183]

Since there may be many different groups of interested parties, the project sponsor may need to use a number of different methods to notify them. Useful techniques include placing notices at the project site and in newspapers and other local media. Direct mailing and notification by

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[177] ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 4, p. 1.

[178] *Id.*

[179] *Id.* at 10 (emphasis added).

[180] *Id.* at Annex 4, p. 1.

[181] *Id.* at 10.

[182] *Id.* at Annex 4.

[183] *CIEL EIA Materials*, *supra* note 79, at 41. The EC Directive requires that the public be notified and given the opportunity to express its opinion before a project is initiated. The Council on the European Communities, Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects in the Environment, at art. 6. Under Slovak law, the government must inform the affected public of the proposed project, make the plan accessible, and allow a minimum comment period of five weeks. These public comments must be considered. SLOVAK ACT, *supra* note 87, art. 8. Under proposed Hungarian law, the permitting authority must hold a public hearing on the EIA process and there must be 15 days notice of the hearing. HUNGARIAN DRAFT EIA DECREE, *reprinted in* EBRD, INVESTORS ENVIRONMENTAL GUIDELINES 254 (1993). In Poland, for investments of "national importance" deemed "exceptionally harmful to the environment," the internal regulations for the EIA commission allow for notification and representation of NGOs, press, etc. EBRD, INVESTORS ENVIRONMENTAL GUIDELINES 437 (discussing Decree No. 22 of the Environment of December 29, 1989).

telephone are also helpful. Notification should include enough information to let parties know whether the project is of interest to them. At a minimum, it should describe the proposed action, its purpose, and alternatives; describe the proposed scoping process; and give the name and address of a contact person.[184]

Draft Procedures for Notifying the Public

The *Draft Procedures* could restrict the number of parties who are to receive notification and create the possibility that no notification will be required until after approval of the project by the Board of Directors. For Category A operations only, the project sponsor is to "provide the affected public, and, *where appropriate*, national and international [NGOs], with notification." Notification "should be made within two weeks after the operation passes Initial Review, *unless the project sponsor has obtained the Bank's agreement that this requirement, exceptionally, will be waived.*" Thus, under the *Draft Procedures*, notification is only expressly required to the "affected public," and under certain unspecified circumstances, may be waived altogether.

The revised procedures should ensure that *all interested* parties are notified. The provision for waiving timely notification should be dropped.

Recommendations:

- ***Project sponsors should be required to notify the public about all Bank-financed projects.***

- ***Notification should occur as early as possible in the project cycle, and in any event well before the onset of the environmental assessment (i.e., before screening).***

- ***With assistance from the EBRD staff, each project sponsor should develop a notification strategy, identifying all interested parties and effective means of notifying them.***

- ***Notification should include enough information about the project for citizens to determine whether it might affect them.***

Public Participation in Scoping

Public participation in scoping should include distribution of an "information packet," consisting of a project description, environmental data, tentative alternatives and impacts, maps, and other relevant information; a public meeting and smaller meetings with different interest groups; and a method for the public to provide information to the project sponsor throughout the scoping phase.[185]

According to the current *Environmental Procedures*, for Category A projects, "adequate" scoping must be undertaken as a first step in the preparation of the EA "to enable the public to raise issues and discuss arrangements for managing public involvement through the course of the EA."[186] Scoping is the responsibility of the project sponsor, who must ensure that there is an "appropriate level of public participation in the

[184] In Slovakia the competent body, the licensing body, the body affected, and the municipality affected perform all scoping. Public comments to the scoping must be considered. SLOVAK ACT, *supra* note 87, at § 8, para. 5.

[185] *CIEL EIA Materials*, *supra* note 79, at 31-33.

[186] ENVIRONMENTAL PROCEDURES, *supra* note 5, at 31.

EA."[187] The project sponsor must identify the concerns of all interested parties affected by the project and set up meetings with interested parties, "as appropriate," to raise issues and discuss arrangements for managing public participation throughout the EA process.[188]

The *Environmental Procedures* fail to provide sufficient guidance as to what information is to be provided to the public prior to scoping and leave it to the project sponsor to determine what constitutes an "appropriate level" of public consultation. As a result, project sponsors have not involved a sufficient number of affected parties in the process; have failed to provide adequate information to ensure informed participation; have limited public comments on the scope of the EA, excluding from consideration such topics as alternatives, impacts, and mitigation; and have not conducted effective public scoping meetings.

Other multilateral development banks detail what information must be furnished to the public prior to consultation. Minimal requirements include a description of the project, a summary of its objectives and a discussion of the potential impacts associated with the project. [189]

As noted above, project sponsors for the ZSNP and Mochovce projects virtually dispensed with public participation during scoping. The ZSNP project included no public scoping whatsoever. The project sponsor for Mochovce made only minimal efforts to comply with the Bank's scoping requirements. The general public was not notified about the project, the NGOs that were notified received no information about the project and only a short time during which to comment on a draft table of contents for the EA, no alternatives were proposed by the project sponsor for discussion, no public meetings were held, and the project sponsor did not respond to public comments.

In the one meeting that was held to discuss scoping of the Mochovce EA, only a small number of NGOs were allowed to participate. Only seven days notice was given, with no information on the meeting's format and no project information beyond a revised table of contents for the EA. It appears that, by the time of this meeting, the EA was well under way and that the scope of the EA had already been set by the Terms of Reference. In particular, the project sponsor was not prepared to discuss alternatives to the project. NGOs that attended the meeting also expressed frustration that no representatives from the EBRD were present, as a number of questions they raised could not be answered by either the project sponsor or the consultants hired to prepare the EA. The NGOs were told they should address those questions to the EBRD.

Both ZSNP and Mochovce illustrate the need to expand and clarify procedures for public participation during scoping, and a mechanism, such as an Independent Inspection Panel, to enforce these new requirements. The *Environmental Procedures* should be strengthened to require the project sponsor to open the public participation process to all interested parties, not just those chosen by Bank staff or project sponsors. Procedural requirements are needed, including a minimum period for public comment and public scoping meetings for all Category A projects, to ensure that the public has both the time and opportunity to develop and express their concerns.

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[187] *Id.* at 30.

[188] *Id.* at 31.

[189] *See* WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at 5-6, para. 20-21; *See also*, IFC Environmental Procedures, *supra* note 100, at 14.

Draft Procedures for Public Participation in Scoping

As with notification, the *Draft Procedures* appear to narrow the breadth of public participation during scoping. According to the *Draft Procedures*, "[t]he scoping process will certainly involve contact with representatives of the locally affected public and with government agencies, and *may* also involve other local and national organizations. Issues *may* be discussed at a scoping meeting to which the project sponsors will invite selected representatives of such organizations..." Rather than opening the scoping process to all interested parties, the *Draft Procedures* require only that the affected public be consulted. They suggest that scoping meetings are optional, and when meetings are held only those chosen by the project sponsor will be allowed to participate.

