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**COMMENTS ON EXPORT
DEVELOPMENT CANADA'S
ENVIRONMENTAL REVIEW
DIRECTIVE**

Karen Campbell, Staff Counsel
West Coast Environmental Law



INTRODUCTION

West Coast Environmental Law has been working to strengthen environmental protection laws in British Columbia and nationally since 1974 (see West Coast's website at <http://www.wcel.org>). As part of the NGO Working Group on Export Development Canada (WG), we have been actively calling for a credible and binding environmental assessment regime that is consistent with other export credit agencies (ECAs) for several years. We were also the only non-governmental organization to attend the recent Export Development Canada's (EDC) Vancouver meeting regarding the Environmental Review Directive (ERD). This brief contains our comments on ERD, released on December 21, 2001.

We recognize that in the past three years, the EDC has undertaken a number of different initiatives to strengthen its accountability; many in response to pressure from NGOs. The EDC has made some progress in identifying and consulting civil society, and has increased the staff complement available to address environmental issues within its offices. We also note that the ERD contains some provisions that reflect improvements over the original Environmental Review Framework that came into effect in 1999, notably the inclusion of the categorization approach, which is becoming standard with many ECAs worldwide.

Overall, we believe that the ERD must be strengthened in order for it to meaningfully reflect the EDC's commitment to ensuring its activities are conducted in an environmentally responsible manner. Currently, the ERD is replete with phrases and terminology that virtually guarantee that its application is almost completely subjective. Most of the main provisions contain disclaimers such as "in EDC's opinion", "in EDC's view", "if EDC considers", or "acceptable to EDC". The repeated use of these phrases leaves the impression that the EDC intends to exercise its discretion frequently in order to limit the application of this Directive. This concern is reinforced by the fact that this document is merely a directive which is by nature discretionary, and does not have the force of law.

Second, we have real concerns about the consultation, or comment process around the ERD. We have been asked to provide comments on a Directive that has already become operative. This offends a fundamental principle of public consultation, which is that opportunities for input are to be made prior to final decision-making. At the Vancouver meeting, EDC staff indicated that the EDC intends to consider public comments despite this fact, and we look forward to a response from the EDC advising us as to how these comments have been incorporated into the Directive. In this context, we offer our comments.



SCOPE

The thresholds of term over two years and value over SDR 10 millions to trigger the ERD are excessively high. There are many transactions and projects that fall under this threshold with the potential for adverse environmental effects. Length of term and cost are not appropriate indicators of potential for environmental risk or harm. At the Vancouver meeting, EDC staff expressed a commitment to reviewing projects with serious environmental impacts even if they do not meet the SDR 10 million threshold.

Recommendation: Delete the threshold requirement and develop criteria based on environmental impact.

By limiting the application to project sponsors, companies or other entities with “prime” responsibility for project design, development and construction, the ERD has real potential to exclude many sponsors or companies that play an active role in the development of a project, but may not have “prime” responsibility. Any sponsor or company that has responsibility that receives EDC support should be subject to this Directive, not only those that have prime responsibility.

Recommendation: Remove the word “prime” in the 2 instances where it appears in the Scope section.

CATEGORIZATION

While the ERD does include categories modelled on those used by other ECAs, this provision states that the EDC reserves the right to re-categorize any project. No justification or rationale is provided for this, making categorization potentially an arbitrary exercise.

Recommendation: Delete last sentence in first paragraph.

In addition to the three categories, this section should also include an Exclusion List. As you know, the World Bank, Australian and US export credit agencies all have lists of activities that they will automatically decline to support. A good example is the exclusion list of the International Finance Corporation of the World Bank.¹ Another approach is that of the US Export-Import Bank, which has guidelines setting out maximum acceptable concentrations of pollutants in air, water and soil.²

Recommendation: EDC should develop and consult on an Exclusion List for the ERD.

¹ To view IFC's exclusion list see: http://www.ifc.org/enviro/enviro/Review_Procedure_Main/Review_Procedure/Annex_A/annex_a.htm.

