

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

PROJECT COMPLAINT MECHANISM

ELIGIBILITY ASSESSMENT REPORT

COMPLAINT: OMBLA HYDROPOWER PROJECT (HPP)

REQUEST NUMBER: 2011/06

Executive Summary

The Eligibility Assessors have determined that the present Complaint satisfies the eligibility criteria for a Compliance Review as set out under the Project Complaint Mechanism (PCM) Rules of Procedure (RPs). At the general level, the Complaint:

- (i) concerns a Project that has been approved for financing by the Bank and actions or inactions that are the responsibility of the Bank;
- (ii) adequately describes the harm that potentially could be caused;
- (iii) adequately describes the PCM function requested;
- (iv) adequately describes the outcomes sought;
- (v) establishes that the Complainant enjoys standing to complain either in his capacity as an individual or as a representative of Friends of the Earth Croatia.

At the more specific level, each of the individual instances of non-compliance alleged in the Complaint satisfies the relevant and applicable eligibility criteria listed under the PCM RPs. For example, each discrete allegation of non-compliance expressly refers to the Relevant EBRD Policy at issue.

This Eligibility Assessment Report includes detailed Terms of Reference for the envisaged Compliance Review, setting out the key compliance questions to be addressed, the key Relevant EBRD Policies at issue, and the essential steps to be taken in conducting the Compliance Review, as well as its scope and time-frame.

Project Complaint Mechanism

Eligibility Assessment Report

Complaint: Ombla Hydropower Project

Introduction

Factual Background

1. On 17th November 2011 a Complaint was submitted in respect of the Ombla Hydropower Project (Croatia) to the Project Complaint Mechanism (PCM) of EBRD by Mr. Enes Ćerimagić of Friends of the Earth Croatia¹. On 24th November 2011 the Complaint was registered by the PCM Officer according to PCM RP 10, notification of registration was sent to the Complainant and the Relevant Parties pursuant to PCM RP 12, and the Complaint was posted on the PCM website and noted on the web-based PCM Register according to PCM RP 13. On 1st December 2011 PCM Expert Dr. Owen McIntyre was appointed as an Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer, in accordance with PCM RP 17.
2. The Project in question consists of a 68MW hydroelectric power plant near Dubrovnik involving, *inter alia*, construction of an underground grout curtain dam 130 meters high x 1300 meters across causing a significant rise in the water table, excavation of an underground cavern to locate the powerhouse, the blocking of existing water conduits and the construction of new tunnels for water conveyance, the construction of new drinking water infrastructure, as well as associated access roads, storage areas and electricity transmission lines². The Project was approved by the Board of Directors of EBRD on 22 November 2011. The Bank is to provide financing of up to €123.2 million, out of an estimated total project cost of €152.4 million.

Steps Taken in the Eligibility Assessment

3. The Eligibility Assessors have undertaken a general examination of the Complaint to determine whether it satisfies the applicable eligibility criteria as set down in the PCM Rules of Procedure. They have also taken account of the responses to the Complaint received from EBRD Management³ and from the Project Client⁴. The Eligibility Assessors have checked the online availability online of the documents cited in the Complaint for the purposes of PCM RP 20c.

¹ Hereinafter, *Friends of the Earth Croatia Complaint*, 17 November 2011 (annexed to this Eligibility Assessment Report as Annex I).

² See Overview of the Ombla HPP Project on the EBRD website at: <http://www.ebrd.com/english/pages/project/psd/2011/42219.shtml>

³ Bank Response to EBRD Project Complaint Mechanism, issued to PCM Officer 19 December 2011.

⁴ Response from Hrvatska Elektroprivreda (HEP) to EBRD Project Complaint Mechanism, issued 16 December 2011.

4. On 26 and 27 January 2012, the Eligibility Assessors conducted fact-finding meetings with members of the Project Team, including the Operation Leader, Mr. Philip Lam, and the relevant members of the ESD, Mr. Jack Mozingo, Mr. Mikko Venermo and Ms. Elizabeth Smith.

Positions of the Relevant Parties

5. The present Complaint comprises a number of distinct elements, each alleging breach of the EBRD's 2008 Environmental and Social Policy:
 - a. The Complainant alleges that in appraising the Project the Bank has relied upon an Environmental Impact Assessment (EIA) dating from 1999, which it contends is outdated and no longer legally valid under the applicable Croatian law. The Complainant argues that if the Bank relied solely on the 1999 EIA, it would not be adequate to meet the requirements of the 2008 Environmental and Social Policy.
 - b. The Complainant also alleges that the Bank failed to ensure that meaningful public consultation took place, as required under the Aarhus Convention, Croatian law and the EBRD's 2008 Environmental and Social Policy. Essentially, the Complainant contends that, due to the time lapse since the conduct of the EIA, meaningful public consultation could not be undertaken prior to the taking of certain decisions and could not have been based on disclosure of relevant and adequate information.
 - c. In addition, the Complainant alleges that the Project has been authorised by the Croatian national authorities and, more recently, approved by the Bank without having undergone a biodiversity assessment adequate to ensure protection of the overall coherence of the Natura 2000 network. Since a number of natural features likely to be impacted by the Project, including the Vilina Cave system, the Ombla Spring and the general karst habitat complex, are part of sites proposed for designation as Natura 2000 sites, the Complainant contends that the Project should not have been approved by the Bank until completion of a biodiversity study equivalent to an "appropriate assessment" under Article 6(3) of the EU Habitats Directive concluding that the Project will not adversely affect the integrity of the sites concerned⁵.
 - d. As a result of the above, the Complainant further claims that the natural features listed in the previous paragraph constitute 'critical habitats' for the purposes of the EBRD's 2008 Environmental and Social Policy and, thus, that they may not be converted or degraded unless certain strict conditions specified in the Policy have been satisfied in accordance with a precautionary approach.
 - e. Finally, the Complainant alleges that the failure of the Croatian authorities to subject either the 2008 Croatian National Energy Strategy or the relevant spatial planning policies to a Strategic Environmental Assessment (SEA) procedure constitutes a breach of Croatian law. According to the Complainant, the Bank's approval of a Project referenced under that Strategy and permitted under those

⁵ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

policies constitutes a breach of its obligations under the 2008 Environmental and Social Policy.

6. In its response to the Complaint, EBRD has addressed each of the specific issues raised by the Complainant:
 - a. According to EBRD, advice received from officials of the Ministry of Environmental Protection, Spatial Planning, and Construction, as well as from the independent legal counsel retained by the Bank, confirms that the permits issued by the Croatian national authorities on the basis of the 1999 EIA remain legally valid and in effect and, further, that there was at the time of appraisal no legal basis for the national authorities to require any further assessment. Regarding the adequacy of the 1999 EIA, EBRD concedes that in certain respects it is not fully compliant with the requirements of the EU EIA Directive⁶ and EBRD's 2008 Environment and Social Policy. EBRD claims that the potential impacts not covered in depth by the 1999 EIA (including the potential impacts of the Project on biodiversity) have been identified in the course of the Bank's appraisal process and will be additionally addressed in line with EU law and the 2008 Environment and Social Policy under the provisions of the Environmental and Social Action Plan (ESAP). Envisaged actions include completion of the studies and reports required under the EU Habitats Directive, including an Appropriate Assessment and, if appropriate, a Biodiversity Management Plan, developed with appropriate public consultation.
 - b. EBRD points out that, although the Bank's Board of Directors approved the Project on 22 November 2011, under the terms of the financing agreement with HEP a series of express conditions must be satisfied before funds will be disbursed. These conditions require, *inter alia*, the completion of a biodiversity study that meets the standards foreseen under the EU Habitats Directive. The Bank's response points out that this biodiversity study will be conducted in a fully transparent manner, as required under EU law, involving appropriate stakeholder consultation. In addition, EBRD's response explains that funding of the Project will not be able to proceed unless the biodiversity study conclusively establishes that it would meet the objective standards of species and habitats protection and/or the requirements as regards public importance stipulated under the Directive. Thus, the Bank argues that the biodiversity assessment conducted to date cannot be considered to be final. Regarding actions already taken, EBRD notes that, further to compliance with applicable regulations at the date of the EIA, disclosure and public consultation have recently taken place in respect of the ESIA package, which includes a Stakeholder Engagement Plan and the biodiversity study required in the ESAP and outlined above, each requiring further disclosure in accordance with the ESP. In relation to the adequacy and relevance of the information disclosed in respect of biodiversity aspects of the Project, EBRD points out that the one further study⁷

⁶ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

⁷ 2007/8 Biodiversity (Bat) Study for Vilina Cave.

already conducted by the Croatian Ministry of Culture was not previously disclosed until the EBRD-required disclosure period, when it was disclosed as part of the “ESIA package”, which included the 1999 EIA, 2007 Bat Study, SEP, NTS, RAP, and ESAP. Further, EBRD notes that the key issues addressed in the ESAP, and disclosed by means of the Non-Technical Summary (NTS) of the ESAP, were in part identified during extensive scoping exercises involving consultations with a broad range of local and national stakeholders.