Recommendations:

- ***All potentially interested parties should have an opportunity to participate in the scoping process.***

- ***A minimum period of sixty days should be provided for public input into scoping.***

- ***Citizens participating in scoping must be provided with complete information and have the opportunity to comment on all relevant topics, especially alternatives, impacts, and mitigation.***

- ***The project sponsor should respond to all issues and proposals raised by the public.***

- ***The project sponsor should hold public scoping meetings, including meetings with individual interest groups.***

- ***The Bank staff should assist the project sponsor in conducting scoping and should attend all scoping meetings.***

Receipt of Comments and Opinions from the Public

The public should have the opportunity to provide comments on a project at any point during the project cycle, but three points are particularly important: during scoping, upon release of the draft EA document, and between release of the final EA document and decision by the Board.

Scoping, as discussed above, gives the public an opportunity to identify areas of concern, suggest alternatives, and discuss impacts and mitigation. The comment period after the draft EA document is released provides the public with an opportunity to review the document carefully and raise issues and alternatives that have not been included or satisfactorily addressed. The comment period after the final document is released gives the public an opportunity to review the document to make sure it has addressed all comments and resolved all outstanding issues satisfactorily.

As discussed in Chapter IV, EAs should be released to the public and the Board of Directors a minimum of 120 days before projects are submitted to the Board for approval. This requirement could be triggered by release of a draft EA–provided the draft EA is complete–so as not to make the process overly long. The only changes in the final EA should be in response to comments on the draft.

The current *Environmental Procedures* provide very limited opportunity for public comment and do not require the project sponsor to respond to comments. The procedures merely

state that comments and opinions expressed by the public are to be taken into account in the project approval process.[190] No explicit provisions are made for the public to comment on either a draft or final EA, no public meetings are required, and no comment period is specified. The project sponsor is not required to even issue the EA report in draft or to respond to comments either by modifying the EA or explaining why the comments do not warrant further response.

There was virtually no opportunity for public comment during the ZSNP project cycle. The EA was not provided in draft form for comment, no public meetings were held during its preparation, and only a hurried, last minute meeting was held with a select group of NGOs prior to submission of the project to the Board. The NGOs that participated were informed of the meeting only days before it occurred and were not given documents in advance of the meeting. Consequently, they could not participate effectively. In any case, it seems unlikely that the NGOs could have said anything at that point to change the staff's mind about proceeding with the project, as the project was submitted to the Board just four days after the meeting was held.

The quality and extent of the public participation process was improved during the Mochovce project, and several innovative steps were implemented to facilitate public comment, such as a hotline and a faxline where comments and questions could be submitted. But some significant problems remained. The scoping phase was poorly handled, and the project sponsor failed to provide a draft EA for public comment. A seventy-day public comment period was established after the release of the final EA, but as indicated in the independent audit of the public participation process of Mochovce, many interested parties found it very difficult to obtain this documentation and did not have an opportunity to review it until several weeks into the comment period.[191] Requests for an extension of the comment period were denied by the Bank. Many problems arose with public meetings, particularly the meeting in Vienna, which had to be canceled because the project sponsors refused to attend. These difficulties demonstrate the need for greater guidance from the *Environmental Procedures* and the Bank staff.

The project sponsor did produce a rather extensive document containing the questions and comments received during the seventy day comment period with responses of the project sponsor.[192] The responses often failed to adequately address the issues presented, however, and several extensive studies and commentaries on the Mochovce plant were dismissed as arbitrary, unobjective, or unfounded.[193]

The World Bank and the IFC have more stringent public participation procedures. Consultation is required, at a minimum, following project categorization and after release of the draft EA. [194] The IFC further stipulates that, once the EA has been approved by its Investment Department, the EA must be made public "not later than 60 days prior to the proposed Board date." [195]

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[190] ENVIRONMENTAL PROCEDURES, *supra* note 5, at Annex 1, p. 9.

[191] CEED Report, *supra* note 139, at 23.

[192] *Slovak Republic Mochovce Nuclear Safety Improvement Project*, Key Questions and Answers, AIRBED document, sec. 3, Question 5.

[193] The CEED report notes that "in some cases the response is too short and the content weak." CEED Report, *supra*, note 139, at 38.

[194] WORLD BANK OPERATIONAL DIRECTIVE, *supra* note 18, at 5, para. 20; IFC Environmental Procedures, *supra* note 100, at 14.

[195] IFC Environmental Procedures, *supra* note 100, at 14-15.

Draft Procedures for Public Comment

The draft procedures provide a 30 day minimum time period between the release of the EA to the public for comment and submission to the Board. This time period may be extended for complex projects and apparently can be waived upon sufficient showing by the project sponsor. As already discussed, this period should be extended to 120 days and should not be waivable.

Recommendations:

- ***The EA should be released in draft at least 120 days before the project is submitted to the Board for approval.***

- ***The project sponsor should provide an opportunity for public comment during scoping and upon release of both the draft and final EA.***

- ***In addition to meetings during the scoping phase, at least one public meeting should be held after the release of the draft EA and another after the final EA.***

- ***The project sponsor, or where appropriate the Bank, should be required to respond in writing to all comments.***

Public Participation in Implementation and Monitoring

The need for public participation does not end with the approval of the project by the Bank's Board of Directors. Continued public consultation and monitoring is necessary both during project implementation and after the project is completed to ensure not only that the project sponsor complies with the environmental conditions of the loan, but that otherwise unforeseen environmental consequences are properly addressed.

For the public to participate effectively, it must have access to project information, loan conditions, and remediation agreements. Under the current *Environmental Procedures*, these documents are not made public. In comparison, other MDBs, notably the World Bank and the IDB, continue to provide and update project information after its approval, including loan documentation and mitigation proposals.[196] This approach is consistent with their respective public disclosure policies, which establish a presumption in favor of disclosure of all project information.[197]

To compensate for failing to implement its public participation procedures on the ZSNP project, the Bank proposed that the public should have a role in monitoring the project. The proposal calls for the public to make sure all agreed remediation and mitigation measures are complied with. Unfortunately, prospects for the success of this exercise appear somewhat doubtful. It has started on the wrong foot–the terms of reference for the exercise are being drafted by the Bank without public input, and drafts of the terms of reference have yet to be made public. NGOs have expressed reluctance to participate, fearing their participation might be perceived as an endorsement of the project. But if it succeeds, this proposal could result in an important advancement of the public's role in ensuring that EBRD projects promote sustainable development.

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[196] Under World Bank Policy, project information, including mitigation actions, can be found in Environmental Data Sheets, which are updated quarterly and can be obtained from the PIC and are available on the Internet. Under the new IDB Policy on Disclosure of Information, both the approved loan document and Environmental Reports, which are prepared by Bank Staff and contain recommendations regarding environmental and preventative and mitigatory measures, will be made available to the public.

