

Project Complaint Mechanism, Eligibility Assessment Report

Complaint: D1 Motorway Phase I, Slovak Republic

1. On 7 June 2010, the Project Complaint Mechanism (PCM) Officer of the European Bank for Reconstruction and Development (EBRD) received a complaint (“Complaint”) regarding the D1 motorway Phase I Project in Slovak Republic (the “Project”). The Complaint was made by the Priatelia Zeme – CEPA and SOS BirdLife Slovensko organisations (the “Complainant”), and, in accordance with PCM RP 10 was registered by the PCM Officer on 11 June 2010. Based on the requirements of the PCM RP 12, the PCM Officer informed all interested parties of the registration of the Complaint and subsequently designated one of the PCM Experts, Dr Walter Leal, to assist in the eligibility assessment (the “Eligibility Assessment”) of the Complaint. Details of the registration were posted on the online PCM Register of Complaints and can be viewed at <http://www.ebrd.com/pages/project/pcm/register.shtml>

2 The Complaint raises concerns about the alleged inadequacy of the appraisal of environmental risks related to the Turany - Hubova section of the motorway and the alleged damage and further potential damage to the Natura 2000 sites and habitats of Community importance. The Complainant alleges that the underestimation of environmental risks has led to insufficient mitigation measures, which have in turn resulted in the recent damage to the Rojkovske Raselinisko Mire Nature Reserve in the course of the preparatory construction works. The Complainant further alleges that the Project has breached the EC Habitat Directive and the Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources of the EBRD Environmental and Social Policy 2008. The Complainant seeks a Compliance Review of the Project under the PCM. The Complaint is at Annex 1 to this Report. Additional information on the Project and the Complaint are presented in the relevant sections of this Report.

3. On 27 April 2010, the EBRD Board of Directors approved a project for the provision of a senior loan of up to EUR 250 million for “D1 Motorway Phase 1” (EBRD Operation ID 39007) in the Slovak Republic. The EBRD is part of a financing consortium which includes the European Investment Bank (EIB) and various other commercial banks. The Project borrower is a special purpose company (Slovenské diaľnice, a.s.) (“the Client”) created by a consortium led by the industrial group formed by Bouygues Travaux Publics SA, DTP Terrassement SA, Colas SA, Mota Engil SGPS SA, Intertoll-EuropeZrt Doprastav a.s., Vahostav–SK a.s. and Meridiam Infrastructure Finance SARL (the “Sponsors”). The Project involves the design, build, finance and operation of selected sections of the Slovak national D1 motorway network; comprising 75 Km of dual carriageways within five stretches:

- Dubna Skala-Turany: 16.75 Km
- Turany-Hubova: 13.6 Km
- Hubova-Ivachnova: 15.3 Km
- Janovce-Jablonov: 18.54 Km
- Fricove-Svinia: 11.2 Km

In addition, the Project entails 107 bridges (totalizing 30 Km) and 4 tunnels with a total length of 7.2 Km. The Client is responsible for the implementation of the Project which,

operationally, is being carried out under a Public-Private Partnership on a 30 year concession basis.

Relevant Facts

4. Project preparation started in 1993 with a feasibility study which considered different route options for the length of the whole D1 motorway. The original feasibility study was updated in 2001 and a total of 13 variants of route options were considered for the five sections of the Project.

5. The Bank's due diligence entailed a number of factors among which a review of the EIAs and other documentation prepared under the Slovakian permitting process was undertaken. This was deemed necessary by the Bank since the original EIA was performed prior to Slovakia's accession to the EU.

6. The Project received EBRD concept clearance on 8 August 2008 which was renewed on the 26th June 2009 and was the subject to a final review on 26 March 2010, prior to its submission to the EBRD Board of Directors for consideration at its meeting on 27 April 2010. The Project had been categorised A/0 in accordance with the Bank's Environment Policy 2003.

7. Prior to the Complaint being made to the PCM, the Complainant had contacted the Bank on a number of occasions, requesting information on the Project, and criticising various aspects of the Project's structure, proposed execution and management. In addition, it seems attempts by the Complainant to contact the Client have also been made and were – apparently – unsuccessful.

8. Formal complaints were also made to EIB and to DG Environment, in respect of the impacts of the Project on the Natura 2000 sites and the procedures adopted by the Slovakian authorities to ensure compliance with various EU requirements.

Steps taken to Conduct Eligibility Assessment

9. On 11 June 2010 the PCM Officer notified the relevant parties, including the Complainant, the Client and the relevant departments and teams within the EBRD that the Complaint had been registered.

10. Following the registration of the Complaint on 18 of June, in accordance with PCM RP 17, the PCM Officer appointed one of the PCM Experts, Dr Walter Leal as the Eligibility Assessment Expert. Thus, Dr Leal and the PCM Officer Anoush Begoyan are the PCM Eligibility Assessors for the purposes of the Eligibility Assessment of the Complaint.

11. In line with PCM RP 13, the Complaint has been posted on the PCM Register (<http://www.ebrd.com/pages/project/pcm/register.shtml>)

12. Pursuant to PCM RP 15, the PCM Officer requested a written response to the Complaint by Bank Management. The response (the "Response") was received on 5 July 2010 and is at Annex 2 to this Report. The PCM Officer also requested a response to the Complaint from the Client, which was received on 25 June 2010 and is at Annex 3 to this Report.

13. During the Eligibility Assessment, the Eligibility Assessors undertook an extensive review of the Complaint, the Bank Response, the response of the Client, including all of the supporting documents attached to them. They also reviewed various Project documents produced by the Bank and by the Client and held meetings with relevant Bank staff.

14. In addition, since the Project is subject to co-financing by the EIB, the PCM Officer, as foreseen in PCM RP 16, notified EIB's accountability mechanism as to the registration of the Complaint and exchanged information with the relevant EIB personnel.

15. The Eligibility Assessors are of the opinion that they have reviewed sufficient information to consider the eligibility of the Complaint and that no additional steps, such as a Project site visit or retaining of additional expertise, are necessary at this stage.

Summary of the positions of the relevant Parties

16 There are three relevant parties whose positions were reviewed during the Eligibility Assessment process: the Complainant, the Bank and the Client.

17. The position of the **Complainant** as presented in the Complaint¹ can be summarised as follows:

- a) The Complainant alleges that there was an inadequate appraisal of environmental risks connected with the Turany-Hubova section of the motorway. According to the Complainant the alleged damage that was caused to the Rojkovske mire to date indicates that the approved variant of the Project will have further impact on the Natura 2000 sites and habitats of Community importance;
- b) According to the Complainant, the underestimation of the environmental risks has led to insufficient mitigation measures, which have in its opinion resulted in recent damage to the Rojkovske Raselinisko Mire Nature Reserve by preparatory construction works;
- c) The Complainant claims that the Project has breached the EC Habitat Directive and the Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources of the EBRD's Environmental and Social Policy 2008²;
- d) the Complainant further alleges that harm has been done during the preparatory works by a trench dug to relocate a cable along the north-western boundary of the Rojkovské Rašelinisko Mire Nature Reserve, stating that about 40% of shrubs predominantly of habitat of national importance were cut down. In addition, the water drained out of the reserve through the trench led to a drop of groundwater levels in the northwest alluvial part of the mire, interfering with habitats of protected plants and endangered animals;
- e) The Complainant also alleges that there was an inappropriate assessment of the Project's impact on the protected areas of Natura 2000, stating that the study by

¹ See Annex 1 to the present Report.