- c. The Bank argues that, although the Board of Directors approved the Project in advance of the completion of an additional study of its biodiversity impacts, the Project has been structured so that there will exist ‘restrictions on any activities being undertaken ... until a study and decisions equivalent to those required under the EU Habitats Directive were completed’. Therefore, EBRD has only agreed to provide funding for works that might affect the proposed Natura 2000 sites on the strict condition that the “appropriate assessment” will be completed and will have conclusively established that the conservation objectives of the sites and the overall integrity of the Natura 2000 network is adequately protected or, alternatively, that the Project meets the requirements of Article 6(4) of the EU Habitats Directive as regards ‘imperative reasons of overriding public importance’.
 - d. EBRD insists that, as “critical habitats” for the purposes of the 2008 Environmental and Social Policy, the Ombla Spring and Vilina Cave will be adequately protected. The Bank expresses confidence that the biodiversity study stipulated under the ESAP, which is to be equivalent to an “appropriate assessment” required under the EU Habitats Directive and followed by a Biodiversity Management Plan, will satisfy all the requirements of PR 6 of the Policy, particularly those relating the protection of critical habitats under PR 6.14.
 - e. Whilst acknowledging the significance of SEA as a key tool for sustainable development and for assessing cumulative impacts of loans and programmes on the environment, EBRD argues that the Ombla HPP Project is authorized on the basis of the 1999 permit and, thus, that the validity of this permit cannot be impacted by any invalidity alleged in respect of the 2008 Croatian National Energy Strategy arising from a failure to conduct an SEA thereof. The Bank also argues that it is beyond its role to adjudicate on the compliance of national authorities with national, EU or international requirements in respect of SEA.
7. In its response to the Complaint, HEP has in turn addressed each of the specific issues raised by the Complainant:
- a. HEP points out that it has conducted an EIA and followed the comprehensive administrative approval process which was required under Croatian law at the relevant time, with concurrent approval of the EIA. While it concedes that the legal requirements applicable to EIAs under Croatian law may change over time, HEP states that there can be no retroactive application of the new legal requirements to those statutory permits that the investor/developer has already obtained, unless in accordance with explicit national laws to that effect. Indeed,

- HEP claims that the Complainant has been selective in terms of the legal provisions cited therein, so that those provisions which confirm non-retroactive application of legislative changes are omitted.
- b. HEP reports that all applicable legal requirements regarding disclosure of the Project and public participation were fully complied with during the conduct of the 1999 EIA and that the results of such public participation were compiled and officially recorded. While HEP contends that further public participation, subsequent to the conduct of the EIA, was not legally required during preparation of the Project, detailed information on the Project was disclosed in May 2011 in such a manner and form as to comply with the requirements of EBRD's 2008 Environmental and Social Policy.
 - c. HEP argues that the studies of the environmental impact of the Project carried out thus far, including those conducted in the course of the 1999 EIA and the 2007/8 Biodiversity Study of Vilina Cave, are adequate in order fully to understand all its potential biodiversity impacts and to identify the measures necessary for the protection of nature in compliance with the standards set out under the EU Habitats Directive.
 - d. Regarding the alleged risks to the natural features characterized as 'critical habitats' in the Complaint, HEP reiterates its position that existing studies have adequately identified all possible impacts as well as the measures necessary to avoid or mitigate such impacts. HEP provides further assurances that the existing monitoring system will be upgraded and that certain information will be made selectively available, in accordance with the requirements of the ESAP.
 - e. HEP points out that the Ombla HPP Project was included in the Physical Plans of the Republic of Croatia and that the process of obtaining the required permits commenced in 1999, presumably with a view to establishing that it predates the 2008 introduction of the requirement under Croatian law for SEA of plans and programmes. Therefore, HEP appears to imply that the Project is compliant with national legal requirements and, thus, that EBRD approval is in compliance with PR 6.15 of the 2008 Environmental and Social Policy.

Determination of Eligibility

PCM Function Requested

- 8. Pursuant to paragraphs 17 and 20a of the Project Complaint Mechanism Rules of Procedure (PCM RP 17 and RP 20a), the Eligibility Assessors must, in making their determination on the eligibility of a Complaint, take into account the PCM function requested by the Complainant. According to the Complaint, the PCM function sought is a Compliance Review. The Complainant also states that it is not requesting a Problem-solving Initiative.
- 9. In addition, the Complainant itself categorises the essential issues of non-compliance alleged in the Complaint under five separate headings:
 - a. Outdated and illegal Environmental Impact Assessment;
 - b. Failure to hold meaningful public consultation;

- c. Incomplete biodiversity assessment;
- d. Damage to habitat without adequate justification; and
- e. Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local spatial planning documents.

Standing to Complain

10. Mr. Čerimagić enjoys standing to make the present Complaint under PCM RP 2, whether in his capacity as an individual or as a representative of Zelena Akcija / Friends of the Earth Croatia.

General Eligibility Criteria

11. In determining the eligibility of the present Complaint, it is necessary to assess whether the Complaint satisfies a number of the relevant and applicable eligibility requirements of PCM RP 19, 20, 23 and 24 by means of an examination of each of the alleged instances of non-compliance as they are listed in the Complaint under the headings set out in paragraph 9 above. However, there are also several generally applicable eligibility criteria listed in the PCM RPs against which the eligibility of the Complaint for a Compliance Review can be determined in broad terms.
12. In respect of the general eligibility criteria, since the project was approved by the Board of Directors of EBRD on 22 November 2011 and the loan agreement was signed on 25 November 2011, the present Complaint satisfies PCM RP 19a, which requires that it 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 of such Project'.
13. Similarly, as regards to the requirement under PCM RP 19b, that the Complaint must 'describe the harm caused, or likely to be caused, by the Project', the Complaint expresses general concern that 'the project's impact on flora and fauna in the local karst system is expected to be significant, due to disruptive construction works involving the use of explosives and changing water levels'⁸. The Complaint further lists the range of protected species of fauna found in the Vilina Case and Ombla Spring system and expresses concern that the ecosystem 'is far from being fully explored', thereby suggesting that the list provided of protected species under threat is unlikely to be exhaustive. Each of these particular points of concern is further developed in respect of each of the specific alleged instances of non-compliance, as listed under the five headings set out in paragraph 9 above.
14. PCM RP 20a establishes that the Complaint should, if possible, include 'an indication of which PCM function the Complainant expects the PCM to use to address the issues raised in the Complaint'. As outlined in paragraphs 8 and 9 above, the Complaint requests the PCM to undertake a Compliance Review of the Project.

⁸ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 1.

15. Under PCM RP 20b, for the purposes of eligibility, a Complaint ‘should also include, if possible ... an indication of the outcome(s) sought as a result of use of the PCM process’. The Complaint expresses the Complainant’s desired outcomes as follows:

‘It is our hope that by mobilizing the PCM to examine these issues in detail, that it will become clear that the EBRD cannot finance the project in its current form and be in compliance with its own policies. As a result we expect that the EBRD will not finance the project, at the very least until a new Environmental Impact Assessment has been carried out’⁹.

In addition, by expressing concern that the Bank had been ‘considering approving the project before such an [biodiversity] assessment has taken place’¹⁰, the Complaint suggests that the Complainant is seeking suspension of Bank approval pending the outcome of a biodiversity assessment equivalent to an “appropriate assessment” under Article 6(3) of the EU Habitats Directive.

16. PCM RP 20c further provides that an eligible Complaint should, if possible, include ‘copies of all correspondence, notes, or other materials related to communications with the Bank or other Relevant Parties’. The Complaint provides details of such communications¹¹. The Complaint provides a hyperlink to each document, thereby facilitating on-line access¹². Where on-line access to such communications is not available, the Complaint provides sufficient detail, (including dates, subject-matter, identification of relevant signatories and officials, *etc.*), to ensure that documentation can be obtained and verified. As noted in paragraph 3 above, the Eligibility Assessors have checked and confirmed the availability of the online documents cited in the Complaint.

17. In the case of a Compliance Review, PCM RP 23 requires the Eligibility Assessors to consider, *inter alia*, whether the Complaint relates to ‘actions or inactions that are the responsibility of the Bank’¹³. Included among the issues of alleged non-compliance listed in the present Complaint are:

- a. the fact that ‘the Environmental Impact Assessment for the project dates from 1999 and is thus outdated and no longer legally valid’¹⁴,
- b. that ‘a biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive has not yet been completed’ but the Bank has ‘approv[ed] the project *before* such an assessment has been undertaken’¹⁵, and

⁹ *Ibid.*, at 9.

¹⁰ *Ibid.*, at 2 (original emphasis).

¹¹ *Ibid.*, at 2-3.

¹² Including, *Zelena Akcija Comments on the Proposed Ombla Hydro Power Plant Loan*, 8 September 2011, available at http://zelena-akcija.hr/uploads/zelena_akcija/document_translations/000/000/768/Ombla_HPP_Comments_ZA_FoE.pdf?1319638049; Zelena Akcija and others, *Open Letter to EBRD Staff and Board of Directors*, 8 November 2011 (weblink broken); EBRD, Full Response to Compiled Comments Submitted to EBRD and HEP, 8 November 2011, available at <http://bankwatch.org/documents/EBRDresponse-OmblaHPP-07Nov2011.pdf>

¹³ PCM RP 23a.

¹⁴ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 1-2.

¹⁵ *Ibid.*, at 2 (original emphasis).

- c. that ‘the public has not been sufficiently included in decision-making’,¹⁶.

Each of the requirements involved above constitute key elements of the EBRD’s project appraisal process¹⁷, which the EBRD Environmental and Social Policy regards as falling within the Bank’s area of responsibility¹⁸. In elaborating on the EBRD’s commitment ‘to ensure through its environmental and social appraisal and monitoring processes that the projects it finances ... are socially and environmentally sustainable’, the ESP states that

‘The Bank’s role is [*inter alia*]: (i) to review the clients’ assessment; (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimize, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs’¹⁹

Further, Performance Requirement 1 on ‘Environmental and Social Appraisal and Management’ (PR 1) of the EBRD ESP states that

‘The information gained [through appraisal activities such as environmental and social impact assessment] *will inform the EBRD’s own due diligence related to the client and project*’²⁰.