[197] *See* discussion, *supra*, notes 156-162 and accompanying text.

The EBRD should not underestimate the difficulty of including public monitoring in its projects. As with ZSNP, NGOs may be reluctant to participate in monitoring certain projects. Project sponsors who experience difficulty in complying with mitigation and remediation may be tempted to restrict public participation. Nevertheless, public monitoring should be included as a condition in loan agreements, and the Bank should reserve the right to accelerate the loan if the project sponsor does not fully comply with public monitoring requirements. Also, as mentioned in Chapter IV, the Bank should consider establishing independent evaluation committees, funded by project sponsors, to monitor compliance with environmental conditions in loan agreements and implementation of environmental remediation plans.

Draft Procedures for Public Participation in Monitoring

The *Draft Procedures* do not adequately address public participation in monitoring. The results of ongoing monitoring may be made available to the public, but at the discretion of the Bank. The *Draft Procedures* do not allow for public input into the design or implementation of the monitoring plan. The EAP which serves to "define monitoring and reporting requirements," lacks a public participation component. Where monitoring reports are not forthcoming, are inadequate, or give rise for concern, the Bank staff may undertake site visits or make recommendations for corrective action. But there is no mechanism to inform the public of these monitoring inadequacies and concerns, or to provide the public with a role in their resolution.

Recommendations:

- ***Public participation in monitoring should be mandatory for all projects requiring environmental assessment.***

- ***Public participation in monitoring should be included as a covenant in loan agreements, and the Bank should reserve the right to accelerate the loan if the project sponsor does not fully comply.***

- ***The Bank should consider establishing independent evaluation committees, funded by project sponsors.***

- ***To facilitate public monitoring, environmental information documents, loan conditions, and remediation agreements should be made available at an EBRD public information center and in the Bank's field offices.***

VI. The Environmental Advisory Council

The Environmental Advisory Council (ENVAC) is an advisory board of twelve environmental experts, with a wide range of backgrounds, from Central and Eastern Europe and OECD countries.[198] Established to "advise the Bank on critical environmental policy and strategy issues and programmes," the ENVAC provides the EBRD with expertise on environmental protection and natural resource management at the regional, national, and local levels.[199]

Creating the ENVAC was a progressive step by the Bank toward fulfilling its mandate to promote environmentally sound and sustainable development. The existence of the ENVAC is significant in itself, but its effectiveness to date is difficult to assess. While ENVAC members have raised many of the same concerns that have troubled the environmental community regarding the lending practices of the Bank, it is hard to find instances where Bank policy or practice has been significantly altered in response to ENVAC recommendations.

The ENVAC has met eight times since its inauguration in 1991, most recently in Riga, Latvia in September of 1995. The operations of the ENVAC were suspended in September 1993, shortly after Jacques de Larosière took over the presidency of the EBRD. He reinstated its operations in June 1994, after reaffirming that the EBRD needs the ENVAC's independent advice and expertise on environmental matters, particularly in the members' respective countries.[200]

Duties of the ENVAC

The ENVAC's primary responsibility is to offer advice on priority policy issues, measures to strengthen national legislative and regulatory frameworks, institutional and human resource concerns, technical developments, emerging trends, and future opportunities.[201] The ENVAC also provides advice concerning the strategic policy implications of global environmental issues.[202]

The ENVAC meets twice a year, once in London and once in Central and Eastern Europe. ENVAC members' terms are limited to three years to allow a large number of experts to serve as advisers to the EBRD over time.[203] Members are provided with a small honorarium to cover incidental costs associated with council meetings.[204] The Environmental Appraisal Unit of the EBRD serves as Secretariat to the ENVAC. Summaries of ENVAC proceedings are available

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[198] EBRD, Investing For A Better Environment 25 (1992).

[199] *Id.*

[200] *EBRD Environmental Advisory Council To Continue Its Role Under New President*, EBRD Press Release No. 39/1994, June 29, 1994.

[201] *Id.*

[202] *Id.*

[203] EBRD, EUROPEAN BANK ENVIRONMENTAL ADVISORY COUNCIL: OVERVIEW (1993).

[204] *Id.*

to the public, though the actual minutes of the meetings are not.

ENVAC Advice

ENVAC members have contributed advice on a variety of topics relating to EBRD operations. Their comments suggest that the ENVAC shares many of the concerns about Bank activities expressed by the larger environmental community.

ENVAC members emphasized the need to focus on demand-side management and new and innovative projects in the transport and energy operations policies. They questioned the wisdom of Bank support for such highly energy-intensive industries as the ZSNP aluminum smelter, without which the need for a potentially dangerous nuclear power plant like Mochovce would have been significantly diminished.[205] They suggested that the *Agriculture Operations Policy* should include a substantial environmental section that emphasizes the effects of irrigation, the danger of agrochemicals, the need to develop more environmentally benign activities, such as tourism and sustainable forestry, and the advantages of organic farming.[206]

ENVAC members advised the Bank to consider a wide range of issues in its due diligence work and to ensure full public participation on significant investment projects prior to funding.[207] They emphasized the need to consider all options, including the zero (no-action) option. They also suggested moving environmental appraisal to an earlier point in the project preparation process to ensure that there is sufficient time for proper consideration of environmental issues.[208]

The ENVAC advised the Bank to make sure all environmental, economic, and social issues were taken into account before a decision was made about the ZSNP project.[209] The ENVAC's biggest concern was that adequate public participation might not be possible in the time available.[210] Similarly, ENVAC members pressed for disclosure of Mochovce project documents and recommended that the public participation program include countries bordering Slovakia.

Strengthening the Role of the ENVAC

The EBRD at times has appeared somewhat ambivalent about the ENVAC, and has not always treated it as an important resource. The Bank's first two operations policies–on energy and transport–were adopted by the Board of Directors without prior review by the ENVAC. Some ENVAC members feel they are not given adequate information and time to prepare for their meetings, which may cover a variety of difficult topics in a relatively short period of time. The crowded agenda and the shortness of time (meetings run from one to two days) make it difficult for members to contribute more than cursory comments.

ENVAC members appear to have had little direct impact on the EBRD's day-to-day operations. A few ENVAC members have expressed a desire to play a greater role in the Bank's environmental activities, and frustration at not having had more influence on the EBRD's environmental policies and procedures, particularly its procedures for public participation.

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[205] *Id.*; Environmental Advisory Council of the European Bank, Meeting Summary 4-5 (London, March 28, 1995).

[206] ENVIRONMENTS IN TRANSITION 13 (Winter 1993).

[207] *Id.*

[208] Environmental Advisory Council of the European Bank, Meeting Summary 7 (London, March 28, 1995).

[209] *Id.*

[210] *Id.*

ENVAC members also appear to have no direct role in Bank operations in their own countries, and ENVAC members have had difficulty communicating with local EBRD representatives. One ENVAC member tried on several occasions to arrange a meeting with the EBRD Resident Representative in the member's country to discuss environmental concerns about several projects. Even though the Resident Representative complained of having no staff members providing advice on environmental matters, he declined to meet with the ENVAC member.