² Although the Complaint refers to the Bank's Environment and Social Policy 2008, the Project has been assessed against the requirements of the EBRD Environmental Policy 2003, which was still applicable at the relevant dates.

Petková and Mika (2007)³ did not adequately reflect the potential harm that the Project will have on the area. The Complainant refers to an alternative study that according to the Complainant is more accurate⁴.

- f) The Complainant also states that the chosen variant of the motorway D1 section Turany - Hubová will have significant negative impacts on Natura 2000 sites, posing risk of serious damage on and/or destruction of the ecological characteristics and integrity of the habitats, ecosystems and landscape, especially in the area of Šútovo - Rojkov Natura 2000 Sites Malá Fatra, Veľká Fatra and Váh River.
- g) The Complainant also mentions that due to public unavailability of the construction permit, civil society organisations were not able to review the legal status of the construction activities that took place in close proximity from the Rojkov mire.

18. As mentioned above, the Bank provided its Response to the Complaint⁵ on 5 July 2010. The Response also includes, as an attachment, the “Lender Environmental and Social Action Plan – Biodiversity/Natura 2000 requirements”. The Bank’s Response can be summarised as follows:

- a) The EBRD due diligence assessed the D1 Project’s impacts against national law and EU environmental standards in accordance with the requirements of EBRD Environmental Policy 2003. As the Project was Concept Reviewed prior to 12 November 2008 when the Environmental and Social Policy 2008 (ESP 2008) entered into force, the Project was not subject to that policy, including Performance Requirement 6, as referenced in the Complaint. This was done in line with the procedures established for the transition phase from the 2003 policy to the 2008 policy (ESP 2008 Section G Clause 49);
- b) The Bank’s due diligence took a precautionary approach to the biodiversity impacts related to the Project and investigations included a review of a significant number of documents prepared regarding the Project under the Slovak legislation and permitting procedures. In addition, additional studies were undertaken by independent consultants, taking into account previous information provided by Bankwatch;
- c) The due diligence findings by the independent consultants concluded that the Project complied with EBRD policy requirements and EU environmental standards, with the adoption of mitigation measures defined in the Lenders Environmental and Social Action Plan;
- d) As far as the EC Habitats Directive is concerned, the State Nature Conservancy (environmental protection agency) of Slovak Republic stated in its Natura 2000 Declarations, that following an ‘appropriate assessment’ according to the Art. 6(3) of Directive 92/43/EEC, the Project will not have significant negative effect on the sites of nature conservation importance. These Declarations were reviewed by independent

³ The assessment of the significance of any impact of the proposed D1 Turany – Hubová on the Natura 2000 sites (Hodnotenie významnosti vplyvov navrhovanej diaľnice D1 Turany - Hubová na územia sústavy NATURA 2000), Creative, s.r.o., November 2007

⁴ The importance of impacts of the proposed motorway D1 Turany - Hubová on species, habitats, Natura 2000 sites and landscape. Specialist opinion. November 2009.

http://bankwatch.org/documents/D1_TuranyHubovaSection_specialist_opinion.pdf

⁵ See Annex 2 to the present Report.

consultants during the due diligence of the Project and their findings were that the Natura 2000 sites were strongly protected under previous Slovakian legislation; that these Natura 2000 sites were adequately assessed in the course of the EIA and permitting processes and that mitigation measures in the Final Statements were considered sufficient with the addition of the Lender ESAP requirements.

- e) The Bank expects to receive the results of the Natura 2000 technical review currently being undertaken by DG Environment, which is assessing the procedures followed by the Slovak authorities in project preparation with a view to ascertaining their compliance with EU requirements;
- f) As far as the appraisal of environmental risks and mitigation measures are concerned, the Bank recognises the need to clearly specify the relevant mitigation measures for the management of issues related to biodiversity and refers to the requirement to develop and implement a Biodiversity Management Plan (BMP) for each section of the D1 motorway. The BMP requirement, which includes requirements for monitoring, had been agreed with the Client as part of its Environmental and Social Action Plan (ESAP). The ESAP also requires the Client to list specific mitigation measures. While the terms of reference for the BMP have been agreed in principle, the final document will need to be reviewed and approved by EBRD and others prior to works commencing in sensitive areas, once EBRD financing becomes effective (i.e., after signing and loan effectiveness);
- g) In terms of the impacts of the preliminary works and monitoring of construction works, the Bank states that even though preliminary works undertaken by the Concessionaire/the Client at the Rojkovske Raselin Mire Nature Reserve did not involve EBRD financing. In response to the concerns raised by NGOs the Concessionaire commissioned an Independent Engineer to visit and assess the results of the preliminary work on the site. The Independent Engineer did not detect any signs of non-compliance or uncontrolled impacts to the Reserve. The Bank has expressed its commitment to continue assessing the situation and to receive and review regular status reports. In addition, the Bank has specified in the draft loan documentation, the need for a Biodiversity specialist to be part of the Independent Engineer's Team to monitor the day-to-day management of the Project once the loan is in effect;
- h) In respect of the public availability of the construction permit, the Bank's Response notes that the Building Permit for the Turany-Hubová section of the D1 Motorway (No.01934/2009-SCDPK/9102) was issued in accordance with valid legislation in Slovakia. The Bank was further advised that the disclosure of the permit to stakeholders was carried out in line with the requirements of Slovakian legislation.

19. The position of the **Client**, as presented in its response⁶ received on 25 June 2010, can be summarised as follows:

- a) According to the Client, none of the organisations represented by the Complainant approached it with a complaint or request for information and no civil society organisations exercised their right to comment on the Project during the public consultation phase, even though some of them were invited to do so.

⁶ See Annex 3 of the present Report.