18. ESP PR 1 further provides that the EBRD and the client are to agree on ‘the area of influence for each project’²¹ and on ‘the nature of due diligence studies required’²². The Bank ‘may agree with the client during appraisal a management of change process’ for Category A projects²³ and any corrective and preventive actions identified as necessary by virtue of the required ‘procedures to monitor and measure compliance with the environmental and social provisions of the legal agreements including effective implementation of the ESAP and the PRs ... will be submitted to the Bank for approval’²⁴. Further, ‘[a]s part of their regular reporting to the Bank, clients will provide the EBRD with updates on their progress in implementing their ESAP’²⁵. All of the above provisions highlight the fact that the Bank is required to play a

¹⁶ *Ibid.*, at 4.

¹⁷ See EBRD, *Environmental and Social Policy* (May 2008), para. 15, at 8, which provides that: ‘EBRD’s environmental and social appraisal includes consideration of three key elements:

- (i) the environmental and social impacts and issues associated with the proposed project;
- (ii) the capacity and commitment of the client to address these impacts and issues in accordance with this Policy; and
- (iii) the role of third parties in achieving compliance with this Policy.’

¹⁸ See, for example, EBRD, *Environmental and Social Policy* (May 2008), para. 14, at 5, which states that

‘All EBRD-financed projects undergo environmental and social appraisal both *to help the EBRD decide if an activity should be financed and, if so, the way in which environmental and social issues should be addressed* ... It is the responsibility of the client to ensure that the required due diligence studies, information disclosure and stakeholder engagement are carried out in accordance with PRs 1 through 10, *and submitted to the EBRD for review as part of its own appraisal.*’ (Emphasis added).

¹⁹ EBRD, *Environmental and Social Policy* (May 2008), para. 3, at 3.

²⁰ EBRD, *Environmental and Social Policy* (May 2008), PR 1: Environmental and Social Appraisal and Management, para. 5, at 15. (Emphasis added).

²¹ PR 1, para. 6, at 16-17.

²² PR 1, para. 8, at 17.

²³ PR 1, para. 15, at 19.

²⁴ PR 1, paras. 20-21, at 20-21.

²⁵ PR 1, para. 24, at 21.

central and ongoing supervisory role and, thus, that the inadequacies alleged in the present Complaint in terms of the appraisal and mitigation of environmental risks associated with the Project involve ‘actions or inactions that are the responsibility of the Bank’²⁶ according to the EBRD Environmental and Social Policy.

19. In addition, the Complaint alleges certain deficiencies in terms of meaningful consultation and public participation in violation of Performance Requirement 10 on Information Disclosure and Stakeholder Engagement (Pr 10). In light of the above conclusions about the Bank’s responsibility for environmental and social appraisal, PR 10 links stakeholder engagement intrinsically to appraisal by explaining that

‘The process of stakeholder engagement is an essential component of the appraisal, management and monitoring of environmental and social issues associated with the client’s investments. Therefore, this performance requirement should be read in conjunction with PR 1’²⁷.

PR 10 then goes on to outline the nature of the Bank’s involvement in the process of information disclosure and stakeholder engagement, as well as the role of that process in the Bank’s own due diligence. For example, PR 10 explains that

‘The Bank will agree with the client how the relevant requirements of this PR will be addressed as part of the client’s overall environmental and social appraisal process, Environmental and Social Action Plan (ESAP) and/or Management System (outlined in PR 1)’²⁸.

Similarly, in relation to the development of the stakeholder engagement plan, PR 10 requires that

‘The client will inform the EBRD how communication with the identified stakeholders will be handled throughout project preparation and implementation’ and, significantly in the case of the present Complaint, that *‘[c]lients should also inform the EBRD of any information provided or consultation activities conducted prior to approaching the EBRD for financing’²⁹.*

In relation to what form the required ‘meaningful consultation’ should take, PR 10 typically provides that

‘The need for and nature of any specific consultation will be agreed with the EBRD ...’³⁰.

20. As regards the significance of the client’s information disclosure and stakeholder engagement activities for the EBRD’s own commitments under the ESP, it is telling that PR 10 should expressly note that

²⁶ PCM RP 23a.

²⁷ EBRD, *Environmental and Social Policy* (May 2008), PR 10: Information Disclosure and Stakeholder Engagement, para. 4, at 68.

²⁸ PR 10, para. 5, at 68. (Emphasis added).

²⁹ PR 10, para. 11, at 70 (emphasis added).

³⁰ PR 10, para. 15, at 71.

‘As part of its own due diligence, the Bank will assess the level of information disclosure and consultation conducted by the client against the requirements of this PR and may require additional engagement’³¹.

Therefore, under the terms of the EBRD’s ESP, the Bank plays an important supervisory role in respect of the Client’s information disclosure and stakeholder engagement activities, thereby bringing such activities within the scope of the Bank’s responsibility for the purposes of PCM RP 23a. Indeed, the EBRD ESP elsewhere describes PR 10 as setting out

‘the Bank’s requirements for clients to identify stakeholders potentially affected by their projects, disclose sufficient information about issues and impacts arising from the projects and consult with stakeholders in a meaningful and culturally appropriate manner’³²

and proceeds to explain that

‘The documentation submitted to the EBRD’s Board of Directors for approval of an operation will include a description of the client’s stakeholder engagement programme, comments and opinions about the client’s practices or the potential impact of the project expressed by stakeholders, and the way these issues are being or will be addressed by clients in accordance with PR 10’³³.

The above paragraphs illustrate that the Client’s compliance with the requirements for information disclosure and stakeholder engagement set down under the Bank’s ESP is a matter of central concern for Bank management.

21. Though questions as to the adequacy of national rules applicable to the Project, or of legal requirements arising thereunder, such as those relating to the legal validity of an EIA conducted in 1999 as the basis for a current Project, are beyond the scope of the Bank’s responsibility, any alleged violation of national laws does come within the scope of the Bank’s responsibility for the purposes of PCM RP 23a. For example, in setting out the EBRD’s environmental and social commitment in general terms, the ESP states that

‘The EBRD will seek to ensure through its environmental and social appraisal and monitoring processes that the projects it finances ... are designed and operated in compliance with applicable regulatory requirements and good international practice’³⁴.

More specifically, Performance Requirement 1 on Environmental and Social Appraisal and Management stipulates that

‘The appraisal should also identify applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters’³⁵.

³¹ PR 10, para. 7, at 68. (Emphasis added).

³² EBRD, *Environmental and Social Policy* (May 2008), para. 25, at 6. (Emphasis added).

³³ EBRD, *Environmental and Social Policy* (May 2008), para. 26, at 6.

³⁴ EBRD, *Environmental and Social Policy* (May 2008), para. 3, at 2 (emphasis added).

³⁵ EBRD, *Environmental and Social Policy* (May 2008), PR 1: Environmental and Social Appraisal and Management, para. 5, at 15

The Complaint raises a number of grounds based on Croatian law to argue that old EIAs may not validly be relied upon in order to permit a current Project³⁶. Therefore, this element of alleged non-compliance also satisfies PCM RP 23a, in that it ‘relates to ... actions or inactions that are the responsibility of the Bank’. However, it is important to point out that, for the purposes of determining the Bank’s compliance with the requirements of the ESP set out above, it is only necessary to examine whether EBRD took *reasonable steps* to ensure that the Project is designed and operated *in compliance with applicable regulatory requirements* and good international practice’, rather than itself to check detailed compliance with national laws.

22. PCM RP 23b requires that, in determining eligibility, the Eligibility Assessors also consider whether
‘the Complaint relates to ... more than a minor technical violation of a Relevant EBRD Policy unless such technical violation is alleged to have caused harm’³⁷.

The present Complaint could not fall within this *de minimis* exception as it alleges serious breach of provisions of the EBRD’s 2008 ESP³⁸ and raises the possibility of serious environmental harm resulting from the Project.

23. PCM RP 23c regarding a failure of the Bank to monitor Client commitments pursuant to a Relevant EBRD Policy is not applicable at this early stage of Project development and has not been raised by the Complaint.
24. PCM RP 24 sets out a list of factors, any of which if found to apply would render a Complaint ineligible. In the Complaint, there is nothing to suggest that it ‘was filed fraudulently or for a frivolous or malicious purpose’³⁹, nor that ‘its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project’⁴⁰. Nowhere does the Complaint raise allegations of fraud, relate to procurement matters⁴¹, relate to ‘Article 1 of the Agreement Establishing the Bank, the Portfolio Ratio Policy or any other specified policy’⁴², or relate to ‘the adequacy or suitability of EBRD policies’⁴³. Though there is nothing to suggest that the issues of non-compliance alleged in the present Complaint have been dealt with by the accountability mechanism of any parallel co-financing institution, such a review by another accountability mechanism would not in any case disqualify

³⁶ See *Friends of the Earth Croatia Complaint*, 17 November 2011, at 3-4.

³⁷ In other words, it remains open to the Eligibility Assessors to decline to find a Complaint eligible where the non-compliance alleged, though relating to a Relevant EBRD Policy, involves a very minimal (*de minimis*) infraction, made in good faith (*bona fides*), which has not resulted and is unlikely to result in any appreciable harm.

³⁸ Including ESP, PR 1, paras. 5 and 9; PR 6, paras. 6, 13, 14 and 15; and PR 10, paras. 10 and 15.

³⁹ PCM RP 24a. Indeed, the correspondence referred to in the Complaint shows that the Complainant had expressed related misgivings about the Project to the EBRD as early as 8th September 2011, thus demonstrating the Complainant’s *bona fide* concern.