The EBRD staff is aware of these problems and has proposed that communication between ENVAC members and local EBRD representatives be transmitted through the Bank staff in London. It would be better if the EBRD instructed local EBRD representatives and project sponsors to cooperate with ENVAC members requesting information or offering advice on EBRD-financed projects in their country or region.

Greater dialogue is needed between the ENVAC, Bank staff, and local EBRD representatives if the ENVAC is to become an effective tool in shaping Bank environmental policy. With the exception of the semi-annual meetings described above, dialogue appears to be largely one-way, from the Bank to ENVAC members. When the Bank has solicited ENVAC comments on environmental issues, it has generally been near the end of the policy or project development process, rather than at the beginning where it would be most useful.

Despite having its advice solicited late in the process, the ENVAC has sometimes been able to influence projects in midstream. For example, the President's decision to release the Mochovce least-cost study and safety assessment to the public appears to have been largely at the urging of the ENVAC.[211]

The EBRD should develop guidelines or procedures to ensure that ENVAC consultation is thoroughly integrated into the Bank decision-making process. Neither the current *Environmental Procedures* nor the *Draft Procedures* provide any guidance as to the role of the ENVAC or how it should fit into the Bank's environmental activities, leaving it entirely to the Bank staff to determine the information the ENVAC will receive and the issues on its agenda.

While it may not be practical for the ENVAC to be directly involved in the environmental assessment process, members should have the opportunity to comment on Category A projects and EAs before they are submitted to the Board. ENVAC comments should be provided directly to the Board, as well as to the Bank staff. To assist them in their advisory role, ENVAC members should have full access to project documentation.

As discussed in Chapter IV, the ENVAC could also help to resolve disputes between the Environmental Staff and other members of the Bank regarding environmental components of projects. More generally, they might function as the EBRD's environmental "trouble-shooters." They could empanel smaller subcommittees to review and evaluate problems and controversies and advise the President.

ENVAC members that so desire should be given a larger role in developing and assessing projects in their own country or region. Local EBRD representatives and project sponsors should be instructed to communicate with their local ENVAC members and, when environmental questions arise, to solicit their advice. It should not be necessary for ENVAC members to

[211] Author's personal communication with ENVAC members.

communicate with local EBRD representatives via the Bank staff in London.

The ENVAC could be most useful in assisting the Environmental Staff in developing a sustainable development policy, criteria, and standards; regional and sectoral policies; and regional and sectoral environmental assessments (Strategic Environmental Assessments in the parlance of the *Draft Procedures*). The expertise and diverse background of the ENVAC make it well suited to provide assistance in identifying opportunities for development that will be economically and environmentally sustainable.

Recommendations:

- ***A greater role needs to be carved out for the ENVAC. Meetings should be longer or occur more frequently, and the ENVAC should participate in Bank activities on an ongoing rather than semi-annual basis.***

- ***The ENVAC should be fully integrated into the process of developing policies and procedures, beginning with the sustainable development policy proposed in Chapter II.***

- ***ENVAC members should have the opportunity to comment on all Category A projects and EAs before they are submitted to the Board. ENVAC comments should be provided directly to the Board, as well as to the Bank staff.***

- ***The EBRD needs to pay greater attention to the recommendations of the ENVAC. Although the ENVAC is an advisory body, its views on environmental matters should routinely be adopted by the Bank, provided they represent a consensus view of ENVAC members.***

- ***The Environmental Staff should respond in writing to each ENVAC comment or recommendation, stating how the recommendation will be implemented or giving reasons why it will not.***

- ***EBRD representatives and project sponsors should cooperate with ENVAC members requesting information or offering advice on EBRD-financed projects in their country or region.***

- ***To assist them in their advisory role, ENVAC members should have full access to all project documentation.***

- ***The ENVAC should have authority to empanel smaller subcommittees to review and evaluate problems and controversies and advise the President.***

VII. Gaining Accountability Through an Independent Inspection Panel

In researching this report, and in particular the case studies of ZSNP and Mochovce, we found that Bank staff and project sponsors did not always follow Bank policies and procedures, especially where there was pressure to speed up the project cycle. For the Bank's environmental and other procedures to be more than mere "guidelines," there must be some mechanism for enforcing these policies and procedures, for holding Bank management responsible and accountable for compliance with the procedures, and for providing citizens with the means to protect the interests that underlie the Bank's policies and procedures.

Exactly the same concerns about accountability and responsibility, voiced by NGOs and certain donor countries, prompted the World Bank to create an Independent Inspection Panel.[212] Other regional development banks are also moving forward to create an equivalent to the Panel. The InterAmerican Development Bank, for example, recently announced its inspection function.[213] Both the African and Asian Development Banks are expected to approve inspection mechanisms soon.[214]

An EBRD Inspection Panel would empower citizens in affected countries to seek remedial action when they have been directly and adversely affected by the Bank's failure to follow its own operational policies and procedures. Any citizen or group of citizens from member countries who are adversely affected should be able to file a claim. The Panel should have clear and uncomplicated rules and procedures, including a simple form like that developed for the World Bank Inspection Panel.

The initial experience with the World Bank Inspection Panel shows that the a Panel mechanism can provide an important and efficient process for fielding complaints from affected parties and triggering Bank management to respond more effectively tp ensure project quality. To date, the World Bank Inspection Panel has received four claims: two of which were determined to be outside the Panel mandate; one which led to Bank management reversing its support of a potentially disastrous hydroelectric power plant in Nepal; and one which is leading to improved compliance and better implementation of a high-profile project in Brazil's Amazon.

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[212] *See* International Bank for Reconstruction and Development, Resolution No. 93-10 (Sept. 23, 1993); International Development Association, Resolution No. IDA 93-6 (Sept. 23, 1993); *see also* The Inspection Panel for the International Bank for Reconstruction and Development, *Operating Procedures* (Aug. 19, 1994).

[213] *See* The IDB Independent Investigation Mechanism, (June 13, 1994).

[214] African Development Bank, Draft Statement on Proposed ADB Inspection Panel (Oct. 3, 1994). The Asian Development Bank has not released its draft proposal for an Inspection Panel.

A Panel mechanism will assist the EBRD to fulfill its commitment to democracy and the rule of law by being a model for greater democracy and transparency among international institutions. Panel mechanisms are an important advance in protecting individual rights in the international system and in providing a process for making international institutions more responsive to those citizens the institutions were created to serve.

Moreover, the process of filing claims works to strengthen and empower indigenous NGOs and to increase their confidence in working "within the system." The basic process of holding a powerful institution accountable to the rules governing it reinforces the rule of law and empowers citizens to participate constructively in their governance. By tying their complaints to specific policy violations, the NGOs will be forced to clarify their concerns and to link their demands more specifically to the authorities and responsibilities of the EBRD.