- b) According to the Client, the Complainant's allegations of damages to the Rojkovske mire are not substantiated. The Client maintains that the trench that was dug during the preliminary works did not affect the groundwater in the peat-bog or in the surrounding area. In this regard, the Client referred the Eligibility Assessors to the reports by the Environmental Manager and an Independent Engineer;
- c) In response to the statement by the Complainant that there are further irreversible impacts on the Mire, the Client states that several studies have been carried out in relation to the possible impacts of the works (especially the Rojkov Tunnel) on the Rojkov peat-bog, complemented by a recent hydro-geological report⁷. These studies concluded that no significant impact to the hydrological regime of the Rojkov peat-bog is expected as a result of the construction of the tunnel.
- d) The Client's position in respect of the underestimation of environmental risks alleged by the Complainant is that the so-called "Creative Study" and Response Paper prepared as a response to DG Environment⁸ provided evidence that these risks had been duly considered. In addition, the Client raises doubts as to the accuracy of the document provided by the Complainant (see footnote 3) and refers to a review made by two consulting companies⁹ and to a review commissioned by the EIB¹⁰ to substantiate its view that the assessment of environmental impacts and risks are in line with national legislation and the Council Directive 92/43/EEC;
- e) The Client also states that the management of the Project has been adequate so far and that the further proper management will be ensured through the additional scrutiny by the Independent Engineer, the advisors from the co-funding banks and the banks themselves. Proper management will be further assisted through the application of the ESAP, the Safety, Quality and Environmental Documentation, the BMP and the Public Consultation and Disclosure Plan. It also refers to the fact that the above measures will be put in place when the financial close and the Concession Contract become fully effective.

Assessment

20. Following registration of the Complaint, the PCM Rules of Procedure require the Eligibility Assessors to issue their Eligibility Report within 40 Business Days. Eligibility of the Complaint is determined in accordance with PCM RPs 17-29.

21. The Eligibility Assessors have concluded that:

- i. the Complaint relates to a Project that has been approved for financing by the EBRD. The Bank has agreed to support the Project– and has not withdrawn it– and thereby satisfies the requirements of PCM RP 19 (a);

⁷ "Assessment of Risks Arising from the Implementation of the Rojkov Tunnel in Regards to Hydrological Regime of the Peat Bog Rojkov", issued by RNDr Ivan Pirman, June 2010.

⁸ „D1 Motorway: Turany to Hubová Response Paper to DG Environmental (European Commission) Regarding Compliance with Art. 6.3 of the Habitats Directive (92/43/EEC)

⁹ "D1 Motorway Project, Slovakia- Environmental and Social Assessment Review", March 2010, produced by Citrus Partner LLP and Enviroconsult Ltd.

¹⁰ D1 Motorway Slovakia, Environmental Due Diligence, A Report by ENVIROS S.R.O.

ii. the Complaint describes the harm caused, or likely to be caused, by the Project as per PCM RP 19 (b);

iii. the Complaint contains an indication of which PCM function the Complainant expects the PCM to use in order to address the issues raised in the Complaint, namely a Compliance Review (PCM RP 20 (a));

iv. the Complaint offers an indication of the outcome sought as a result of the use of the PCM process; i.e. that the Bank “oversee preparation of a proper biodiversity impact assessment of the chosen route as well as of alternative solutions and ensure that a comparative analysis is performed”¹¹ (PCM RP 20 (b));

v. the Complainant has supplied copies of correspondence, notes, or other materials related to its communications with the Bank and or other Relevant Parties (PCM RP 20 (c)); and

vi. the Complainant has provided details of the Relevant EBRD Policy it believes to be at issue in the Complaint (PCM RP 20 (d)). Although the Complainant makes an erroneous refers to a policy that is not applicable to the Project, we would not wish for that mistake to preclude a Compliance Review, where the same assessment is required under the policy that in fact applies to the Project, namely Environmental Policy 2003.

22. Pursuant of the PRM RP 22, the Eligibility Assessors have established that the Complainant has made good faith efforts to address the issues raised in the Complaint by, in particular raising the issue with the Management of the Bank, as well as with the grievance mechanism of a parallel co-funding institution. The Eligibility Assessors have considered the status of the complaint raised with the EIB in 2009 and the technical review currently being undertaken by DG Environment and have concluded that these recourses do not have any implications for the PCM proceedings.

23. In determining the Eligibility, the Eligibility Assessors have also, in line with PCM RP 23, established that the Complaint relates to alleged inactions that are the responsibility of the Bank; that it alleges more than minor technical violations of EBRD policy; and that it relates to possible failures of the EBRD to monitor Client commitments made pursuant to Relevant EBRD Policy.

24. The Complaint does not fall under any of the categories provisioned in PCM RP 24.

25. Consequently, based on an evaluation of the eligibility criteria set out in the PCM RPs 17-24, and on the analysis of the relevant documents including the Complaint, Bank Response, Response by the Client and other relevant project documentation submitted by the Bank and the Client, the Eligibility Assessors declare the Complaint **eligible** for a **Compliance Review**.

26 The Compliance Review should assess whether and – if so – which EBRD policy or policies may have been violated and if harm has been caused due to action or inaction on the part of the Bank. In line with PCM RP 28(b), the terms of reference for a Compliance Review, identifying the type of expertise required to carry out the review, as well as the scope and time frame for the review, are presented below.

¹¹ See the Complaint at Annex 1, p.11

Terms of Reference (TOR)
Compliance Review of the D1 motorway Phase I, Slovak Republic

Compliance Review Expert

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert Dr. Owen McIntyre as the Compliance Review Expert for this Compliance Review.
2. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

Scope

3. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy, in this case Environmental Policy 2003 and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
4. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
5. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.
6. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.
7. The Compliance Review shall remain within the scope of the original Complaint¹². It shall not go beyond the parameters of the Complaint to address other issues.

Time Frame

8. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.

¹² See Annex 1 of this Report

9. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, this time period may be extended by the PCM Officer for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

Procedure: Identification of Core Compliance Issues

10. The Compliance Review process will examine the core questions of compliance raised in the Complaint with a view to identifying the central elements of the Compliance Review, including (without limitation):
 - (i) whether there was an inadequate appraisal of environmental risks connected with the Turany-Hubova section of the motorway and whether the alleged damage to the Rojkovske mire to date indicates that the approved variant of the Project will have further impact on the Natura 2000 sites and habitats of Community importance;
 - (ii) whether the underestimation of the environmental risks, if any, has led to insufficient mitigation measures, which, in turn, have resulted in damage to the Rojkovske Raselinisko Mire Nature Reserve by preparatory construction works;
 - (iii) whether the Project has breached the EC Habitat Directive and the EBRD's Environmental Policy 2003¹³;
 - (iv) whether there has been an inappropriate assessment of the Project's impact on the protected areas of Natura 2000 and whether the study by Petková and Mika (2007)¹⁴ has adequately reflected the potential harm that the Project may have on the area;
 - (v) whether the chosen variant of the motorway D1 section Turany - Hubová will have significant negative impacts on the Natura 2000 sites, posing risk of serious damage to and/or destruction of ecological characteristics and integrity of the habitats, ecosystems and landscape, especially in the area of Šútovo - Rojkov Natura 2000 Sites Malá Fatra, Veľká Fatra and Váh River.
11. Any elements which are beyond the scope of the Compliance Review will be excluded.

¹³ Although the Complaint erroneously refers to the Bank's Environment and Social Policy 2008, the Project has been assessed against the requirements of the EBRD Environmental Policy 2003, which was still applicable at the relevant dates.