⁴⁰ PCM RP 24b.

⁴¹ PCM RP 24c.

⁴² PCM RP 24d.

⁴³ PCM RP 24e.

a Complaint seeking a Compliance Review from being processed by the PCM⁴⁴.

Specific Eligibility Criteria

25. As noted in paragraph 11 above, it is also necessary to examine each of the individual instances of alleged non-compliance listed in the Complaint under the headings identified in paragraph 9 above, for the purposes of ascertaining that each satisfies those more specific eligibility criteria set down in the PCM Rules of Procedure which apply to discrete allegations of non-compliance. Such criteria include PCM RP 19b, which dictates that ‘the Complaint *must* ... describe the harm caused, or likely to be caused, by the Project’, and PCM RPs 20b and 20d, which respectively provide that ‘the Complaint *should also include, if possible* ...an indication of the outcome(s) sought as a result of use of the PCM process’ and ‘*if applicable*, details of the Relevant EBRD Policy at issue in the Complaint’⁴⁵. The former requirement is thus mandatory while the latter two are somewhat less imperative.

Outdated and illegal Environmental Impact Assessment

26. Regarding the alleged invalidity of the 1999 EIA for the Project, the Complainant contends that the EIA ‘does not meet current EU and Croatian legal requirements’⁴⁶ and suggests implicitly that this deficiency might result in a failure to prevent or mitigate the impact on flora and fauna in the local karst system, especially in relation to the protected species expressly listed in the Complaint⁴⁷. Though the Complaint tends to emphasise formal non-compliance with the requirements of the EBRD ESP, taken in combination with the concerns expressed elsewhere in the Complaint, particularly those in respect of the integrity of the conservation objectives of the site⁴⁸ and the risk of damage to ‘critical habitats’⁴⁹, these concerns can be regarded as satisfying the requirements of PCM RP 19b regarding the harm likely to be caused.

27. As noted in paragraph 14 above, the Complainant expects ‘that the EBRD will not finance the project, at the very least until a new Environmental Impact Assessment has been carried out’⁵⁰. This meets the requirements of PCM RP 20b. The Complainant lists those Performance Requirements of the EBRD’s 2008 Environmental and Social Policy, and those provisions of national law, which it considers to have been contravened by reliance on the 1999 EIA⁵¹. Therefore, the requirements of PCM RP 20d are deemed to have been met.

Failure to hold meaningful public consultation

⁴⁴ See PCM RP 24f.

⁴⁵ Emphasis added.

⁴⁶ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 3.

⁴⁷ *Ibid.*, at 1. See paragraph 12 above.

⁴⁸ *Ibid.*, at 6.

⁴⁹ *Ibid.*, at 7.

⁵⁰ *Ibid.*, at 9.

⁵¹ *Ibid.*, at 3. The Performance Requirements listed include PR 1.5, PR 1.9 and PR 6.15.

28. As regards the alleged failure to hold meaningful public consultation, the Complainant argues that the comments and submissions of interested parties cannot now be incorporated into and addressed under a completed EIA, or under environmental permits granted subsequent to such an EIA⁵². It claims that all options are no longer open and, thus, that public consultation can only now have a limited effect. According to the Complaint

‘it is very unlikely that the zero option, *i.e.* the project not going ahead, will be seriously considered at so late a stage, after some environmental permits have already been obtained, and after the EBRD has approved financing. It is unclear how the Natura 2000 study could impact on the permits that have already been issued. Thus we do not agree that major options are still open’⁵³.

More specifically, the Complaint points out that, in order for any consultation to be meaningful, the biodiversity studies required under the ESAP ought to have been prepared in advance of such consultation, which in turn should have taken place before an environmental permit was issued for the Project⁵⁴. Of course, specific material harm need not be established in the case of an alleged failure to undertake meaningful consultation, as such failure would inherently impact on the integrity of the relevant decision-making process, and thus on the quality and legitimacy of the decision taken. Harm can be presumed in the case of any such instance of non-compliance. Therefore, this aspect of the Complaint would appear to satisfy the requirements of PCM RP 19b.

29. The outcome sought remains that set out in paragraphs 14 and 25 above⁵⁵ and it is to be presumed that the new EIA therein proposed would comply fully with EBRD requirements on information disclosure and stakeholder engagement. In addition, the Complaint sets out in detail those Performance Requirements of the EBRD’s 2008 Environmental and Social Policy, and those provisions of national and international law, which it considers to have been contravened by the failure to hold meaningful public consultation⁵⁶. Therefore, this aspect of the Complaint meets the requirements of both PCM RP 20b and 20d.

Incomplete biodiversity assessment

30. As regards the alleged failure to conduct an adequate biodiversity assessment, the Complaint quotes ESP Performance Requirement 6.6 at length, which stipulates that such a study ‘should be sufficient to fully characterize the risks and impacts consistent with a precautionary approach’⁵⁷. In addition it quotes the EBRD’s response to the Complainant’s concerns⁵⁸, which guarantees that the biodiversity study proposed under the ESAP will ensure that ‘there is adequate mitigation to the integrity and the conservation objectives of the

⁵² *Ibid.*, at 5.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, at 6.

⁵⁵ *Ibid.*, at 9.

⁵⁶ *Ibid.*, at 4-5. The Performance Requirements listed include PR 1.5, PR 1.9, PR 10.10 and PR 10.15.

⁵⁷ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 6.

⁵⁸ *EBRD Response*, 7 November 2011.

sites, or compensation to ensure overall coherence of the Natura 2000 network is protected'⁵⁹. Thus, taken in combination with the concerns expressed elsewhere in the Complaint⁶⁰, these references strongly imply the harm to biodiversity likely to be caused by the Project, in accordance with PCM RP 19b. Such potential harm includes risks to the integrity and the conservation objectives of the sites concerned and to the overall coherence of the Natura 2000 network.

31. Once again, the outcome sought remains that set out in paragraphs 14 and 25 above⁶¹, *i.e.* the carrying out of a new EIA that would presumably include a biodiversity study that would meet the requirements of an 'appropriate assessment' under Article 6(3) of the EU Habitats Directive. The Complaint expressly points out that 'a biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive has not yet been completed'⁶². Such a biodiversity study would need to establish that the Project will not adversely affect the integrity of the site(s) concerned before the Project is permitted to proceed⁶³. The Complaint states the view that the lack of an adequate biodiversity assessment prior to approval of the Project amounts to a contravention of ESP Performance Requirement 6.6. Thus, this element of the Complaint meets the requirements of both PCM RP 20b and 20d.

Damage to habitat without adequate justification

32. Regarding the Vilina Cave and Ombla Spring habitat, which the Complaint argues to be a 'critical habitat' within the meaning of ESP PR 6.13, the Complaint sets out very clearly, in accordance with PCM RP 19b, the harm likely to be caused by the Project:

'There is too little information available to give a definitive opinion on *all* the adverse impacts on the Vilina Cave – Ombla Spring habitat from the Ombla HPP project, however it seems reasonable to argue that there are likely to be serious changes in the habitat due to changes in water levels and seriously disruptive construction work. This may lead to a reduction in the population of the endemic species *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, (aquatic cave snails) and *Eukonenia pretneri*, the cave paligrade, as well as the new Genus of terrestrial isopod found in the cave in 2009'⁶⁴.

33. It appears, for the purposes of PCM RP 20b, that a new EIA is sought, which would include a 'Natura 2000 study' that would ensure compliance with 'EBRD's provisions on protected areas'⁶⁵. The Complaint also suggests that this might ensure 'compliance with due process' as required under ESP PR

⁵⁹ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 3.

⁶⁰ See paragraph 24 above.

⁶¹ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 9.

⁶² *Ibid.*, at 2.

⁶³ According to the Complaint, *ibid.*, 'it is not clear why the bank is considering approving the project *before* such an assessment has been undertaken' (original emphasis). See also, *Friends of the Earth Croatia Complaint*, 17 November 2011, at 7, citing ESP PR 6.14.

⁶⁴ *Ibid.*, at 7-8.

⁶⁵ *Ibid.*, at 7.

6.14⁶⁶. In addition, it states the view that approval of the Project amounts to a breach of ESP PR 6.14, and in particular the stipulation contained therein that: ‘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.’

Thus, this aspect of the Complaint meets the requirements of both PCM RP 20b and PCM RP 20d.

Lack of Strategic Environmental Assessment

34. Regarding the alleged failure by the Croatian authorities to subject the 2008 Croatian Energy Strategy, or the relevant and applicable spatial planning documents, to Strategic Environmental Assessment (SEA), as required under national law, the Complaint contends that

‘any projects which stem from it [the Croatian Energy Strategy] cannot be regarded as having been subjected to proper legal assessment if the whole strategy was not subject to SEA’⁶⁷.

Thus, though the Complainant focuses on the alleged non-compliance in a formal sense, rather than on any specific physical environmental harm caused or likely to be caused by such non-compliance, it seems reasonable in light of the potential harm to biodiversity expressed generally in the Complaint to conclude that this element satisfies the requirements of PCM RP 19b. Of course, the environmental objectives of the EU SEA Directive⁶⁸ are themselves stated in quite broad and non-specific terms:

‘The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.’

Thus, it appears that the EU Directive would regard any failure to conduct SEA where it is required to be harmful *per se*.

35. In addition, the Complainant links the alleged failure to conduct SEA of the Strategy to ESP PR 6.15, which requires that ‘due process leading to such [Project] permission has been complied with’. It is self-evident that specific material harm does not need to be established in the case of an alleged breach

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at 8.