Because of the EBRD's commitments to democracy and sustainable development, it should be willing to go even further than the World Bank. The EBRD's Panel should entertain claims that the Bank has failed to comply with international legal norms and the goals of its own charter, in addition to its own policies and procedures. The EBRD Panel should allow public disclosure and discussion of the Panel's pending claims and recommendations *before* the Board of Directors makes final decisions. Finally, the EBRD Panel should be given clear authority to slow the project cycle when claims are pending and to make specific recommendations for remediation.

Recommendations:

- ***The EBRD should create an Inspection Panel modeled after the World Bank's Inspection Panel, but with additional features to ensure public accountability and independence.***

- ***In addition to entertaining claims based on the Bank's failure to follow its own policies and procedures, The EBRD's Panel should entertain claims that the Bank has failed to comply with international legal norms and the goals of its charter.***

- ***The EBRD Panel should allow public disclosure and discussion of the Panel's pending claims and recommendations before the Board of Executive Directors makes final decisions.***

- ***The EBRD Panel should be given clear authority to slow the project cycle when claims are pending and to make specific recommendations for remediation.***

VIII. The EBRD Operations Policies

The EBRD's mandate to promote sustainable development gave environmentalists hope that the Bank would take a new approach to development lending. However, the Bank's operations policies, which guide its lending in a number of sectors, failed to address most of the environmental issues that other MDBs have already confronted in their lending operations, and failed to commit the Bank to specific actions to remedy the few problems the operations policies did identify.

Recently, however, the EBRD revised its energy policy. The new energy policy is much more detailed on environmental issues and actions it will take to address those issues than previous versions. The new policy, and the new Energy Efficiency Unit formed to help implement it, suggest that, at least in the energy sector, the Bank has begun to take its environmental mandate more seriously.

The Energy Operations Policy

Problems and Opportunities in the Energy Sector

The orientation towards self-sufficiency and the reliance on indigenous fuels in Central and Eastern Europe has resulted in an energy sector heavily dependent on low-grade coal and dangerous, outmoded nuclear plants.[215] The low calorific value and high sulfur content of the coal, the inefficient combustion of power plants, and their lack of desulfurization and particulate filters have produced an extremely severe air pollution problem in the region.[216] The region's poorly designed nuclear plants provide their own set of well-known environmental and pollution safety concerns.

Cheap energy exported from the Soviet Union stimulated the growth of energy-intensive industries in Central and Eastern Europe and persuaded planners that energy efficiency, while desirable, was not necessary.[217] Some gains in efficiency were made in the last decade, but they were not commensurate with gains in market economies, and the energy intensity in Central and Eastern European countries remains at least twice as high as in Western countries.[218] As a result, most analysts believe that tremendous opportunities exist for increasing efficiency and conservation in Central and Eastern Europe.[219]

The EBRD Energy Operations Policy

The new EBRD *Energy Operations Policy* is a marked improvement over the first energy policy introduced in March of 1992. Critics objected to the lack of end-use efficiency and conservation measures in the initial policy,[220] and castigated the

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[215] ECE, ENERGY CONSERVATION POLICIES AND PROSPECTS FOR CO-OPERATION IN THE ECE REGION, U.N. Doc. Energy/R77 12 (Aug. 1992) [hereinafter ECE].

[216] *Id.* at 10.

[217] *Id.* at 8.

[218] *Id.*

[219] *Id.* at preface.

[220] The Bank's own research supported this criticism. A background paper issued with the original Energy Operations Policy stressed the importance, both economically and environmentally, of adopting policies that promote energy

Bank for issuing both it and the transport operations policies without prior review by the ENVAC. An improved energy policy was reissued in the spring of 1993, after review and comment by the ENVAC.[221]

In the current *Energy Operations Policy*, issued in July 1994, conservation, energy efficiency, least-cost planning, integrated resource planning, and, to a lesser extent, development of renewable energy sources play prominent roles.[222] The Bank's main objectives in the energy sector are: (1) supporting and accelerating establishment of competitive energy markets; (2) increasing energy efficiency and cost effectiveness, in both supply and demand; (3) improving sector environmental performance; (4) improving the safety of nuclear power plants; and (5) mobilizing private sector resources necessary to achieve these objectives.[223] Each of these objectives, according to the EBRD, will contribute to the environmental performance of the energy sector, and most environmentalists would agree. For example, the development of competitive energy markets, while not a panacea, could lead to more efficient and cost sensitive utilization of energy resources, helping to promote energy efficiency and conservation.

Close inspection of the Bank's energy policy does raise some questions, however. For example, the policy suggests that maintaining a balance among energy sources will be a priority, despite the fact that some sources have far greater adverse environmental and health impacts, and associated costs, than others.[224] Furthermore, although the policy strongly supports least-cost analysis and integrated resource planning (IRP), it does not require environmental costs to be included in the least-cost calculation, so decisionmakers may not have a clear picture of the true costs of projects and alternatives.

This disjuncture between cost analysis and environmental impacts is evident in the Bank's approach to evaluating the Mochovce project. As required by the *Energy Operations Policy*, a least-cost analysis was prepared for Mochovce. But because the EA and the least-cost analysis of the project were conducted separately, the least-cost study will not evaluate all the impacts identified in the EA, and the EA will not assess all the alternatives considered in the least-cost study. As a result, the Bank did not get a complete picture of the respective costs of the project and its alternatives. In the future, environmental assessment and least-cost analysis should be integrated.

The energy policy states that reform of energy pricing, along with institutional reform, will be the key to improving countries' energy efficiency,[225] and a number of energy sector loans have been made contingent upon such reforms.[226] While there is almost universal agreement that energy prices will eventually have to rise to the level of prices in market economies, the effectiveness of price reform as a near-term measure for achieving

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conservation and supply and end-use efficiency. It estimated that by 1995 at least 15% of total demand could be met through conservation and efficiency measures, without the need for major investment and with a resulting savings of approximately US$4.5 billion. EBRD ENERGY SECTOR, ISSUES AND OPTIONS 7 (1992).

[221] Subsequent improved revisions of the Energy Policy were issued only after review and comment by the ENVAC.

[222] ENERGY OPERATIONS POLICY, *supra* note 113.

[223] *Id.* at 1. These objectives are updated from the previous Energy Operations Policy which had the following objectives: (1) to redirect Central and Eastern European counties' focus from supply to least-cost options; (2) to promote commercial management in the energy sector; (3) to improve environmental performance; and (4) to assist efforts to improve nuclear safety.

[224] *Id.* at 2.

[225] *Id.* at 3.