¹⁴ The assessment of the significance of any impact of the proposed D1 Turany – Hubová on the Natura 2000 sites (Hodnotenie významnosti vplyvov navrhovanej diaľnice D1 Turany - Hubová na územia sústavy NATURA 2000), Creative, s.r.o., November 2007

Procedure: Conduct of the Review

12. The Compliance Review Expert may conduct the Compliance Review process in such a manner as he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainant as set out in the Complaint, and the general circumstances of the Complaint. Specifically, the Compliance Review Expert may:
- (i) review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with its Environment Policy 2003;
 - (ii) review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - (iii) consult extensively with EBRD staff involved in the Project including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
 - (iv) solicit additional oral or written information from, or hold meetings with, the Complainant and any Relevant Party;
 - (v) conduct a visit to the Project site to ascertain disputed facts accompanied by such officials of the Bank, the Complainant or the representatives of the Client, or other persons, as he may consider necessary and appropriate;
 - (vi) request the PCM Officer to retain additional expertise if needed;
 - (vii) cooperate, pursuant to PCM, RP 16, with EIB and DG Environment in order to avoid duplication of efforts in the inquiry, review, or processing of the Complaint;
 - (viii) identify any appropriate remedial changes in accordance with PCM, RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project related agreements;
 - (ix) take any other action as may be required to complete the Compliance Review within the required time-frame.

Procedure: General

13. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
14. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
15. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all involved parties, including relevant Bank staff.
16. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review

Expert obtaining access to sites, submission of written materials, provision of information and attendance at meetings.

Compliance Review Report

17. In accordance with PCM, RP 38, the Compliance Review Report shall include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review.
18. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint and shall be strictly impartial.
19. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management, in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

Exclusion of Liability

20. Without prejudice to the privileges and immunities enjoyed by PCM Experts, the Compliance Review Expert shall not be liable to any party for any act or omission in connection with any Compliance Review activities undertaken pursuant to these Terms of Reference.

Annexes

Annex 1- Complaint

To: Ms. Anoush Begoyan
PCM Officer
Project Complaint Mechanism
European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom
Fax: +44 20 7338 7633
Email: pcm@ebrd.com

From:
Priatelia Zeme-CEPA, Slovak Republic
SOS BirdLife Slovensko, Slovak Republic

Subject: Complaint on D1 motorway Phase I, Slovak Republic seeking project compliance review

07th June 2010

Dear Ms. Begoyan,

we are writing to complain about the D1 motorway Phase I project in the Slovak Republic, approved by the EBRD Board of Directors for financing on 27 April 2010, currently pending signing.¹⁵ We are particularly concerned about the inadequate appraisal of environmental risks connected with the Turany - Hubova section of the motorway, damage so far and further potential impacts on the Natura 2000 sites and habitats of Community importance. We are convinced that the underestimation of environmental risks has led to insufficient mitigation measures resulting in recent damage to the Rojkovske Raselinisko Mire Nature Reserve by preparatory construction works. Taking into account that the construction of the highly complex Rojkov highway tunnel on the route of the D1 motorway is to take place in the close vicinity of the reserve, we fear that any similar misinterpretation of environmental risks and inadequate project management would translate into further irreversible impacts on the mire.

We are of the opinion that the project has breached the EC Habitat Directive and the EBRD's Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources established by the EBRD Environmental and Social Policy. Our specific concerns of policy breaches are described in the text below.

In the light of our findings, we ask the Project Complaint Mechanism to undertake a compliance review of the project. We hope that the review will help to prevent further environmental damage to the Rojkov mire as well as potential adverse impacts on the other fragile ecosystems along the motorway route.

¹⁵ <http://www.ebrd.com/projects/psd/psd2009/39007.htm>

Description of the harm done

On April 24, 2010 construction workers dug a trench for relocating a cable along the north-western boundary of the Rojkovské Rašelinisko Mire Nature Reserve. The trench led from the turn-off of the service road of the prepared western portal of the Rojkov highway tunnel parallel with the main road at a distance of a few metres outside the boundary of the Reserve. About 40 % of shrubs, predominantly of habitat of national importance Kr8 Mire willow scrub were cut. Although the trench itself was outside of the Reserve, for the next seven days, water drained out of the reserve through the trench, resulting in a drop of groundwater levels in the northwest alluvial part of the mire that severely interferes in habitats of protected and endangered plants and animals.

After media had reported on the incident and state inspectorate had examined the matter, the unfinished trench was filled up with soil without relocating the cable. This raises doubts about whether the works happened in accordance with the construction permit and whether the works were critical to the project. Civil society organisations have not been able to confirm this due to the public unavailability of the construction permit.

For details on the harm incurred to the reserve and for the related photo documentation, see the enclosed preliminary expert report “Most significant impacts of the proposed motorway D1 Turany - Hubová on the Rojkovské Rašelinisko Mire”, prepared by the Slovak biologist Jan Topercer.

We would like to acknowledge that on being informed of this development the EBRD did act promptly in sending a consultant to check the situation. Information provided orally at the EBRD annual meeting suggests that the consultant did not find evidence of long-term damage to the reserve. We are concerned that a single visit to the site, particularly if it took place after the trench was filled in, may not have been sufficient to identify potential long-term damage.

The relevant parts of the EBRD Environmental and Social Policy at issue in the Complaint

Inappropriate assessment of the project’s impacts on protected areas of NATURA 2000

The environmental impact assessment of several variants of the D1 Turany – Hubová section (as part of the longer section Martin – Ľubochňa) was performed between 1995 and 2002 according to Act No. 127/1994 on Environmental Impact Assessment. On 12 November 2002, the Ministry of Environment SR (MoE SR) issued a Final Environmental Impact Statement No. 1832/02-4.3 on the construction of the D1 Martin - Ľubochňa Motorway (including the Turany - Hubová section). On 27 June 2006 Národná diaľničná spoločnosť a.s., Bratislava (the National Motorway Company, joint stock company, based in Bratislava) asked the MoE SR for prolongation of the final statement. The MoE SR prolonged the validity of the final statement by decision No. 8344/06 - 7.3./ml of 8 August 2006 until 1 February 2008.

At the time of the prolongation of the validity of the final statement the Slovak republic had already become an EU member state and in accordance with the Treaty of Accession sites were identified on its territory that the Slovak Republic proposed to include into the Natura 2000 Networking Programme in conformity with the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

Since some of the sites that the Slovak Republic proposed to include in the NATURA 2000 Networking Programme are located on the route of the D1 motorway, an additional study assessing motorway impacts on the Natura 2000 sites¹⁶ was prepared by the company Creative, s.r.o. in November 2007 (hereafter “the study of PETKOVÁ & MIKA 2007”) and submitted to Ministry of

¹⁶ The assessment of the significance of any impact of the proposed D1 Turany – Hubová on the Natura 2000 sites (Hodnotenie významnosti vplyvov navrhovanej diaľnice D1 Turany - Hubová na územia sústavy NATURA 2000), Creative, s.r.o., November 2007

Environment of the Slovak Republic. The analysis concluded that if the proposed mitigation measures are implemented, the Turany - Hubová variant of the D1 motorway would have no significant impact on Natura 2000 sites.

