February 13, 2009

TO: European Bank for Reconstruction and Development

FROM: Pacific Environment

RE: Comments on EBRD Draft Rules of Procedures for Project Complaint Mechanism

Thank you for the opportunity to provide public comments on EBRD Draft Rules of Procedures for Project Complaint Mechanism (hereafter called *Draft Rules.*

Pacific Environment is an international Non-Governmental Organization (NGO) that supports international grassroots and local community activism to achieve environmental and social protection and to promote sustainable development. To this end, Pacific Environment has worked with many NGOs and community organizations to engage international finance institutions including the EBRD in regions in the Former Soviet Union, including Siberian and Far Eastern Russia, and Central Asia. In so doing, we have gained considerable experience with projects supported by these institutions, including some that have contributed to development, and others that have caused harm and that have resulted in complaints filed to independent accountability mechanisms. From those experiences, we have gained knowledge of what works and what can be improved upon in these important mechanisms.

We are glad that EBRD is taking the opportunity to improve upon its Independent Recourse Mechanism. In particular, the provision of a PCM Officer as a fully responsible, independent evaluator is a very important improvement. We stress that this position should not be subordinated under the Chief Compliance Officer, but rather should retain the same level of seniority. Such a denigration will send the wrong message to Bank staff and management that the institution cares less about an independent accountability mechanism than it did before. Also, this is important since the PCM Officer may be asked to review compliance and to solve problems resulting from actions and inactions of some of the highest officials within the institution. This crucially important independent function will not be effectively fulfilled it staffed by a subordinate.

Our more detailed comments below follow relevant sections and paragraph numbers from the *Draft Rules.*

Introduction and Purpose: The *Draft Rules* state that their goal "is to enhance the EBRD's accountability through the PCM's two functions", the second of which is "the Compliance Review function, which seeks to determine whether or not the EBRD has complied with Relevant EBRD Policy in respect of an approved

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Project." However, it is our experience that many problems associated with EBRD-financed projects stem from ***client non-compliance with EBRD policy***, not solely EBRD's own compliance with its relevant policies. The *Draft Rules* should make explicit that its goal includes project and project sponsor compliance with EBRD policies.

1) The *Draft Rules* state that "[t]wo or more individuals from an Impacted Area who claim that a Project has caused, or is likely to cause, harm may submit a Complaint seeking a Problem-solving Initiative." The limitation of two or more individuals is very arbitrary. Why should a single individual not be able to file a Complaint?

Meanwhile, Impacted Area is defined as "[a]ny geographical area which is, or is likely to be, affected by a Project." This infers that harm is limited to geography of a project area, while harm can also occur to EBRD stakeholders, including citizens of EBRD member countries, who have invested considerable time and energy to help their governments and with EBRD to enact policies that they expect will be enforced. The non-enforcement of those policies causes harm to the public interest in addition to harm to a specific geographic location. Therefore, Complaints should not be geographically constrained.

2) The *Draft Rules* provision to allow organizations, including national and international NGOs to submit a Complaint is a very important improvement. National and international NGOs possess some of the greatest independent external knowledge of international finance institutions policies and practices, and of impacts and remedies, and of global best practices that can help these banks fulfill their mission. National and international NGO essentially offer resources in addition to those that the Bank can gather, and therefore help the PCM achieve its goal.

At the same time, the Draft Rules state that *"[o]*rganisations filing a Complaint must provide documentation to establish that they are registered as a NGO in a member country of the Bank." This requirement is wholly inappropriate, and in some instances could be dangerous to the Complainant. In some countries where the EBRD does business the government uses the required registration of NGOs as a way to identify and repress people who seek to exercise their internationally recognized human right of association and expression. In one instance, such human rights violations contributed to a moratorium of EBRD financing for a government in Central Asia. Meanwhile, organizational registration has no bearing on whether a Complaint to EBRD raises valid and reasonable concerns. For these reason the *Draft Rules* requirement of NGO registration is untenable and should be struck.