[226] *EBRD Polishes Green Credentials*, Financial Times, Oct. 30, 1992.

efficiency gains is not certain. Many Central and Eastern European countries have already made substantial progress in pricing,[227] but have not experienced corresponding reductions in energy intensity. They may resist additional increases, fearing further price hikes would hasten economic decline and exacerbate the hardships of their citizens.[228] Moreover, the incentive to conserve provided by higher prices is diluted by the dearth of capital available for investing in energy efficiency.[229] The new policy seems to be sensitive to these issues, and calls for the development of "suitable social safety nets" and provision on commercial terms of funds for investments to promote energy efficiency.[230]

No doubt, higher energy prices could have a negative impact on Central and Eastern European economies. Low energy prices, low wages and high environmental externalities helped make the region's energy-intensive manufacturers competitive in the world market, and exports of these products are their main source of hard currency.[231] EBRD-financed projects like the ZSNP aluminum smelter perpetuate this reliance on heavily polluting energy-intensive industries. Given the guarantees of low energy prices that underlie the ZSNP project, that loan also undermines efforts to eliminate energy subsidies.

The energy policy lists measures the Bank will support to achieve demand-side efficiency. These include:

- ☐ adjustment of energy prices to reflect economic cost;
- ☐ promotion of government incentives to offset current price distortions;
- ☐ introduction of load management techniques;
- ☐ direct investments to reduce the energy intensity of demands by industries and individuals;
- ☐ provision on commercial terms of funds for investments to promote energy efficiency;
- ☐ support of local manufacturing of energy conservation and efficiency equipment and services; and
- ☐ support of construction and equipment efficiency standards.

A number of more specific actions were discussed in earlier versions of the policy that are not mentioned in the new policy. These include installation of electric meters, improved building insulation, and inter-fuel substitution (to discourage the use of residential electric heating). Presumably, the Bank continues to support these actions, which would contribute greatly to energy efficiency and conservation. In addition to these actions the Bank should promote installation of more efficient electrical appliances and water heaters, which a recent United Nations study finds would boost household energy efficiency by 20 to

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[227] Average energy prices in Hungary are now at or above West European prices, and industrial prices for coal, oil and gas in a number of other Central and Eastern European countries are at or close to import or export parity prices. ENVIRONMENT FOR EUROPE, ENVIRONMENTAL ACTION PROGRAMME FOR CENTRAL AND EASTERN EUROPE III-6 (1993).

[228] Wolfgang Munchau, *A Harsh Lesson For Eastern Europe*, The Times, Jan. 2, 1991.

[229] During the past decade, most energy-efficiency projects in Central and Eastern Europe have been no-cost or low cost, or projects with very short payback times (i.e., two years or less). ECE, EAST-WEST ENERGY EFFICIENCY 15 (1992) [hereinafter ECE EFFICIENCY].

[230] ENERGY OPERATIONS POLICY, *supra* note 113, at 11.

[231] As energy intensity for producing a good increases, the share of the OECD market captured by Central and Eastern Europe producers increases exponentially. ECE EFFICIENCY, *supra* note 229, at 12, fig. 4.

40%.[232] There is also great potential in the transportation sector for efficiency gains from infrastructure investment and improvements in vehicle mileage.

Perhaps the greatest strength of the new policy is its commitment to integrated resource planning. Acknowledging that the institutional resources do not yet exist to fully adopt IRP in the region, the policy calls for a phased approach to build institutional capacity and develop necessary data. Meanwhile, all projects should be subject, at a minimum, to a least-cost plan integrated within an environmental assessment.

Energy Sector Lending

The operations policy will be a useful environmental tool only to the extent it produces environmentally sound and energy efficient projects. While information about the Bank's energy sector lending is hard to come by, a few observations are possible at this early stage. The projects focus more on energy supply, and supply-side efficiency, than demand-side efficiency. Approximately 7.5% of total energy sector spending has gone to supply-side efficiency, and only 3% to demand-side efficiency.[233]

It should also be noted that, although most of the Bank's client states signed the Framework Convention on Climate Change and the Montreal Protocol on Substances that Deplete the Ozone Layer, the *Energy Operations Policy* does not address global warming, ozone depletion, or other global environmental problems. This is a major policy flaw, and these problems should not be ignored. he region is a major source of greenhouse gases and other global pollutants, and over time can be expected to share the burden of responding to these environmental problems. Projects that address such problems may be eligible for grants from the Global Environment Facility.[234]

The EBRD should explore alternatives to heavily polluting energy projects by significantly increasing its lending for renewable energy technologies. To date, large-scale hydropower projects have received the most funding, although a small amount has been invested in geothermal. Of more than 2.87 billion ECU budgeted for total energy spending, less than 50,000 ECU (<.002%) is for solar energy and wind power, combined.[235]

Recommendations:

- ***The EBRD's long-term commitment to integrated resource planning is commendable and should be fully implemented.***

- ***At a minimum, least-cost analysis should be undertaken for all energy projects and should be integrated with EBRD environmental assessment procedures.***

- ***More attention needs to be paid to specific investments in conservation and energy efficiency, particularly in the residential and transport sectors. Every project should reflect the Bank's commitment to energy efficiency and conservation.***

- ***Benign renewable technologies, such as solar and wind, need much more support.***

- ***The EBRD should pay more attention to global environmental problems, such as climate change and ozone depletion.***

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[232] ECE, *supra* note 215, at 18.

[233] ENERGY OPERATIONS POLICY, *supra* note 113, at table 4.

[234] Instrument for Establishment of the Restructured Global Environment Facility (GEF), Mar. 14, 1994.

[235] *Id.*

The Nuclear Policy

The EBRD has been given a central role in determining the future of nuclear energy production in Central and Eastern Europe. In addition to being able to fund nuclear projects with its own resources, the Bank administers the Nuclear Safety Account established by the G-7 nations to help address serious safety risks in the most dangerous reactors operating in Central and Eastern Europe. Given the Bank's pivotal role on this critical issue, the *Energy Operations Policy* gives surprisingly little attention to nuclear energy.

Problems in the Nuclear Sector

The accident at Chernobyl focused the world's attention on the grave threat posed by Soviet-built nuclear reactors. Scattered throughout Central and Eastern Europe, these plants provide nearly 15% of the total electric generating capacity in the region; in some countries the figure is much higher.[236]

The plants are of two basic designs. The Chernobyl-type RBMK graphite core reactors, found mainly in the former Soviet Union, are considered the most dangerous.[237] The three generations of VVER pressurized water reactors common in other Central and Eastern European countries also pose serious safety risks, with the degree of danger increasing with the age of the plant. There is virtually universal agreement among Western experts that the RBMK and older generation VVER 230 reactors should be shut down as quickly as possible.[238] There is less certainty about what to do with the newer VVER 440/213 and VVER 1000 reactors, a number of which are under construction or have had construction halted for lack of funds, but few experts believe that any of these plants can be safely operated without substantial improvements to their safety systems.[239] Current plans to backfit some of these plants, like Mochovce, with Western technology are untested and highly controversial.