In November 2009, the study of PEŤKOVÁ & MIKA 2007 was reviewed by a team of nature protection experts who described their findings in the report “The importance of impacts of the proposed motorway D1 Turany - Hubová on species, habitats, Natura 2000 sites and landscape - Specialist opinion”¹⁷.

The report argues that the study of PEŤKOVÁ & MIKA 2007 is not based on complete, methodically and clearly specified sources of information and thus, it should not be considered as an appropriate assessment under Article 6(3) of the Habitat Directive 92/43/EEC.

Contrary to the the study of PEŤKOVÁ & MIKA 2007, the review indicates that the chosen variant of the motorway D1 section Turany - Hubová would have significant negative impacts on Natura 2000 sites, posing the risk of serious damage and/or destruction of ecological characteristics and integrity of the habitats, ecosystems and landscape, especially in the area of Šútovo - Rojkov (Natura 2000 Sites Malá Fatra, Veľká Fatra and Váh River). Further, the experts claim that along with the insufficient assessment the PEŤKOVÁ & MIKA 2007 study seriously neglects mitigation measures.

The recent draining of the Rojkovske mire stands as unfortunate real-life evidence of the risk assessment and management deficiencies described in the expert study. In light of the expert report findings and the physical damage to the Rojkov mire, we believe that the EBRD failed to ensure that the client fully identifies and characterizes biodiversity impacts related to the project. We regard this as a violation of the Paragraph 6 of the EBRD Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources which claims that:

*“Through the environmental and appraisal process, the client will identify and characterise the potential impacts on biodiversity likely to be caused by the project. The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.”*¹⁸

The expert report identifies the project site as a complex that “shows representativeness for mountain, forest, rock, wetland and water biota of the Western Carpathians and is endowed with high landscape heterogeneity, an extraordinary diversity of habitats (at least 26 types of Community and national importance) and plant and animal species (tens of rare, endangered, endemic or otherwise important species, some of them surviving only in minimum viable populations), concentrated connectivity and important refugial functions.” It concludes that “the losses of these specific natural features could be neither compensated nor mitigated (or only to a very limited extent) and some of them may have a substantial impact on Slovak as well as European natural heritage”.

In our view, such site characterization is analogical to the EBRD definition of critical habitats as put forward by the Paragraph 13 of the Performance Standard 6 of the EBRD Environmental and Social Policy:

“Irrespective of whether it is natural or modified, some habitat may be considered to be critical by virtue of (i) its high biodiversity value, (ii) its importance to the survival of endangered or critically endangered species, (iii) its importance to endemic or geographically restricted species and sub-species, (iv) its importance to migratory or congregatory species, (v) its role in supporting assemblages of species associated with key evolutionary processes, (vi) its role in supporting

¹⁷ The importance of impacts of the proposed motorway D1 Turany - Hubová on species, habitats, Natura 2000 sites and landscape. Specialist opinion. November 2009.

http://bankwatch.org/documents/D1_TuranyHubovaSection_specialist_opinion.pdf

¹⁸ EBRD’s 2008 Environmental and Social Policy. Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources. Paragraph 6.

biodiversity of significant social, economical or cultural importance to local communities, or (vii) its importance to species that are vital to the ecosystem as a whole (keystone species)."

We assume that any project activities impacting on the critical habitats (Natura 2000 sites) should be dealt with it according to the Paragraph 14 of the Performance Standard 6:

"Critical habitat must not be converted or degraded. Consequently, in areas of critical habitat, the client will not implement any project activities unless the following conditions are met:

- Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with.*
- There are no measurable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function in the way(s) outlined in paragraph 13.*
- Taking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned such that the persistence of a viable and representative host ecosystem be compromised.*
- Notwithstanding the above, all other impacts are mitigated in accordance with the mitigation hierarchy."*

However, the digging of the trench by the Rojkov mire has demonstrated that the client has undertaken activities likely to result in adverse impacts that have impaired the functioning of the critical habitat. We regard this as breaching Paragraph 14 of the Performance Standard 6 of the EBRD Environmental and Social Policy.

As mentioned above, due to the public unavailability of the construction permit, civil society organisations have not been able to assure themselves on the legal status of the construction activities concerning the Rojkov mire. If proved to be illegal, the activities would breach the Paragraph 15 of the Performance Standard 6 of the EBRD Environmental and Social Policy which rules that:

"Areas may be designated by government agencies as protected for a variety of purposes, including to meet country obligations under international conventions. Within defined criteria, legislation may permit development in or associated with key evolutionary processes; adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will:

- consult protected area sponsors and managers, local communities and other key stakeholders on the proposed project in accordance with PR 10;*
- demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; and*
- implement additional programmes, as appropriate, to promote and enhance the conservation aims of the protected area."*

Desired outcomes

Overall, the insufficient environmental assessment of the Turany – Hubová motorway section and the harm done to the Rojkovske mire rings an alarm bell about the approved variant's further potential affects on the mire and adequacy of the proposed mitigation measures. The same concerns apply more generally to the project's impacts on the species and habitats of Community and national importance, Natura 2000 sites and the landscape along the route. As the expert report explains the Rojkov motorway tunnel which is to be built on the surface only approximately 80 metres southwest from the border of the Rojkovske reserve could pose existential danger to the mire. This could lead to the escalation of the current affects on the habitat. Taking into consideration the recent and potential impacts, the Bank should oversee preparation of a proper biodiversity impact assessment of the chosen route as well as of alternative solutions and ensure that a comparative analysis is performed. We understand that this decision is outside of the scope of the Project Complaint Mechanism.

With this complaint, we request the EBRD Project Complaint Mechanism experts to perform a Compliance Review into the D1 motorway Phase I project.

Best regards,

A handwritten signature in blue ink, reading "Lucia Lackovičová".