⁶⁸ Directive 2001/41/EC on the Assessment of the Effects of certain Plans and Programmes on the Environment, OJ L 197/30, 27 June 2001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:197:0030:0037:EN:PDF>

On the relevance of the 2001 EU SEA Directive for the EBRD’s 2008 Environmental and Social Policy Performance Requirements, see below.

of ‘due process’, as such breach would inherently impact on the integrity of the relevant decision-making process, and thus on the quality and legitimacy of the decision taken.

36. This section of the Complaint suggests that the entire 2008 Croatian Energy Strategy, as well as the relevant and applicable spatial planning documents, ought to be subjected to SEA in advance of the carrying out of a new EIA, or other complementary studies, for the Ombla HPP Project⁶⁹. This would appear to amount to ‘an indication of the outcome(s) sought’ for the purposes of PCM RP 20b.
37. In relation to the requirement in PCM RP 20d that the Complaint ought to provide ‘details of the Relevant EBRD Policy at issue’, the Complaint contends that the lack of an SEA of the 2008 Croatian Energy Strategy offends ESP PR 6.15 on protected and designated areas and, particularly, against the requirement that the client will:
- ‘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’⁷⁰.

The Complaint points out that the EBRD, in its earlier response to the Complainant’s concerns about the lack of an SEA, referred explicitly to the EU SEA Directive, concluding that ‘the Ombla HPP project itself is not subject to an SEA’⁷¹. This amounts to a recognition by the Bank of the relevance of ESP PR 6.2, which provides that, in pursuing the aims of biodiversity conservation and sustainable management of living natural resources,

‘the Bank is guided by and supports the implementation of applicable international law and conventions and relevant EU Directives ... [including] ... Council Directive 2001/42/EC June 201 on Strategic Environmental Assessment’.

38. As regards the relevance of the SEA Directive to an individual Project, it is worth noting that the European Court of Justice has recently suggested that the failure to conduct an SEA of a plan or programme required under the EU SEA Directive could result in measures preventing related projects from being implemented. In its February 2012 judgment in *Inter-Environment Wallonie ASBL v. Région Wallonne*, which concerned an action for the annulment of a programme for nitrate vulnerable zones adopted by the Belgian Regional Government under the EU Nitrates Directive due to a failure to conduct an SEA, the Court stated:
- ‘The fundamental objective of Directive 2001/42 [SEA Directive] would be disregarded if national courts did not adopt in such actions brought before them ... the measures provided for by their national law, that are appropriate for preventing such a plan or programme,

⁶⁹ *Friends of the Earth Croatia Complaint*, 17 November 2011, at 8.

⁷⁰ *Ibid.*, quoting from ESP PR 6.15.

⁷¹ *Ibid.*

*including projects to be realized under that programme, from being implemented in the absence of an environmental assessment [SEA]'*⁷².

Thus, the Court appears to regard the SEA Directive as part of an integrated and coherent set of due process requirements applying to development planning and approval. It is apparent, therefore, that the Complainant has raised a valid compliance question regarding the implications of ESP PR 6.15 in the present circumstances and has satisfied the requirement of PCM RP 20d.

39. Whereas the Bank would not normally be required to ascertain, in the course of its environmental and social due diligence of Projects, that national authorities have complied with applicable requirements, Performance Requirement 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources appears to impose just such a role. As noted above, PR 6.15 requires in respect of Projects that might impact upon 'protected and designated areas' that the client will:

'demonstrate that any proposed development in such areas is legally permitted and the due process leading to such permission has been complied with by the host country, if applicable, and by the client'.

This wording requires the Bank, in its supervisory role in relation to the Client, to satisfy itself that national authorities have complied with due process requirements for the permitting of Projects, which may include any applicable national or EU rules on SEA⁷³. Indeed, a similar obligation to ascertain compliance by national authorities with legal due process requirements is imposed upon the Bank in respect of a 'critical habitat' under PR 6.14, which stipulates that:

'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'*⁷⁴.

Indeed, in an effort to illustrate the type of due process requirements envisaged, PR 6.14, referring implicitly to the requirements of Article 6 of the EU Habitats Directive, explains that

*'For example, countries may have to demonstrate that no plausible alternatives exist or that the project is in the national interest'*⁷⁵.

Therefore, in the particular context of the onerous safeguards imposed in respect of biodiversity conservation, Performance Requirement 6 requires EBRD to satisfy itself that relevant permits issued by national authorities are

⁷² Case C-41/11, *Inter-Environment Wallonie ASBL v. Région Wallonne*, Judgment of the Court (Grand Chamber), 28 February 2012, at page 6 of 9 of online version (emphasis added), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0041:EN:HTML>

⁷³ See Case C-41/11, *Inter-Environment Wallonie ASBL v. Région Wallonne*, *ibid.*

⁷⁴ PR 6.14 (emphasis added).

⁷⁵ PR 6.14, fn 3, 2008 ESP at 47 (emphasis added).

legally valid and that national authorities followed due process in making the decision to issue such permits.

Conclusion

40. On the basis of the findings set out above, the present Complaint satisfies all of the generally relevant and applicable eligibility criteria set out under PCM RPs 17, 19, 20, 23 and 24 and is, therefore, determined by the Eligibility Assessors to be **eligible** for a **Compliance Review**.
41. In addition, each individual instance of non-compliance alleged under the Complaint satisfies the more specific eligibility requirements set out under PCM RPs 19b, 20b and 20d and each must, therefore, be examined in the course of the Compliance Review.

COMPLAINT: OMBLA HYDROPOWER PROJECT

REQUEST NUMBER: 2011/06

Terms of Reference for the Compliance Review

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert **Mr Graham Cleverly** 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 the EBRD's 2008 Environmental and Social Policy 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 site visits, 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 confine itself to the Compliance Review issues raised in the present Complaint¹. 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.
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. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the provisions of the ESP and of the Performance Requirements contained therein, in respect of which non-compliance is alleged in each of the grounds of complaint deemed eligible in the this Eligibility Assessment Report. Such provisions notably include ESP PR 1, paras. 5 and 9; PR 6, paras. 6, 13, 14 and 15; and PR 10, paras. 10 and 15.
11. 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):

Outdated and illegal Environmental Impact Assessment

- a. Whether EBRD has taken reasonable steps to ascertain that the EIA dating from 1999, and the permit(s) based thereon, are in compliance with the requirements of Croatian national law?

¹ Request No. 2011/06, Ombla HPP. See Annex I to this report.

- b. Whether the ESIA package, disclosed in 2011 and including the 1999 EIA, was sufficient to satisfy PR 1.5 and/or PR 1.9 of the 2008 Environmental and Social Policy (ESP).
- c. Whether, for the purposes of compliance with the 2008 ESP, gaps in knowledge about the potential impacts of the Project, identified under the ESIA package, may be addressed subsequent to Bank approval of the Project, but prior to a final Bank decision on the disbursement of funding?
- d. Whether EBRD's reliance on the 1999 EIA, in combination with further subsequent and planned biodiversity studies, contravenes PRs 1.5, 1.9 or 6.15 of the 2008 ESP.

Failure to hold meaningful public consultation

- e. Whether EBRD relied to a significant degree on public consultation undertaken during the course of the 1999 EIA and whether such reliance was inappropriate for the purposes of meeting the requirements of PR 10 of the 2008 ESP.
- f. Whether public consultation undertaken by the client subsequent to the 1999 Croatian approval of the EIA can constitute meaningful public consultation for the purposes of PR 10 of the 2008 ESP and satisfaction of any relevant and applicable requirements of the Aarhus Convention.²
- g. Whether the public consultation on the 2011 ESIA disclosure package could be meaningful with regard to biodiversity impacts and related mitigation measures if additional biodiversity studies including the additional public consultation process required in the ESAP were scheduled following Board approval, but prior to disbursement of funding and construction of the Project.
- h. Whether the requirement under PR 10.15, providing that “meaningful consultation” involves the disclosure of relevant and adequate information ‘prior to decisions being taken when options are still open’, relates to the Bank’s decision to approve the Project or can include subsequent decisions on the disbursement of funds subject to conditions attached to the Environmental and Social Action Plan (ESAP).
- i. Whether EBRD failed to ensure that the client held meaningful public consultation as required under the 2008 ESP.

Incomplete biodiversity assessment

² The Aarhus Convention is expressly cited under PR 1.5 of the 2008 ESP as an example of ‘host country obligations under international law’.

- j. Whether under PR 6.6 and PR 6.2, and the corresponding requirements of Article 6(3) of the EU Habitats Directive which guide implementation of PR 6,³ the Bank must have conclusively determined that the Project would not adversely affect the integrity of the proposed Natura 2000 site(s), subject to the exceptions listed under Article 6(4) of the Directive, before the Bank may approve the Project.⁴
- k. Whether, PR 6 permits the Bank to approve the Ombla Project subject to contractual conditions requiring satisfactory completion of a biodiversity study approximating to an “appropriate assessment” under Article 6(3) of the EU Habitats Directive and agreement of an appropriate biodiversity management plan before any disbursement of funds takes place.
- l. Whether, in the circumstances of the present Project,⁵ EBRD has justifiably adopted a ‘purposive’⁶ approach to the interpretation and application of the requirements of PR 6 to the Ombla HPP Project, in order to maximize environmental benefits⁷ whilst ultimately meeting the substantive standards of biodiversity protection prescribed, in accordance with the principle of additionality.⁸ Whether the Bank has applied the relevant requirements of the 2008 ESP in a manner consistent with the objectives and intended environmental outcomes of the Policy.
- m. Whether in the circumstances of the present Project, any purposive approach established with regard to the application of PR 6 to the Ombla HPP Project might be regarded as reasonable and proportionate?⁹

³ See PR 6.2, fn. 1, EBRD, Environmental and Social Policy 2008, at 44.