Opportunities for Reducing Reliance on Nuclear Energy

A window of opportunity exists for closing nuclear plants in Central and Eastern Europe. Electricity demand has declined dramatically throughout the region, due mainly to economic restructuring and a sagging economy.[240] The World Bank forecasts that demand will soon begin to rise, returning to 1990 levels sometime around 2005.[241] Other experts believe that if the right conservation policies are put in place, demand

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[236] THE WORLD BANK & INTERNATIONAL ENERGY AGENCY, NUCLEAR POWER AND SAFETY IN CENTRAL AND EASTERN EUROPE AND THE FORMER SOVIET UNION 3 (1993) [hereinafter NUCLEAR POWER AND SAFETY].

[237] EBRD, REVIEW OF ECONOMIC ASPECTS OF NUCLEAR GENERATION AND SAFETY IMPROVEMENTS IN EASTERN AND CENTRAL EUROPE 9 (June 1993)[hereinafter EBRD REVIEW].

[238] *See, e.g.*, STEWART BOYLE AND ANTONY FROGGATT, SHUTDOWN (1993); *see also* FRIENDS OF THE EARTH, RUSSIAN ROULETTE: NUCLEAR POWER REACTORS IN EASTERN EUROPE AND THE FORMER SOVIET UNION (1993).

[239] Some Eastern experts do not share the concerns of the West. For example, Russian Federation nuclear power chief Viktor Mikhailov claims the Russian public isn't worried about nuclear power, and that Russia intends to export its reactors to "Korea, Vietnam, India, and Iran." Ann MacLachlan, *Disenchantment Settles Over Eastern Nuclear Safety Aid*, Nucleonics Week, Dec. 9, 1993. But Mikhailov's statistics–he claims that 26% of Russians want new reactors–do not seem to support his claim that the nuclear option is popular in Russia.

[240] Electricity consumption in the former Soviet Union fell more than 8% since 1990. SHUTDOWN, *supra* note 238, at 7; electricity demand in Eastern Europe declined by 6.2% between 1989 and 1990. RUSSIAN ROULETTE, *supra* note 238, at 31.

[241] NUCLEAR POWER AND SAFETY, *supra* note 236, at annex 4.

could fall even farther and possibly stabilize well below present levels.[242]

Studies by the World Bank and the EBRD indicate that a "low nuclear scenario" for Central and Eastern Europe would require substantially less investment than a "high nuclear scenario." They conclude that a high nuclear investment strategy for the region would require an investment of US$ 28 billion through 2000, whereas a low nuclear strategy would require only US$ 21 billion and would reduce safety risks dramatically.[243] The reports indicate that energy demands under the low nuclear scenario can be met through more reliance on gas fired plants.[244]

But all the opportunities for reducing Central and Eastern European countries' dependence on nuclear power do not guarantee that such a transition will occur. Indeed, at present, the trend seems to be in the opposite direction.[245] The EBRD notes in its report that the "low nuclear" approach would be resisted by Central and Eastern Europe because nuclear power is considered "an important `indigenous' source of electricity [which] limits the countries' dependence on imported fossil fuels."[246] Central and Eastern European governments have little incentive to replace existing nuclear facilities with fossil fuel-powered plants. They are reluctant to spend scarce hard currency on imported fossil fuels when the cost of nuclear fuels, as a percentage of total operating cost, is much lower.[247] Moreover, hard currency can be earned by selling both fossil fuels and electricity to the West.

The electricity market also gives Western countries an incentive to keep Central and Eastern European nuclear plants operating. It is cheaper for them to buy electricity from Central and Eastern Europe nuclear plants than to produce it themselves.[248] Investors have proposed that 50% of the electricity from the two reactors at the Mochovce facility in Slovakia could be sold to Western Europe at a far lower price than electricity produced in Western plants.[249] The nuclear industry in the West also stands to gain from Central and Eastern European countries' continued dependence on nuclear power. Nuclear technology and fuel companies, having seen their sales plummet in the West, view emerging markets in the East as an opportunity to revitalize their industry.[250] Their influence in formulating regional and global approaches to nuclear energy development should not be underestimated.

Clearly, the EBRD is subject to pressure, both from within and without Central and Eastern Europe, to support nuclear energy. It may find

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[242] One recent study shows that with economic reform and greater intervention by governments to make markets work, improvements in efficiency of 25-50% could be achieved by 2010. SCHIPPER & MARTINOT, DECLINE AND RE-BIRTH: ENERGY DEMAND IN THE FORMER SOVIET UNION (1992).

[243] NUCLEAR POWER AND SAFETY, *supra* note 236, at 1; EBRD REVIEW, *supra* note 237, at 6. The EBRD report notes that when fuel costs are considered, the cost differential diminishes. The reports do not include decommissioning and insurance costs, however.

[244] *Id.*

[245] *Eastern Europe's Nuclear Power*, The Economist, July 24, 1993, at 20.

[246] EBRD REVIEW, *supra* note 237, at 6.

[247] *Id.* Capital costs are the largest part of the cost of operating a nuclear plant. For many nuclear facilities, capital costs were virtually eliminated when ties to the former Soviet Union were severed.

[248] *Veba East and West*, Power Europe, Apr. 10, 1992, at Energy Section. It is ironic that, while Austria is widely recognized as being "nuclear free" (i.e. no nuclear plants within its borders), it has contributed significantly to the demand for nuclear plants by buying nuclear electricity from the Ukraine, which generates most of its electricity at Chernobyl. *Id.*

[249] GLOBAL 2000 REPORT, *supra* note 8, at 4.

[250] *See, e.g., Balancing Nuclear Safety*, Energy Economist, Feb. 1994.

appears to be sound. Western financial and technical capital flows in, to be used to perform major upgrading of pipelines, refineries and wells. In return, investors receive oil for sale on world markets with favourable profit margins to guarantee an adequate return.

However, Western corporations have been more successful than their Russian hosts in wringing major financial and political concessions to their advantage. The main benefits include tax exemptions and 'oil-swapping'.

Tax Breaks

Following intensive lobbying by Western oil companies, in October 1994 - just weeks after the Arctic oil spills - the Russian government agreed to offer tax exemptions to investments in oil for three years or until oil ventures have recovered their investments, whichever comes first.

Both the KAO and Polar Lights ventures benefitted from this giveaway. In addition, KAO's investors were given this tax break retroactively to January 1 1994.

The tax is about US$5 per barrel. These lost revenues to the Russian government could have been used to upgrade the oil infrastructure.

Whatever the merits of the view that tax concessions are needed to attract foreign capital, the damage to the Arctic and its peoples will not be paid for by the companies taking the oil from the ground. The Russian government will pay these costs and those of pipeline repair-if at all-without the benefit of taxes accrued from oil exports by these corporations.

'Oil swapping'

The new investment flowing into Russia might have provided the resources for pipeline upgrading. KomiNeft, after all, is the dominant partner in the ventures, and also operates the local pipeline.