Lucia Lackovičová

National coordinator for Slovakia CEE Bankwatch Network
Friends of the Earth-CEPA
Karpatska 11, 811 05 Bratislava,
Slovakia
Tel./Fax: +421 2 5244 2104

Overview of the communication with EBRD and other Relevant Parties:

1. Most significant impacts of the proposed motorway D1 Turany Hubová on the Rojkovské Rašelinisko Mire. Preliminary report. By Jan Topercer. May 2010
http://bankwatch.org/documents/report_D1impacts_May2010.pdfD1 motorway Phase I, Slovakia - EBRD AGM Issue Paper. May 10, 2010.
http://bankwatch.org/documents/IP_EBRD_D1motorway_10May2010.pdf
2. Letter to the EBRD President Thomas Mirow from April 29, 2010.
http://bankwatch.org/documents/letter_EBRD_D1loanapproval_29April2010.pdf
3. Letter to the Corporate Director for Environment and Sustainability Alistair Clark regarding specialist opinion on the impacts of the D1 motorway section Turany-Hubova from February 16, 2010.
http://bankwatch.org/documents/Letter_EBRD_SpecialistOpinion_Feb10.pdf
4. Letter to European Commission regarding impacts of the D1 motorway Turany-Hubova. March 23, 2010.
http://bankwatch.org/documents/Letter_EC_D1motorway_March2010.pdf
5. Specialist opinion on the importance of impacts of the proposed motorway D1 Turany-Hubová on species, habitats, Natura 2000 sites and landscape. November 15, 2009.
http://bankwatch.org/documents/D1_TuranyHubovaSection_specialist_opinion.pdf
6. Letter to the EIB regarding impacts of a proposed D1 motorway section. December 21, 2009.
http://bankwatch.org/documents/letter_EIB_D1expertise_21Dec2009.pdf
7. Letter to the European Commission regarding impacts of a proposed D1 motorway section. December 21, 2009.
http://bankwatch.org/documents/letter_EC_D1expertise_21Dec2009.pdf
8. Complaint to EIB regarding breaches of EU legislation in preparations for the D1 motorway. May 4, 2009.
http://bankwatch.org/documents/complaint_EIB_D1_04May2009.pdf
9. D1 Motorway, Slovakia - EBRD AGM Issue Paper. May 2009.
http://bankwatch.org/documents/D1Slovakia_IssuePaper_EBRD_AGM2009.pdf

Annex 2- Bank Response

<u>EBRD Project Complaint Mechanism</u>	
Project	39007 D1 Motorway Slovakia
Project Team	Operation Leaders: Agnieszka Lukasik, Ivana Duarte OGC: David Kennedy ESD: Debbie Cousins, Mikko Venermo, Dariusz Prasek
Date of issue to ExCom	24 th June 2010
Date of approval by ExCom	
To: PCM Officer	Anoush Begoyan
Date of Issue to PCM Officer	

The PCM Officer has advised the EBRD D1 Project Team of a request for a compliance review of the D1 Project under the EBRD Projects Complaints Mechanism (PCM) by CEE Bankwatch. This complaint was officially registered on the 11th June 2010 and this is ‘the Bank Response’ to the Complaint as outlined in PCM: Rules of Procedure (Clause 15).

Compliance with EBRD Environmental and Social Policy 2008 and Performance Requirements

As stated in the Project Summary Document available on the EBRD website, the EBRD due diligence has assessed the D1 Project’s impacts against national law and EU environmental standards in accordance with the requirements of EBRD Environmental Policy 2003. As the Project was Concept Reviewed prior to 12th November 2008, no assessment of the Project has been undertaken against the Environmental and Social Policy 2008 and the specific sections of its Performance Requirement 6 as referenced in the letter of complaint. This is in line with the procedures established for the transition phase from the 2003 policy to the 2008 policy.

EBRD due diligence has taken a precautionary approach to biodiversity impacts related to the D1 Project. Investigations have included a review of a significant number of documents prepared for the Project under the Slovak law and permitting procedures, as well as additional studies undertaken by independent consultants, taking into consideration previous information provided by Bankwatch.

Due diligence findings by Independent Consultants concluded that the Project complied with EBRD policy requirements and EU environmental standards, with the adoption of mitigation measures defined in the Lenders Environmental and Social Action Plan (ESAP).

EC Habitats Directive – Appropriate Assessment

The State Nature Conservancy of Slovak Republic (ŠOP SR) which is responsible for monitoring sites of nature conservation importance, states in its Natura 2000 Declarations, that following an ‘appropriate assessment’ according to the Art. 6(3) of Directive 92/43/EEC, the Project will not have significant negative effect on the sites of nature conservation importance. The Declarations were reviewed by independent consultants during the due diligence of the Project and their findings were:

- The Natura 2000 sites were strongly protected under previous Slovakian legalisation.
- These Natura 2000 sites were adequately assessed by the EIA and permitting process processes and
- Mitigation measures in the Final Statements were considered sufficient with the addition of the Lender ESAP requirements.

The Slovak Authorities have recently provided documentary evidence to the EU DG Environment in order to present the processes followed to demonstrate compliance with EU environmental legislation, specifically Art. 6.3 of the Habitats Directive. In particular they have addressed the specific concerns raised regarding protection of the Peat-bog of Rojkov and the SCI River Váh detailing the mitigation measures which have been specified for the Project.

The EU DG Environment is currently reviewing the information provided and is due to finalise its technical review of the Natura 2000 procedure followed by the Slovak authorities in project preparation, to assess its compliance with EU requirements. The results of this review are expected to be made available to EBRD soon and any EU DG Environment recommendations that are made will be addressed by the Grantor and via the Biodiversity Management Plan (BMP) being prepared by the Concessionaire.

Appraisal of environmental risks and mitigation measures

EBRD recognised the need to clearly specify the mitigation measures for the management of biodiversity related issues. The Environmental and Social Action Plan (ESAP) for the Project agreed with the Concessionaire includes the requirement for a Biodiversity Management Plan (BMP) for each section of the D1 motorway and lists specific mitigation measures to be applied in addition to those specified in permit requirements. (See Annex 1 for specific details of the ESAP commitment).

The BMP will be a time bound management plan for the conservation of natural habitats and habitats of species (including wild birds) defining

- i) proactive, preventative, procedural and stakeholder engagement requirements for site conservation and protection,
- ii) all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and
- iii) responsibilities, both internally and externally, for biodiversity management.

The BMP will summarise in one concise document the potential impacts of the Project on biodiversity or the structure and function of ecosystems, as well as on the integrity and conservation objectives of the affected Natura 2000 sites, and propose mitigation and compensation measures as well as a comprehensive management/monitoring programme to ensure that the Project does not result in a net loss of sensitive biodiversity.

The Concessionaire has already agreed a detailed terms of reference for the BMP with EBRD and is currently in the process of selecting a consultant. The plan shall take into account the concerns raised by stakeholders, including the issues and reports highlighted by NGO's, and will be based on a precautionary approach.

The BMP shall be reviewed and approved by the EBRD, the other Lenders and the Independent Engineer prior to works commencing in sensitive areas. The Plan needs to be completed within 90 days of signing the Loan Agreement and will be implemented via the management system of contractors and monitored by the Independent Engineer.

Impacts from Preliminary works and monitoring of construction works

The preliminary works undertaken by the Concessionaire at the Rojkovske Raselin Mire Nature Reserve were not subject to any pre-approval by EBRD. However, EBRD did respond to NGO's concerns relating to the preliminary works and the Independent Engineer monitoring the site did not detect any non-compliance or uncontrolled impacts to the Reserve, however EBRD will continue to monitor the situation. As stated in EBRD's previous letter to CEE Bankwatch (11 May 2010) the Concessionaire has provided evidence that the necessary precautions and mitigation measures have been put in place to protect the site during the Preliminary works.