² To view the US Export-Import Bank pollution guidelines see: <http://www.exim.gov/envguide.html>.

CATEGORIZATION — CATEGORY A

Paragraph 3 in this section indicates that project related public consultations are expected to occur with “affected” parties in the host country. An expectation is not a requirement. Also, defining “affected” is an extremely subjective exercise; for public consultation to be meaningful, any interested parties should be eligible to participate, at home and abroad.

Recommendation: Replace the word “expects” with “requires”.

Recommendation: Delete the word “affected” from line 1 of paragraph 3.

Recommendation: Adjust wording to include consultation opportunities within Canada as well.

We acknowledge that under the disclosure policy, 45 days will be allocated for consultation, but we also note that this falls far short of the 120 days used in best practice.

ENVIRONMENTAL REVIEW INFORMATION REQUIREMENTS

We do not understand why projects in Canada or the US do not need to be subjected to further information requirements if they have been designed in compliance with host country environmental requirements.

Recommendation: Delete paragraph 3.

In its comprehensive examination of the Environmental Review Framework, the Auditor General indicated that the framework should stipulate that the decision to provide or decline financial support will not be taken in the absence of sufficient environmental information.³ This recommendation was also included in the Government’s Guidance for a Revised Environmental Review Framework for the EDC.⁴ This requirement has not been translated into the ERD.

Recommendation: That the ERD clearly indicate that in the absence of sufficient environmental information, no financial support will be provided.

³ Report of the Auditor General of Canada on the Export Development Corporation’s Environmental Review Framework, May 2001.

⁴ See June 26, 2001 Press Release by Minister Pierre Pettigrew, announcing policy changes for the EDC.



ENVIRONMENTAL REVIEW INFORMATION REQUIREMENTS — CATEGORY A

We are pleased to see that the EDC will require that an independent review be conducted where the assessment has been undertaken the project sponsor or an affiliate thereof. However, such an independent review should identify any potential problems with the analysis, not merely significant problems.

Recommendation: Delete the word “significant” in paragraph 2.

In many circumstances, EDC may represent the face of Canada abroad, therefore, particular attention should be paid to ensure that Canada’s international obligations are upheld. Support for any projects that are inconsistent with the purposes and provisions of international environmental agreements that Canada has ratified should be automatically declined.

Recommendation: Environmental review information requirements should include an evaluation of the extent to which Category A and B projects are consistent with Canada’s international environmental commitments; and where they are not, EDC support must be declined.

ENVIRONMENTAL REVIEW INFORMATION REQUIREMENTS — CATEGORY B

The first paragraph indicates that EDC may accept “various approaches” to meeting its informational requirements for this category of projects, and then it lists some examples. Given that there is no disclosure for Category B, we find this approach to be unnecessarily vague, and are of the view that a list of specific criteria in the ERD would provide some rigour to this section.

Recommendation: Replace the list of examples with specific criteria that provide a clearer indication of the information requirements for a Category B environmental review.

EVALUATION AND DECISION

This section states that the EDC will use “as reference points or benchmarks, the international standards which are in EDC’s opinion the most appropriate”. Annex 5 provides an “illustrative” list of internationally recognized good practices, standards and guidelines, which presumably are to be relied upon in the evaluation of an environmental review. In our view, this language and approach is not adequate to give effect to the recommendation that in the “Government Guidance for a Revised Environmental Review Framework”, dated June 26, 2001, which states that the framework should “clearly identify the environmental

standards that EDC will apply in conducting environmental reviews”, and screen projects based on “simple, clear and objective standards”.⁵

This section is extremely vague. It refers to a broad list of international standards that will be used as reference points or benchmarks, and neither term is defined. We do not understand the distinction between reference points and benchmarks. As well, the standards listed in Annex 5 represent a broad spectrum of possible applicable standards; we are given no sense of which standard will be used and in what circumstance. This section does not provide the simple, clear and objective standards envisioned by the Minister.