8) The *Draft Rules* state that Complaints can be delivered by post, fax, or hand delivery. We suggest that email may be a more secure, reliable and convenient

way to deliver Complaints in many areas, and should be included along with the other modes of delivery.

18) The *Draft Rules* state that "to be held eligible for a Problem-solving Initiative, the Complaint must… relate to a Project where either of two conditions exists, including where

> (i) the Bank has provided – and not withdrawn – a clear indication that it is interested in financing the Project (such indication would usually be provided if the project has been approved by the Bank's Technical Cooperation Committee or has passed Final Review by the Bank's Operations Committee); or
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> (ii) the Bank maintains a financial interest in the Project in which case, the Complaint must be filed within twelve (12) months after the date of the physical completion of the Project or, where physical completion is not an appropriate measure, within twelve (12) months after the later of (x) the date of the Bank's final disbursement of funds for the Project or (y) the date of cancellation of any amount not yet disbursed as this date is determined by the Bank; and

This convoluted and confusing set of conditions is inappropriate because:

- These conditions have no bearing on whether the PCM goal to enhance the EBRD's accountability is achieved;

- The second condition appears to limit the ultimate date after which a Complaint will not be held eligible. Yet, EBRD's financing can enable projects to be created that have lifespans far exceeding the term of financing provided by the Bank, including decades into the future, when harm and consequent EBRD violations can still be caused. If the PCM goal is to enhance EBRD's own accountability, there is no need whatsoever for the second condition.

18) The *Draft Rules* state that "[t]o be held eligible for a Problem-solving Initiative, the Complaint must…describe the good faith efforts the Complainant has taken to address the issues in the Complaint, including with the Bank and/or the Client, and a description of the result of those efforts, or an explanation of why such efforts were not possible." In some instances, where the safety and security of the Complainant preclude contact with the Bank and/or the Client, such a condition is unreasonable.

19) The *Draft Rules* state that "[t]o be held eligible for a Compliance Review, the Complaint must…relate to a Project that has either been approved for financing

by the Board or by the Bank committee which has been delegated authority to give final approval to the Bank financing such Project…." This is inappropriate because in many instances EBRD due diligence on a project may last years prior to financing, and harm may be caused by a project already under construction or operating, resulting in violations of EBRD policy committed either by EBRD or its prospective client prior to financing. In the case of Sakhalin II, EBRD considered the project for several years before deciding against financing, and publicly acknowledged that the project resulted in harm and that violated their policies long before making that decision.

22) The *Draft Rules* state that with regard to the Problem Salving function, "[i]n determining whether the Complainant has made good faith efforts to address the issues in the Complaint per RP 18(c), the Eligibility Assessors will consider whether the Complainant has raised the issues in the Complaint with the Client's dispute resolution or grievance mechanism, or with the complaint or accountability mechanism of a parallel co-financing institution, or before a court, arbitration tribunal or other dispute resolution mechanism and, if so, the Eligibility Assessors will consider the status of those efforts." However, if a Complaint alleges problems with EBRD staff or violations of EBRD policy, the external dispute mechanisms of the client and other institutions, courts, tribunals, etc., would typically have no jurisdiction or competency to resolve that kind of concern.

23) The *Draft Rules* state that "[w]here the Complaint raises issues appropriate for a Compliance Review, the Eligibility Assessors will, in their determination of eligibility, also consider whether the Complaint relates to… actions or inactions that are the responsibility of the Bank…" An additional provision should be included for actions and inactions that are the responsibility of the client. This is important to account for potential incidences in which EBRD policies are violated by clients but where actions by EBRD staff to enforce bank policies are missing or weak.

23) The *Draft Rules* state that "[w]here the Complaint raises issues appropriate for a Compliance Review, the Eligibility Assessors will, in their determination of eligibility, also consider whether the Complaint relates to… more than a minor technical violation of a Relevant EBRD Policy." This should be struck or more narrowly defined. In the case of the Sakhalin II project, the project ESIA was not developed even to the point that EBRD considered it fit for the purpose of consultation until the project was nearly half built. Some EBRD officials argued that this egregious violation of internationally accepted practice and EBRD policy was nothing but a minimal technical process violation. In our experience, the abuse of discretion in defining a minor technical violation, which allows egregious process violations to go forward unchecked, is far more common than any rare cases in which Complaints are written for minor technical violations.