The Concession Agreement recognises that the construction stage of the works will require careful and effective environmental management, so specifies environmental management controls which are needed during construction. Additional measures have also been specified in the ESAP. Day-to-day management of the Project will be subject to monitoring in the field by an Independent Engineer (IE). EBRD has specified the need for a Biodiversity specialist to be included on the IE Team; they will be responsible for monitoring and reporting on the implementation of the BMP. EBRD shall receive and review regular monitoring reports and will also undertake periodic site visits to verify operational controls and the application of mitigation measures as part of the Projects Monitoring Plan.

Public availability of construction permit

The Building Permit (No. 01934/2009-SCDPK/9102) for the Turany – Hubová section of the D1 Motorway, Section was issued by the Department of Road Transport and Road of the Ministry of Transport, Posts and Telecommunications of the Slovak Republic acting as the Special Building Office in accordance with Act. 135/1961 Coll. on Roads on 3 March 2009. EBRD were advised that information regarding the disclosure of the permit to stakeholders was carried out in line with Slovakian requirements.

EBRD has worked and will continue to work with independent advisers, including CEE Bankwatch, to identify, verify and evaluate the potential environmental risks, controls and mitigation measures to minimise the potential impacts of the D1 Project on Natura 2000 sites. This will include close involvement in the development of the BMP and contractor management and monitoring.

A list of the documents that have been reviewed by EBRD and their consultants can be provided upon request.

The Concessionaire in co-operation with contractors shall prepare and implement a Biodiversity management plan for each D1 motorway section. This should cover the following points:

- Fulfilment of requirements of competent authorities stated during EIA procedure, zoning permit and building permit;
- The need to engage and consult with other stakeholders;
- Performance within the designated Natura 2000 sites located in the Turany -Hubova and Hubova - Ivachnova sections of the motorway;
- Monitoring of potential impacts on the local water regime and the peat bogs at PR Rojkovske raselinisko, focus on possible changing in water regime (surface and underground, quality and quantity), impact to biodiversity state and ensuring the goals of nature protection. Additional mitigation measures will be developed based on the results of the research monitoring, if needed;
- Performance within the natural reserve Hajik in the Jablonov - Janovce section of the motorway;
- Design and conduct mitigate measures on Natura 2000 sites located in the Turany - Hubova and Hubova - Ivachnova sections of the motorway according to the Environmental and social impact assessment review proposals (March 2010);
- Design and conduct mitigate measures to avoid impacts the stream and river banks of the Vah River at each crossing point;
- Invasive alien species monitoring and subsequent remedial measures during operation period;
- Retaining walls and cutting should be designed in such a way that they can be planted with native vegetation such that they are better incorporated with the surrounding landscape;
- Fencing should be used to prevent animals crossing the motorway and to focus animal migration onto the eco-corridors
- Eco-corridors should be planted with native vegetation designed to screen the road.
- In Section 2 include an underpass of sufficient height so that the nameless stream that is tributary of the Vah (obj. 560.00) can serve as a bio-corridor for small animals and provide access to the Vah river.

- Section 2 at selected plots and localities within km 4.3-4.5 build-up a system of standing water, damp areas and depressions with appropriate vegetation which will serve as wetland habitats for amphibians' reproduction and living site. Link these to the river stream and bank vegetation.
- Section 2 km 4.3: undertake the revitalisation and restoration of habitats 3260, 3220, 6430, 3270, 6430 and 91E0* under the motorway bridge to river left river bank and related waterside along a minimum 1000 m length, and below the bridge to left river bank for a minimum of 600 m;
- Section 2 restore the stream running along the Suchie creek with its representative habitats 6430, 9180* and 91E0*.
- Section 2 restoration of forest habitats 9130, 9110 and 9150 in between km 3.5 and 4.0 linking these to the eco-corridor which should be plants with typical forest species.
- Section 2 restoration of the closed dolomite stone-pit at km 3.3 – 3.6 by planting with appropriate vegetation to be serve as a eco-corridor and ultimately an ecologically important habitat.
- Section 2 restoration of damaged river bank in between km 5.8 and 6.5 on left side of the Vah River with the planting aimed at creating a river habitat suitable for relevant ichtiofauna through planting appropriate vegetation and morphology works;
- Section 2 installation of hard fencing with vegetative adaptation of the motorway especially from the north side (buffer zone of national park in between km 0.0 and 2.0) to create a barrier for migrating animals and divert them to safe crossing points.
- Establish permanent monitoring system for evaluation of fatal bird collisions on the motorway and adopt seasonal mitigation measurements if needed (e.g. speed reduction during the migration and breeding season, installation of barriers etc.);
- Section 3 implement detailed monitoring of the natural tuffaceous springs km 2.8 and 2.9 to ensure that there are no negative impacts on the habitat and hydrological regime to which it is linked during construction.

Annex 3 – Client Response

European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom

Attn: Ms. Anoush Begoyan
PCM Officer
Project Complaint Mechanism
Zn./Ref.No.: C-46-2010/7

Bratislava, 25.06.2010

Re: Complaint re D1 Motorway Phase I, Slovak Republic Seeking Project Compliance Review

Dear Ms. Begoyan,

Reference is made to your letter dated 11 June 2010 with regard to the above matter. First of all hereby we would like to thank you for giving Slovenské diaľnice, a.s. the opportunity to set out our views and information on the above topic and on the complaint submitted to EBRD by the organizations Priatel'ia Zeme – CEPA and SOS BirdLife Slovensko (the “**Complainants**”) in their letter dated 7 June 2010 (the “**Complaint**”).

We would like to confirm that to date none of the two organizations have approached us with their complaint or with any request for information.

Further we would like to point out that according to our information no civil organizations exercised their right to comment on the proposed project implementation during the public consultation phase of the project notwithstanding that some of them (BirdLife Slovakia specifically) had been directly called upon to take part in the procedure. From the discussions between the NGOs, the specialists and the relevant authorities, it seems that the organizations involved are not familiar with the details of the project (*Please see Annex 1 hereto*), and from a public statement of NGOs, including Priatel'ia Zeme – CEPA, we understand that the initiatives of the organizations involved are politically motivated (*Please see Annex 2 hereto*).

Irreversible Impact on the Mire

The Complainants state that the mire was irreversibly damaged through the lowering of the groundwater level in the mire which was caused by the draining out of water from the mire through the trench dug by the Concessionaire's sub-contractor. The Complainants did not however substantiate this statement with any evidence.

The works carried out are described in the sub-contractor's reports and the Concessionaire's memorandum attached hereto as *Annexes 3-6*.

In our view **the excavation of the trench did not affect the groundwater level in the peat-bog** or in the surrounding area as the water in the trench formed a continuous standing water table approximately with the same water level as the water level in the adjacent gutter, and the water did not drain away from the trench, but infiltrated into the natural sub-soil, which is not an open drain connected to any recipient watercourse. The source of the water in the trench was most probably natural mineral water from greater depths. Please see attached the report of the

Concessionaire's Environmental Manager and the Independent Engineer's report attached hereto as *Annex 7-8*.