⁴ See, for example, Environmental and Social Policy (2008), para. 3, at 2, which emphasises the Bank’s commitment to promoting EU environmental standards and provides that

‘The EBRD will seek to ensure through its environmental and social appraisal and monitoring processes that the projects it finances ... are designed and operated in compliance with applicable regulatory requirements and good international practice.’

⁵ Whilst any “exceptional circumstances” will remain to be identified under the Compliance Review. The might include, for example, where a Project has been permitted long before the Bank became involved and/or where there have been significant changes in the applicable national legal regime or in the protected status of habitats likely to be affected.

⁶ A ‘purposive’ or ‘teleological’ approach to normative interpretation permits any body charged with interpreting and applying rules to interpret those rules in the light of their underlying purpose. The European Court of Justice routinely takes such an approach to the interpretation of EU environmental legislation and the UK courts take such an approach to interpreting legislation when traditional methods of statutory construction might result in an absurdity, see for example, *Pepper v. Hart* [1993] AC 593.

⁷ See, for example, EBRD Environmental and Social Policy (2008), paras. 2 and 3, at 2.

⁸ See EBRD Environmental and Social Policy (2008), para. 1, at 2.

⁹ The principle of ‘proportionality’ constitutes a fundamental principle of EU law and of many national systems of public and administrative law, from which it has been borrowed by the European Court of Justice. It requires that, in order to be lawful, any action or measure satisfies three tests:

- (a) it must be an appropriate (*i.e.* suitable or effective) measure aimed at a legitimate objective (*e.g.* environmental protection under the 2008 ESP);

- n. Whether EBRD may be regarded as not yet having ‘agreed’ to the Ombla HPP Project within the meaning of Article 6(3) of the EU Habitats Directive, due to making the disbursement of funding conditional on the findings of the biodiversity assessment required under the ESAP. Whether “approval” or “disbursement” of funds corresponds to the analogous “agreement” of a competent permitting authority under Article 6(3).¹⁰
- o. Whether the decision on disbursement of funds for the Ombla HPP Project is to be taken at an appropriately senior level within the Bank’s institutional hierarchy and/or is to be subjected to sufficient institutional oversight, in order for such decision to be capable of corresponding to the analogous “agreement” of a competent permitting authority within the spirit and intent of Article 6(3).

Damage to habitat without adequate justification

- p. Whether the Bank’s conditional approval of the Project constitutes a breach of the onerous requirements for the protection of critical habitats set out under PR 6.14, including the taking of a precautionary approach to appraisal of the Project’s potential impacts.
- q. Whether in the circumstances of the present Project, a measure of flexibility is permitted under PR 6.14 as regards the timing of the due process requirement of comprehensive assessment of adverse impacts.
- r. Whether the measures stipulated under the ESAP might be regarded as sufficient and proportionate having regard to the requirements of PR 6.14.

Lack of Strategic Environmental Assessment

- s. Whether EBRD has taken reasonable steps to ascertain that the Croatian national authorities met all the relevant and applicable due process requirements in granting permits to the Ombla HPP Project.

-
- (b) it must be necessary (*i.e.* it must not go beyond what is strictly necessary to achieve the legitimate objective); and
 - (c) it must be fair and reasonable (and not disproportionate), considering the competing interests and the costs and benefits involved.

The 2008 ESP would appear to envisage a proportionality-type test for deciding whether or not to approve a derogation under Paragraph 30, which provides:

‘In deciding whether to approve any derogation to this Policy, the Board will balance the proposed approach against the overall environmental and/or social costs and benefits of the project.’

¹⁰ While EBRD clearly cannot be regarded as a ‘competent national authority’ within the meaning of Article 6(3) of the EU Habitats Directive, the requirement on the Bank under PR 6.2 of the 2008 ESP to support ‘the implementation of ... relevant EU Directives’, including the 1992 Habitats Directive, suggests that its decisions on funding projects are at least analogous to the decisions of a competent national authority on permitting projects.

12. The Compliance Review Expert will also determine the precise scope, having regard to the circumstances of the present Project, of any permissible exception to or alternative approach to the requirement to conduct an appropriate environmental and social appraisal of a Project, setting out final and definitive findings regarding likely impacts and required mitigation measures, in advance of its approval by the Bank. For example, Performance Requirement 1 on Environmental and Social Appraisal and Management provides that the Bank ‘may agree with the client during appraisal a management of change process’ for Category A projects¹¹ and further recognises that corrective and preventive actions may be identified as necessary by virtue of the required ‘procedures to monitor and measure compliance with the environmental and social provisions of the legal agreements including effective implementation of the ESAP and the PRs’.¹²
13. Notwithstanding Paragraph 11 above, the Compliance Review Expert retains the authority to identify and frame the precise compliance questions to be addressed in the course of the Compliance review. However, any elements which are beyond the scope of the Complaint will be excluded.

Procedure: Conduct of the Review

14. 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:
- a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with the elements of the 2008 Environment and Social Policy in respect of which the Complaint alleges non-compliance;
 - b. Review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - c. 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;

¹¹ PR 1, para. 15, at 19.

¹² PR 1, paras. 20-21, at 20-21.

- d. Solicit additional oral or written information from, or hold meetings with, the Complainant, any Relevant Party and any party, such as the competent national authorities responsible for protected areas and for the permitting of such projects;
- e. Conduct a visit to the Project site to ascertain facts accompanied by such officials of the Bank, the Complainant or his representatives or the Client, or other persons, as he may consider necessary and appropriate;
- f. Request the PCM Officer to retain additional expertise if needed;
- g. 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;
- h. Take any other action as may be required to complete the Compliance Review within the required time-frame.

Procedure: General

- 15. 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.
- 16. 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.
- 17. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all parties involved in the Compliance Review process, including relevant Bank staff.

18. Generally, Bank staff 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 relating to submission of written materials, provision of information and attendance at meetings. It is expected that all Relevant Parties will make best efforts to cooperate with the Compliance Review Expert, who will report to the PCM Officer where the actions or lack of action by any Relevant Party hinders or delays the conduct of the Compliance Review.

Compliance Review Report

19. In accordance with PCM, RP 38, the Compliance Review Report shall include a summary of the facts and of the allegations in the Complaint, and the steps taken to conduct the Compliance Review.

20. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint(s) and shall be strictly impartial.

21. 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

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.

Annex I – Complaint

17 November 2011

Project Complaint Mechanism
Attn: PCM Officer
European Bank for Reconstruction and Development
One Exchange Square London
EC2A 2JN Fax:
+44 20 7338 7633
E-mail: pcm@ebrd.com

Complaint to the EBRD's Project Complaint Mechanism regarding the Ombla hydropower project, Croatia

1. Name of the Person(s) or Organisation(s) filing the Complaint (“the Complainant”).

Zelena akcija/Friends of the Earth Croatia

2. Contact information of the Complainant (please include email address and phone number if possible).

Mr Enes Ćerimagić,
Zelena akcija/Friends of the Earth Croatia
Frankopanska 1 pp.952
10 000 Zagreb
Croatia
Tel: + 385 (0)1 4813-096
Mob: + 385 (0)99 8065426,
enes@zelena-akcija.hr

3. Is there a representative making this Complaint on behalf of the Complainant?

No.

4. Are you requesting that this Complaint be kept confidential?

No.

5. Please provide the name or a description of the EBRD Project at issue.

Ombla HPP. The project is due to be approved on 22 November 2011.

6. Please describe the harm that has been caused or might be caused by the Project

The proposed project involves constructing an underground hydropower plant near Dubrovnik in Croatia. The Vilina cave system and the Ombla river spring at the site are part of a proposed **Natura 2000 site**, and the project's influence impact on flora and fauna in the local karst system is expected to be significant, due to disruptive construction works involving the use of explosives and changing water levels. Among the issues of concern are five species of protected bats and *Proteus anguinus*, the

cave salamander, classed as 'vulnerable' on the IUCN Red List. (IUCN Red List (VU); FFH Directive: Annex II, IV; Bern Convention: Annex II), *Troglocaris anophthalmus*, the cave shrimp, (IUCN Red List (VU)) and *Congerius kusceri*, the cave clam (FFH Directive: Annex II, IV). Among other cave species four taxa are found only in the Vilina Spilja - Ombla spring, and nowhere else in the world: *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, (all three are aquatic cave snails) and *Eukonenia pretneri*, the cave paligrade. Proof that the cave is far from being fully explored is the fact that a new Genus of terrestrial isopod found in the cave in 2009.

It should be noted here that the Environmental Impact Assessment for the project dates from 1999 and is thus outdated and no longer legally valid (see section below on breaches of EBRD policies for more details).

Also, a biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive has not yet been completed. The EBRD appears to accept that the completion of this study and adoption of mitigation measures will resolve outstanding issues. Apart from the fact that we are not convinced by this (see section on biodiversity assessment below), it is not clear why the bank is considering approving the project *before* such an assessment has been undertaken.

7. If you are requesting the PCM's help through a Problem-solving Initiative, you must have made a genuine effort to contact the EBRD or Project Sponsor regarding the issues in this complaint.

a. Have you contacted the EBRD to try to resolve the harm caused or expected to be caused by the Project? Is the written record of this contact with the EBRD attached to your complaint?

b. Have you contacted the Project Sponsor to try to resolve the harm caused or expected to be caused by the Project? Is the written record of this contact with the Project Sponsor attached to your complaint?