Meanwhile, a provision to this section should be added to allow for the determination of eligibility of a Complaint based on the action or inaction of a client, since that is often the most clear test of whether EBRD policies have been complied with.

24) The *Draft Rules* state that "[a] Complaint will not be eligible for either a Problem- solving Initiative or a Compliance Review if… it relates to the adequacy or suitability of EBRD policies." This should be struck because inevitably Complaints will always relate somehow to the adequacy or suitability of EBRD policies, either as interpretations of vague policies argued by any Relevant Party, or by EBRD staff which may claim that problems are the result of, for example, minor technical violations of policies. What's more, EBRD policies on the development of policies may be violated by EBRD. Much fuzzy ground exists in the continuum between the review of policy compliance and the adequacy of policies.

27) The *Draft Rules* state that "[i]f the Eligibility Assessors find the Complaint ineligible, they will recommend that the Complaint be closed. In such event, the Eligibility Assessment Report will be submitted to the Board (for Projects already approved by the Board) or to the President (for Projects that do not require Board approval or which have not yet been Board approved) to approve the recommendation." Given that the goal of the PCM is to enhance EBRD accountability, a simpler and more instructive way would be to send all Assessment Reports to both the Board and President. That would be consistent with the approach at #29.

30. The *Draft Rules* state that "[i]f at any time during the processing of a Complaint, the PCM Officer believes that serious, irreparable harm will be caused by the Bank's continued processing or disbursements in respect of the Project, the PCM Officer may make an interim recommendation to suspend further Bank processing of, or, if possible, disbursements in regards to, the Project." This is a very important provision that should be retained and clarified to state that the term "continued processing" includes ongoing environmental and social due diligence. This could have aided greatly in the case of Sakhalin II, when bank staff conducted several years of due diligence even after project construction was well underway, and even after serious, fundamental and irreparable harm and irreversible violations of EBRD policy occurred.

31) The *Draft Rules* state that "…The President will decide, within ten (10) Business Days of submission of the recommendation, whether or not to accept [a recommendation from the Eligibility Assessor whether to undertake a Problem-solving initiative]. However, the President him/herself may be the subject of a problem that a Complainant seeks to have solved, thus creating a conflict of interest. Such was the case with the Sakhalin II project when for several years the President refused to end ongoing consideration of financing for a project that had

already caused irreparable harm and that committed severe violations of EBRD policy.

What's more, the PCM is intended to provide an "independent review of complaints." This cannot be independent if the President has the ability to quash a Problem-solving initiative. This provision should be struck and replaced with one that ensures that the PCM Officer has sole independent authority to proceed with a Problem-solving initiative. This also speaks to the need for the PCM Officer to not be a subordinated position.

32) The *Draft Rules* state that "[u]pon completion, the Problem-solving Expert will issue a Problem-solving Completion Report" which includes issues, methods, results and follow-up. Additionally, this should explicitly include required recommendations with regard to actions that EBRD and other Relevant Parties should take, especially in the event that Relevant Parties do not reach agreement and no further progress towards resolution of the dispute is possible.

36) The *Draft Rules* state that the "Compliance Review may not recommend the award of compensation to the Complainant beyond that which may be expressly provided for in the Relevant EBRD Policy." This deserves clarification for two reasons. First, EBRD policies refer to situations where compensation is not expressly provided for per se, but rather situations in which compensation may generally be provided depending on the project circumstance (many examples of this can be found in EBRD's Environmental and Social Policy). Moreover, situations may arise outside these circumstances in which someone is harmed by an EBRD project. Since EBRD is an international institution that enjoys some legal immunity, a person could be harmed by an EBRD project and have no recourse to obtain compensation outside of a Compliance Review or Problem Solving Initiative.