We would like you to note that the relevant cable laying works were completed (to the contrary of the statement of the Complainants) and also that the location of the cable was determined on the basis that the existing cable is situated in this very same trench (obviously laid several years ago without any irreversible harm to the peat-bog).

Priatelka Zeme – CEPA and Mr. Topercer have initiated an investigation at the Environmental Inspectorate at Žilina which carried out a very detailed and thorough examination of the case. Although other mistakes were found in the procedure (which we do not comment on in this letter) the draining out of the mire is not even mentioned in the authority's report. Please see the report of the Inspectorate attached hereto as *Annex 9*.

Further Irreversible Impact on the Mire

The Complainant asserts that the implementation of the project would result in further irreversible impacts on the mire through the construction of the Rojkov tunnel.

Several studies have been carried out with regard to the possible impacts of works, namely of the construction of the Rojkov tunnel, on the Rojkov peat-bog. Additionally a new study has been prepared making use of the results of the latest geotechnical surveys stating that **no significant impact to the hydrological regime of the Rojkov peat-bog is expected due to the construction of the tunnel**. Please see the hydro-geological report attached hereto as *Annex 10*.

(Under)Estimation of Environmental Risks

The Complainant states that the environmental risks of the project have not been duly estimated and that the planned mitigation measures are insufficient. Reference is made to a study prepared by independent scientists (The Importance of Impacts of the Proposed Motorway D1 Turany – Hubova on Species, Habitats, Natura 2000 Sites and Landscape, hereinafter the "**Scientists' Opinion**"). The referred Scientists' Opinion contains the opinion of the authors (including Mr. Topercer and Mr. Ridzoň) on another study (Assessment of Severity of Impacts of the Proposed Motorway D1 Turany – Hubova on the Sites of the Natura 2000 Network, hereinafter the "**Creative Study**") which was one of the documents on the basis the impacts of the project on the environment were assessed.

The Slovak Authorities confirmed that the Creative Study was not the only document on the basis of which the opinion was formulated that the project has no significant impact on Natura 2000 sites. Please see the Response Paper to DG Environmental (European Commission) prepared by Arup for the Ministry of Transport, Posts and Telecommunication of the Slovak Republic attached hereto as *Annex 11*.

We would like to note that the Scientists' Opinion does not define the methodology they used in formulating their opinion, does not describe the discrepancies between the prescribed assessment methodology and the applied one in the Creative Study and it does not refer to sources of information other than unpublished data of the authors. We further would like to point out that the Complainant states in the Complaint that they do not know of the contents of the Construction Permit, therefore it is unclear how the opinion was formulated that the planned mitigation measures are insufficient.

In preparation for the financing of the project by EBRD beside many other financial institutions, a further review has been prepared by Citrus Partners LLP and Enviconsult Ltd. which states that **"although the project will impact Natura 2000 sites, these sites were strongly protected under previous Slovakian legislation and these have been adequately assessed by the EIA**

process and mitigation measures in the Final Statements are considered sufficient.” Please find attached the review as *Annex 12*.

The European Investment Bank has also mandated the preparation of an independent review attached hereto as *Annex 13*. The review has found that “*This procedure [the assessment of the impacts on the Natura 2000 sites] is in accordance with the national legislation, which transpose the Council Directive 92/43/EEC*”.

We would like to further point out that one of the conditions of the financing of the project by EBRD and the other financial institutions is the preparation of a Biodiversity Management Plan (BMP). The mandate for the preparation of the BMP includes a mandate to undertake additional biodiversity assessment in conformity with the Habitats Directive to address issues identified by the European Commission (basically reflecting the Scientists’ Opinion). Please see the Request for Proposal attached hereto as *Annex 14*. We have to note that Slovenské diaľnice will be in a position to award this mandate only if the complaint of the Complainants in front of the European Commission is closed down to an extent allowing the financial close of the project.

Inadequate Project Management

The Complainant also states that the project management has been and will be inadequate.

We believe that the management of the project by the Relevant Authorities has been – if not free of all mistakes – adequate in light of the above reviews. We further believe that if the project can proceed, and if it will be implemented in a PPP structure, where the additional scrutiny of the Independent Engineer, the banks’ advisors and of the banks themselves are built-into our procedures, **the management of the implementation of the project will be adequate.** Proper management will be ensured among other things through the application of the Environmental and Social Action Plan, the Safety, Quality and Environmental (SQE) Documentation, and the Biodiversity Management Plan. Finally, – in line with EBRD’s principles – we wish to involve into the monitoring of the project implementation the stakeholders of the project, and among other organisations, the NGOs. Please see the finalized Public Consultation and Disclosure Plan of Slovenské diaľnice attached hereto as *Annex 15*.

The above mentioned measures will be put in place in full extent following financial close and the Concession Contract becoming fully effective. After Effective Date the Concession Company and the Contractor will have app. 50 highly qualified managers with international PPP experience in the Concession Company and in the central management of the Construction Sub-Contractor ensuring compliance with the SQE plans and the Independent Engineer will have 51 people for monitoring the implementation of the Works and the compliance with the SQE plans. This is a qualitative difference compared to Early Works which were supposed to last only for a few months with very limited scope of works acknowledging the good intentions of the Slovak Government to proceed with the project which is vital for the development of Slovakia.

Sincerely yours,

Dr. Fruzsina Szilvia Biró
Chief Executive Officer
Slovenské diaľnice, a. s.

Olivier Chambon
Chief Financial Officer

Annexes

- 1: Minutes of meeting between the Public Authority and NGOs on 14.06.2010
- 2: Press release : NGOs Urge New Government of Slovakia to Halt PPP Projects (22.06.2010)
- 3: Report of the sub-contractor dated 29.04.2010
- 4: Report of the sub-contractor dated 16.06.2010
- 5: Report of the sub-contractor dated 22.06.2010
- 6: Memorandum of the Concessionaire on works carried out near the peat-bog dated 12.05.2010
- 7: Report of the Environmental Manager dated 30.04.2010
- 8: Report of the Independent Engineer dated 04.05.2010
- 9: Report of the Environmental Inspectorate at Žilina dated 09.06.2010
- 10: Assessment of Risks Arising from the Implementation of the Rojkov Tunnel in Regards to Hydrological Regime of the Peat-bog Rojkov (June 2010)
- 11: Response Paper to DG Environmental (European Commission)
- 12: D1 Motorway Project, Slovakia Environmental and Social Assessment Review (March 2010)
- 13: Environmental Due Diligence by Enviros s.r.o. (June 2010)
- 14: Request for proposal for the preparation of the Biodiversity Management Plan (10 May 2010)
- 15: Public Consultation and Disclosure Plan (01.06.2010)