We are not requesting a Problem-solving Initiative. Nevertheless we have contacted the EBRD and the project sponsor, Hrvatska Elektroprivreda (HEP), regarding this project.

Communication with the EBRD about this project has been undertaken by several different groups such as, the Croatian Biospeleological Society, NGO Grad from Dubrovnik and CEE Bankwatch Network, but direct communication between Zelena akcija, the EBRD and the project sponsor has been as follows:

8 September 2011: As part of the commenting period in which the EBRD made available the Environmental Impact Assessment, Zelena akcija submitted comments¹ to EBRD staff and the Project Sponsor as follows:

Philip Lam, Operations Leader
Olga Filippova, Civil Society Adviser,
Alistair Clark, Corporate Director, Environment and Sustainability Department,
Riccardo Puliti, Managing Director, Energy,
Tomislav Pavisa, HEP.

¹ The comments are available at: http://zelena-akcija.hr/uploads/zelena_akcija/document_translations/000/000/768/Ombla_H_PP_Comments_ZA_FoE.pdf?1319638049

09 September 2011: A short holding response was received from Mr Puliti (see Annex 1).

10 October 2011: A meeting was held between the Project Sponsor, HEP, and NGOs. Mr. Jack Mazingo from the EBRD was also present at this meeting. Unfortunately the meeting did not resolve our concerns.

26 October 2011: Having received no response to the substance of our concerns from the EBRD, and seeing that the EBRD's website indicates the bank's intention to proceed with the project approval on 08 November 2011, Zelena akcija, supported by 33 other Croatian and international organisations, sent an open letter to the EBRD's staff and Board of Directors, with a copy to the Project Sponsor.²

31 October 2011: A short response was received from Mr Philip Lam of the EBRD (see Annex 2). The response promised more information in due course but did not address our concerns as it mentioned only discussing the issues with the project sponsor, and minimising and mitigating them. This is not sufficient, as the Environmental Impact Assessment for the project does not meet current EU and Croatian legal requirements – an issue that requires more than discussions with the project sponsor to address.

08 November 2011: A full response was received from Ms Biljana Radonjic Ker-Lindsay in table format.³ The table laid out a summary of comments submitted to the EBRD and to HEP during recent months and provided responses. While the explanations were useful they did not resolve our most serious concerns, as explained below.

If you have not contacted the EBRD and/or Project Sponsor to try to resolve the harm or expected harm, please explain why.

N/A

If you believe the EBRD may have failed to comply with its own policies, please describe which EBRD policies.

Primarily we would argue that the EBRD has failed to comply with its Environmental and Social Policy 2008. We lay out here the Performance Requirements that we believe have been breached, with a short explanation of our reasoning.

Outdated and illegal Environmental Impact Assessment

Ombla HPP project is based on an EIA which dates from 1999. Since this time major changes in Croatian legislation and the social, environmental and political situation have occurred. This means that the EIA contravenes several clauses of the EBRD's 2008 Environmental and Social Policy:

- *PR 1.5. The appraisal process will be based on recent information [...].*
- *PR 1.9 The Environmental Impact Assessment (EIA)/Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws.*
- *PR 6.15. Areas may be designated by government agencies as protected for a*

2 The letter is available at: http://zelena-akcija.hr/uploads/zelena_akcija/document_translations/000/000/766/OpenLetterOmblaFINAL.pdf?1319639090

3 Available at: <http://bankwatch.org/documents/EBRDresponse-OmblaHPP-07Nov2011.pdf>

variety of purposes, including to meet country obligations under international conventions. Within defined criteria, legislation may permit development in or adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will: [.....]

- *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; [...]*

The EIA procedure in Croatia is governed by two pieces of legislation: the Environmental Protection Act (EPA) and Governmental Directive on Environmental Impact Assessment (GDEIA). The former provides the rationale and basic requirements for an EIA procedure and the latter provides detailed instructions for the successful execution of the EIA. At the time of conducting the 1999 EIA the Acts applicable were the 1994 EPA (Official Gazette # 82/94 and #128/99) and 1997 GDEIA (Official Gazette # 34/97 and #37/97). In the case of the Ombla HPP project HEP is operating under the assumption that the 1999 EIA is still valid. The reason for this wrong assumption could be the fact that neither the 1994 EPA nor 1997 GDEIA have provisions about the temporal validity of the EIA whereas the new 2007 EPA prescribes that the EIA is valid only if the project commences within two years of the finishing of the EIA process.

However, there are at least two legal arguments that old EIAs cannot be used:

1. The Ordinance on Environmental Impact Assessment (Official Gazette # 59/00, # 136/041 and # 85/06) which has superseded the 1997 GDEIA (under which the Ombla HPP EIA was conducted) clearly states in Article 25. paragraph 2. that **“An EIA study conducted in compliance with the GDEIA (Official Gazette # 34/97 and # 37/97) rules can be used as an expert document for the Environmental Impact Assessment for three months upon the entry into force of this Ordinance”**. (i.e. until 12th September 2000.)
2. The fact that the 1994 EPA has no provisions on the temporal validity of an EIA does not allow for the interpretation that EIAs conducted in compliance with the 1994 EPA are without expiry. This would lead to unacceptable consequences where theoretically a 30 year-old EIA conducted in 1981 would be valid but a 3 year-old EIA conducted in 2008, after the passing of the 2007 EPA, would not. That this should not be interpreted in such a manner follows not only from plain logic but also from the 'final and transitional provisions' of the 2007 EPA. In Article 228. paragraph 3. it is stated that **legislation passed in compliance with the old 1994 EPA can be used until new legislation in compliance with the new 2007 EPA is passed only if it does not collide with the provisions of the new 2007 EPA**. An interpretation that EIAs are without expiry would be in direct contradiction with the provision of Article 80 of the 2007 EPA which states that EIAs are valid for two years and can only be extended once for another two years.

In 2008 a similar case of the 1986 EIA for the HPP Kosinj was overturned by the Ministry of Environmental Protection, Spatial Planning and Construction, noting that such an old EIA is no longer valid and that a new EIA process compliant with current legislation should be prepared. We intend to challenge the EIA process for Ombla in court if HEP proceeds with the project.

While the EBRD has clearly made efforts to ensure that additional studies will be carried out, these cannot be a substitute for a legally valid EIA.

In response to this point, the EBRD/HEP has pointed out that:

“HEP recognizes that conditions are different at present than at the time of the original EIA. However, it is important to note that the Ministry of Environment, Spatial Planning, and Construction found the EIA met then -current requirements and has stated that the permits issued as a result of the 1999 EIA and further required studies remain valid. This Ministry and the Ministry of Culture have also reported there is no legal basis under Croatian law to require further studies or assessments.” (Response 07 November 2011)

We do not find this sufficient and if HEP moves ahead with the project we intend to challenge the validity of the EIA in a court of law. It is not beyond the realm of possibility that the Ministries are mistaken in their assessment of the requirements of Croatian EIA legislation, particularly given that a state-owned company is involved, for which it is surely in the government's interest that the procedures run as smoothly as possible.

Failure to hold meaningful public consultation

Croatia is a party to the Aarhus Convention, which is reflected in the Croatian Law on Environmental Protection (Official Gazette No. 110/07). However as a result of the EIA process being carried out in 1999 and the piecemeal approach to updating environmental information being undertaken for the project, the public has not been sufficiently included in decision-making. As well as violating the Aarhus Convention, this means that the project contravenes several clauses of the EBRD's 2008 Environmental and Social Policy:

- *PR 1.5. The appraisal process will be based on recent information, including an accurate description and delineation of the client's business or the project, and social and environmental baseline data at an appropriate level of detail.*
- *PR 1.9 The Environmental Impact Assessment (EIA)/Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws.*
- *PR 10.10. In the case of Category A projects the client will engage in a scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the Environmental and Social Impact Assessment (ESIA) process. The scoping process will also facilitate development of a Stakeholder Engagement Plan for the project. As part of the scoping process, stakeholders should be able to provide comments and recommendations on the draft Stakeholder Engagement Plan and any other scoping documents.*
- *PR 10.15 Meaningful consultation:*
 - *should be based on the disclosure of relevant and adequate information including, where appropriate and relevant, draft documents and plans, prior to decisions being taken when options are still open*
 - *should begin early in the environmental and social appraisal process*

As we have seen above, the EIA is not compliant with current EIA legislation due to its age. Although the EBRD and HEP have tried to make up for this by publishing the EIA for a commenting period and by holding presentations of the project, none of these steps fulfil the definition of 'meaningful consultation' or comply with the Aarhus Convention.

This is for two reasons:

1) Public participation has been not been undertaken *prior to decisions being taken when options are still open*

Project presentations took place in September 2011, on the Environmental and Social Action Plan; Stakeholder Engagement Plan⁴ and Non-Technical Summary of the EIA. Yet the EIA has already been approved on the national level, and there is therefore no legal process in place which would ensure the incorporation of comments received or explanation as to why they have not been included. To provide for public participation in such circumstances cannot be compatible with the Aarhus Convention because by then public participation is neither early nor effective and major options are no longer open. The EBRD has denied that this is the case:

“As noted in responses to other comments, a further biodiversity study will be undertaken, in part because the site has now been proposed for protection under Natura 2000. This study will include a comprehensive evaluation of data in order to determine if further mitigation is needed, whether specific mitigation measures can reduce or control impacts to an acceptable level, and/or whether compensation should be provided for unavoidable impacts. This process will allow any number of options to be considered, so it cannot be said that options are no longer open.” (Response 07 November 2011)

Clearly there are still options for mitigation measures, however it is very unlikely that the zero option ie. the project not going ahead, will be seriously considered at so late a stage, after some environmental permits have already been obtained, and after the EBRD has approved financing.