However, the question obviously arises: Why don't the oil companies step in to fix the pipeline, given that oil is a valuable commodity and that a sizeable portion of their oil is disappearing into the tundra?

One reason is Russia's concern to maintain full ownership of the pipeline. Another reason is that joint ventures receive a credit note from Russian authorities for every barrel of oil pumped through the wellhead and into the pipeline. The companies then redeem their credits-barrel-for-barrel-at the refineries. In other words, it makes no financial difference to the oil companies whether their oil goes to the refinery or into the local environment. The oil companies have no incentive to concern themselves with the pipeline; with their credit notes, they get their oil at the other end.

In this way, the Russian economy and the northern ecosystem is absorbing the entire cost of the inefficiency which this arrangement represents.

Energy Charter

In the initial enthusiasm for Russian oil, much ink was spilled about the desirability of upgrading Russia's oil pipelines. In the early 1990s, both the EBRD and the leaders of the then-European Community made strong statements that they were prepared to invest in this field.

The non-binding Energy Charter signed in December 1994 was to have ensured that the inflow of Western capital would benefit both the oil infrastructure and the production wells. At the time that this charter was signed by 35 countries, environmentalists warned that it would result in a 'free-for-all' for the Western oil interests who would be unlikely to spend their money upgrading the Russian oil infrastructure. At the same time, environmentalists warned that their aims would be to extract as much oil and gas as possible.

A European Commission (EC) proposal made to the European Council of Ministers details

policies and actions which should be undertaken by energy investors in Russia. The polluter should pay for cleanup costs of pollution, including transboundary pollution. The EC also proposed that investors should investigate energy efficiency and renewable energy sources.

However, given the credit system negotiated by the oil ventures, these protocols would not make any difference to the state of the Russian tundra. Komineft, the pipeline operator, has no money to clean up the spills.

The main pipeline carrying oil from the Timan-Pechora Basin is severely corroded and leaking. Western investment has not flowed to the maintenance of this pipeline and, as a result, major losses of oil into the environment have come to be regarded virtually as 'business-as-usual'. This serves to illustrate the extreme inefficiency of energy supply in Russia, and this should be tackled prior to any moves to increase oil production.

The local oil pipeline is owned and operated by KomiNeft, the State-owned entity created following the disintegration of the Soviet oil monopoly. KomiNeft is also the dominant partner in the major joint ventures in the region and receives fees from the producers for oil pumped into the pipeline at the well-head.

Oil executives in the East and West have known for years that the pipeline situation in Russia was deteriorating. By some estimates, 55% of the country's 75,000 km of pipeline needs to be replaced. The EBRD made strong statements during 1991 and 1992 that their priority for funding in Russia would be to upgrade infrastructure, including pipelines. The Bank could have imposed lending conditionalities to ensure that the ventures to which it granted loans undertook repairs. Although the Bank has recently announced its intention to raise finance for pipeline repair, the damage to the tundra has already been done.

What now?

In May 1995, the EBRD approved a US$25 million loan to the Russian Federation, to help finance an emergency oil spill recovery and rehabilitation program in the Komi region. This loan was part of a US$140 million loan package jointly financed by the World Bank. It is to be used for activities such as clean up, monitoring, pipeline inspection and replacement, as well as, operational improvements and studies.

Although the Bank boasts that "the international community has responded quickly to the Russian Government's request for assistance in cleaning the spills and repairing the pipelines", it fails to mention that the Bank could have prevented some of the spills from occurring by placing conditionalities on the loans it granted to the joint ventures operating in the region.

The total cost of this project is estimated at US$140 million-a cost that will further indebt the Russian people. Furthermore, the payback period for the loan-19 years-has been calculated using the dollar price for oil on the world market. Komineft, however, who are responsible for repaying the loan currently sell most of their oil on the domestic market at one third of the world price-another cost to be borne by the Russian public.

More recently in July, 1995, Lloyd's announced the EBRD's intention to raise some US$1 billion towards a US$3 billion Russian investment to make safe or replace the most dangerous segments of its extensive gas pipeline system.

The scheme to modernise the system began with an 18-month US$9 million study organised by the EBRD and financed by Britain, Canada, France, the Netherlands, Norway, and the US, as well as private sources. They have specified and prepared concrete investment projects worth US$3 billion.

A high level Russian delegation from Gazprom and several engineering firms have recently completed discussions with the EBRD. They have agreed on an investment program costing up to US$700 million a year until the end of the century, up to 35% of which would be funded by the Bank.

Other co-funders of this project include the World Bank, whose loan is intended to encourage energy exports through the introduction of a non-discriminatory framework for allocating access rights to limited pipeline capacity.

The net result of this enormous investment could be the Russian people paying for increased gas exports. Since oil and gas production are inextricably linked, this investment could also spur increases in oil production and the risks of further environmental devastation.

Instead of allocating funding to re-direct Russia's energy sector towards efficiency and renewable energy supplies, these loans confirm the view that the whole thrust of EBRD energy loans is geared to furthering increased reliance on non-renewable and non sustainable energy supplies.

Conclusion

The lending institutions, oil companies and the Russian authorities all bear responsibility for the pollution of the Arctic tundra and the effects on indigenous peoples in the region.

The environmental destruction in the Arctic serves to emphasise that oil pollutes from its extraction through to its end use. The financial institutions and oil companies, encouraged by political agreements such as the non-binding Energy Charter, pay little, if any, regard to the local, regional and global environmental damage wrought by increasing use of oil and gas.

The direct environmental damage caused by oil spills is already too high a price to pay for reliance on oil. However, the price is even higher when considering that oil, when it is used, produces 44% of the carbon dioxide (CO_2) being pumped into the atmosphere from the use of fossil fuels. CO_2 has been recognised both scientifically and politically as the major greenhouse gas which is causing climate change. The world's governments have recognised the threat and in signing the Framework Convention on Climate Change (FCCC) have committed themselves to cutting CO_2 emissions. The EBRD and other financing bodies should ensure that their lending policies reflect these international commitments. It is impossible to equate increased oil development and consumption with cuts in CO_2 emissions.

The lending institutions, oil companies and politicians involved in the Russian oil free-for-all have completely disregarded the direct environmental and human health damage of their activities. Furthermore, economic opportunities and the environmental need for energy demand management through energy conservation and renewable energy supplies, are not considered. By adopting Clean Production criteria which favour these options, and ensuring that lending policy applies the criteria, the EBRD would promote long- term environmental and economic security and reduce the potential for further oil spills.

The re-orientation of loan criteria to favour energy conservation and efficiency before increased oil developments would have a significant effect on protecting local and global environments. Increased oil developments increase environmental destruction, while conservation uses the resource wisely. Capital saved by following a conservation strategy allows for development towards renewable energy sources which are the only truly sustainable energy supplies of the future. The Bank has a key role in investing for this future now.