Further, we remain concerned about the use of benchmarking, as per our earlier submissions and those of the WG, and note that in this Directive, the ERD does not even commit to using benchmarking, as reference points may be substituted, resulting in an application that could be even more vague; these provisions are far from “simple, clear and objective”.

Recommendation: Remove one or the other of “reference points” or “benchmarks”; define whichever term remains, and redistribute for public comment.

Recommendation: Annex 5 should be deleted altogether and one common standard should be adopted: the ERD should commit to applying the World Bank’s Pollution Prevention and Abatement Handbook and the International Finance Corporation’s Safeguard policies, as recommended in the Government Guidance for a revised Environmental Review Framework.

Recommendation: If Annex 5 is not deleted, then remove the word “illustrative” from the title, as it means that any of the standards listed are optional.

The grounds whereby the EDC may justify providing support to a project that has adverse environmental effects despite mitigation measures are also unclear and potentially obfuscatory. For example, the third bullet refers to “compelling socio-economic considerations” presented by the host country, which presumably would be balanced against environmental effects identified in the environmental review. It is virtually impossible to balance socio-economic impacts with environmental impacts, particularly where the environmental review does not have to consider socio-economic or social impacts; it is akin to comparing the proverbial apple and orange.

Recommendation: Include “social impacts” in the definition of environment (which is too narrow in any event, the importance of this recommendation extends beyond this specific context.)

Recommendation: Provide more detail on some of these grounds – what are examples of compelling socio-economic considerations; what constitutes an opportunity to improve environmental conditions; how will these trade-offs be evaluated and addressed? What type of reporting out will occur in these circumstances?

⁵ Summarized in the Government Guidance for a Revised Environmental Review Framework, June 26, 2001, accompanying Minister Pettigrew’s Press Release of the same date.



COVENANTS AND MONITORING

Providing that compliance will “normally” be confirmed through warranties and representations is insufficient for two reasons. First, the use of the word normally is vague.

Recommendation: Replace the word normally with “always” or simply delete “normally” in paragraph 1.

Of additional concern is the fact that warranties and representations are difficult to enforce. Common to commercial practice, and in particular in the construction context, is the use of holdback provisions, whereby monies are withheld until certain terms and conditions are met. This has the effect of ensuring compliance that is not based on promises. In complex situations, holdback schemes often operate on a number of levels, so that monies are gradually released as terms and conditions are met. Given that the EDC operates in a commercial context, it should consider incorporating commonly accepted commercial standards in its practices, at a minimum, with respect to Category A projects, as well as Category B projects.

Recommendation: The ERD should require holdbacks, instead of warranties and representations, where support is provided for projects with potential for adverse environmental effects.

Of even more concern is that this section does not indicate criteria by which the EDC will monitor a project. At a minimum, the EDC should monitor all Category A projects, and those Category B projects where the EDC is of the view that support is justified despite the implementation of mitigation measures to address adverse environmental effects.

Recommendation: The ERD should indicate when monitoring of a project will be required, as above. In addition, monitoring reports should be disclosed, as should related information such as emergency response plans, for example.

In circumstances where the EDC is unable to secure rights, assurances or covenants that it deems necessary in the circumstances, the EDC must decline to enter into the transaction; this should not be optional.

Recommendation: Replace “may” with “must” in the last line of paragraph 2 of this section.

Finally, the ERD does not provide any indication of whether, when and how its implementation will be reported upon. This important information must be included in the text of the ERD. We acknowledge that the amended *Export Development Act* requires that the Auditor General audit the design and implementation of the Directive once every 5 years. However, this is not a substitute for regular reporting by the EDC on the implementation of the Directive.

Recommendation: The Directive should include a provision requiring that the EDC report annually on its implementation. These reports should include an overall evaluation of the effectiveness of the ERD; and the number of occasions where the ERD was applied; what resulted in each circumstance, and an indication of how applied.