37) The *Draft Rules* include the methods that the Compliance Review Expert will use in the conduct of a Compliance Review. In addition to those methods listed, the Compliance Review Expert should also be able to retain or recommend the use of testing facilities. For example, we have seen instances in which a compliance review at another institution involved a dispute over pollution effluent levels that were not able to be ascertained by the compliance officer without results from an independent laboratory. On Sakhalin II, we have seen instances in which the only way to obtain accurate information on the origins of some spilled crude oil was through the use of laboratory facilities. This is consistent with, and reinforcing of paragraph #50 and #56, which allows for independent experts. Also, provisions should be made in the *Draft Rules* for the public disclosure of all findings of independent and non-independent expert analysis that plays a role in the resolution of a Complaint.

41) The *Draft Rules* state that if the Compliance Review Expert concludes that the Bank was not in compliance with the Relevant EBRD Policy, the Compliance Review Expert will issue a draft Compliance Review Report which will include recommendations, which will be sent to Bank Management for response. This draft Compliance Review Report and recommendation and the Management response should also be sent to the Complainant for their comment in the interest of transparency and fair play between the parties, and in the interest of ensuring that the recommendations can be crafted as reasonably as possible to resolve the concerns of the Complainant.

43-44) The *Draft Rules* indicate that the final Compliance Review Report and the Management Action Plan will be sent to the Board or President, and it then infers that the Board or President will accept or not the report, recommendations, and Management Action Plan. There should be a reasonably short period of time after this report has been received by the Board or President, during which the Complainant is invited to provide any comments, and then a record of decision by the Board or President is issued on whether they accept the Report, recommendations and Management Action Plan.

48- The *Draft Rules* states that "[t]he PCM Expert, upon completion of his or her term of service, will not be entitled to work for the Bank..at any point in the future." It then states that "[t]he PCM Officer, upon completion of his or her term of service, will not be entitled to work for the ..for at least the three (3) years immediately following." The reason for this difference should be clarified. In any case, we support the concept in general, after having witnessed one particular instance in which an international finance institution accountability compliance officer was hired by the head of that institution to run the very environmental department that she had theretofore been in charge of holding accountable, creating perceived conflicts of interests and tensions that damaged the reputation of the institution.

51-56) The *Draft Rules* provide for both the PCM Officer and PCM Expert to retain additional expertise. We strongly support this, and we believe a provision should be included to allow for necessary associated expenses such as laboratory or other testing facilities in support of those experts.

61) The *Draft Rules* indicate that the "PCM Officer and/or PCM Experts will have full access to relevant Bank staff and files, including electronic files, cabinets and other storage facilities." We have experienced instances in which Bank staff is unwilling to gather information from the client or elsewhere that would have demonstrated non-compliance with Bank policy. In these situations, the PCM Officer and PCM Expert will be unable to perform their functions because the information necessary to do so does not exist in the files of Bank staff. Given such circumstances, the PCM Officer and PCM Experts should have

the authority to request from the client any information that Bank staff would normally have the authority to request from the client.

65) The *Draft Rules* state that "[t]he Bank will provide budgetary resources to the PCM sufficient to allow all of the activities permitted by these Rules to be carried out." It is extremely important to also include a provision that ensures that the PCM Officer has the independent authority to allocate and spend that budget in a way that the PCM Officer deems necessary to carry out the permitted and required duties. We have seen one instance in which a bank accountability office was thwarted from fulfilling its duty to conduct a project site visit by bank management's refusal to approve travel expenses even though those expenses were sufficiently budgeted.

6-66) The *Draft Rules* state that Complaints can be filed in any of the working languages of the Bank, however the language of reports to be issued by either the PCM Officer or any of the PCM Experts will be English. While it is important for many Relevant Parties to receive these reports in English, the Complainant in particular should be able to expect and receive reports from the PCM Officer and Expert in the language of their submitted Complaint. To do otherwise is to create an unlevel playing field between most Relevant Parties and the victims of harm caused by Bank policy violations.

Thank you for the opportunity to comment on EBRD's *Draft Rules of Procedures for Project Complaint Mechanism.*