It is unclear how the Natura 2000 study could impact on the permits that have already been issued. Thus we do not agree that major options are still open.

2) Public participation has not been based on *disclosure of relevant and adequate information* and appraisal cannot have been based on *environmental baseline data at an appropriate level of detail*.

Much of the *relevant information* and *environmental baseline data at an appropriate level of detail* is simply missing because the Natura 2000 study and other baseline studies have not been undertaken yet. The Environmental and Social Action Plan acknowledges this by stipulating that HEP must, before construction: *“Undertake pre-construction ecological surveys to establish a robust baseline (note: EIA includes an equivalent requirement). Include surveys of:*

- *Terrestrial ecosystems*
- *Aquatic ecosystems*
- *Protected bat species*
- *additional surveys of the locations and extent of species populations in the caves affected by the Ombla HPP - Protected Proteus anguinus (Cave salamander).*
- *Birds*
- *Undertake additional analysis on whether the measures that have already been identified to mitigate impacts on flora and fauna are sufficient to avoid potential effects upon the Natura 2000 site. Based on results, prepare plan required by item 6.2.”*

⁴ The Environmental and Social Policy mentions commenting on the Stakeholder Engagement Plan as part of the scoping process. However here there appears to have been no scoping process – not surprising considering that the EIA process was already finished over a decade ago – and the Stakeholder Engagement Plan was published at the same time as the EIA and the Environmental and Social Action Plan.

Such studies should have been prepared **before** public consultations on the EIA, and consultations should have taken place **before** an environmental permit was issued for the project. Trying to correct the situation with piecemeal studies and consultations cannot be a substitute for a properly carried out EIA process. An example from a previous hydroelectric project, the Lešće HPP on the River Dobra – also involving HEP - illustrates this point: In spite of a 2007 recommendation from the Bern Convention not to go ahead with the HPP construction, HEP went ahead. The company agreed to undertake a new biodiversity study, however when asked by a representative of Zelena akcija (Green Action) whether it would wait for the results before continuing with the construction, the answer was “No, of course not”. It is insufficient to rely on a series of piecemeal studies and consultations that take place after the EIA process is completed. There is no way to correct this situation in a legally acceptable manner except by starting the Environmental Impact Assessment procedure from the start.

Incomplete biodiversity assessment

The fact that the biodiversity assessment is incomplete is evidenced by the Environmental and Social Action Plan, which stipulates that HEP must, before construction: “*Undertake pre-construction ecological surveys to establish a robust baseline (note: EIA includes an equivalent requirement). Include surveys of:*

- *Terrestrial ecosystems*
- *Aquatic ecosystems*
- *Protected bat species*
- *additional surveys of the locations and extent of species populations in the caves affected by the Ombla HPP - Protected Proteus anguinus (Cave salamander).*
- *Birds*
- *Undertake additional analysis on whether the measures that have already been identified to mitigate impacts on flora and fauna are sufficient to avoid potential effects upon the Natura 2000 site. Based on results, prepare plan required by item 6.2.”*

This means that the EIA has been approved on the national level and the EBRD is about to approve the project in the absence of detailed, comprehensive and up-to-date information.

In our opinion this is in breach of the EBRD's Environmental and Social Policy 2008:

- *PR 6.6. 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.*

The EBRD believes that this will be addressed as follows: “*At the same time, the ESAP to which HEP has agreed, and which will be part of the legal financing agreement with EBRD, will not allow construction that will affect the areas proposed for protection as Natura areas until a biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive is completed and there is adequate mitigation to the integrity and the conservation objectives of the sites, or compensation to ensure overall coherence of the Natura 2000 network is protected.*” (Response 07 November 2011)

Again the emphasis is on mitigation measures and does not address the question of what will happen if the study finds that the project is too harmful to the Natura 2000 site to proceed with. It also does not address the point raised above about how this study would legally be able to impact on those environmental permits already issued.

Damage to habitat without adequate justification

The EBRD Environmental and Social Policy 2008 distinguishes between *natural habitats, protected areas, and critical habitats*. The Vilina Cave - Ombla Spring, as a planned Natura 2000 area and the only known habitat globally for the aquatic cave snails *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, and *Eukonenia pretneri*, the cave palpi grade, fits all of these categories.

The EBRD and HEP argue that “*No activities will be undertaken in Vilina Cave; in addition, Croatian authorities are requiring steps to be taken to ensure that water levels cannot rise to the level of this Cave, and also to ensure that no construction takes place near the cave when bats are active.*” This will be impossible to independently monitor. The EBRD and HEP do admit that: *There will be some level of effects on the karst cave system. For example, the water level is expected to rise up to 100 meters upgradient of the grout curtain “dam”, and the transition zone that is currently flooded part of the time will move upward. In addition, the portion of the karst downgradient of the grout curtain “dam” will become dry for more of the year than is presently the case.*” They also point to the Natura 2000 study that should be carried out before going ahead with the construction.

We have already argued in the section on the *Outdated and illegal Environmental Impact Assessment* that the illegality of the EIA means that **the EBRD's provisions on protected areas are being breached.**

In addition, we believe that the Vilina Cave – Ombla Spring area fits the EBRD's criteria on critical habitats as follows:

- *PR 6.13. 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 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).*

If so:

- *PR 6.14. 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.*

As outlined in detail above and below on the sections on EIA and SEA, *compliance with due process* has not been complied with in this case.

There is too little information available to give a definitive opinion on *all* the adverse impacts on the Vilina Cave – Ombla Spring habitat from the Ombla HPP project, however it seems reasonable to argue that there are likely to be serious changes in the habitat due to changes in water levels and seriously disruptive construction work. This may lead to a reduction in the population of the endemic species *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, (aquatic cave snails) and *Eukonenia pretneri*, the cave palpigrae, as well as the new Genus of terrestrial isopod found in the cave in 2009.

Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local spatial planning documents.

The EBRD in its Country Strategy for Croatia recognizes that “*efforts to implement the SEA need to be stepped up*” but by financing the energy sector boosts breaches of EU and Croatian SEA legislation. The 2008 Croatian Energy Strategy – one of the most important state programmes with the most significant environmental impacts - still has not been subject to a Strategic Environmental Assessment procedure and therefore none of the projects which arise from that strategy, are fully compliant with the EU *acquis communautaire*. Neither has an SEA been prepared for the current spatial planning documents that allow the construction of the HPP in that area.

In our opinion this is in breach of the following Performance Requirement (our emphasis):

- *PR 6.15. 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 adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will: [.....]*
 - ***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; [.....]***

The EBRD and HEP responded to the lack of SEA as follows:

“Under the Environmental Protection Act (OG 110/07), the Government of the Republic of Croatia in June 2008 adopted the Regulation on strategic environmental assessment of plans and programmes (OG 64/08), the Regulation on information and participation of the public and public concerned in environmental matters (OG 64/08) and the Ordinance on the Committee for Strategic Assessment (OG 70/08), with which the provisions of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment were fully transposed into Croatian legislation.

EBRD acknowledges the importance and benefits of Strategic Environmental Assessment (SEA) as a key tool for sustainable development and for assessing the cumulative impacts of plans and programmes on the environment, including SEAs prepared according to EU SEA Directive or the Protocol on Strategic Environmental Assessment (Kiev, 2003) to the Convention on Environmental Impact Assessment (EIA) in a Transboundary Context. Whereas the Bank does not have ownership of such plans and programmes, it will liaise with governments, regional bodies and those multilateral institutions most appropriately placed to use SEAs as a government decision making tool and will structure its projects in accordance with the conclusions of relevant SEAs, where available.

Considering the Ombla HPP project itself is not subject to an SEA and that it has valid permits based on the 1999 EIA approval, the completion of the SEA on the Croatian Energy Strategy is not deemed to be a legal requirement for the implementation of the project.”

We would not agree with this conclusion. As the Croatian National Energy Strategy was approved in October 2009, well after the relevant legislation on SEA was adopted, it was a legal requirement to carry out this process on the Strategy. Thus any projects which stem from it cannot be regarded as having been subjected to proper legal assessment if the whole strategy was not subject to SEA.

Please describe any other complaints you may have made to try to address the issue(s) at question (for example, court cases or complaints to other bodies).

None at present. We are currently considering further options.

Are you seeking a Compliance Review where the PCM would determine whether the EBRD has failed to comply with its Relevant Policies?

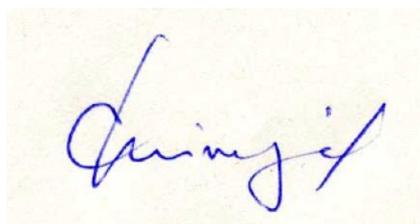
Yes

Are you seeking a Problem-solving Initiative where the PCM would help you to resolve a dispute or problem with the Project?

No

What results do you hope to achieve by submitting this Complaint to the PCM?

It is our hope that by mobilising the PCM to examine these issues in detail, that it will become clear that the EBRD cannot finance the project in its current form and be in compliance with its own policies. As a result we expect that the EBRD will not finance the project, at the very least until a new Environmental Impact Assessment has been carried out.

A handwritten signature in blue ink, appearing to read 'D. M. J. J.', is written on a light-colored rectangular background.

Annex 1

----- Original Message -----

Subject: RE: Comments on Ombla HPP, Croatia
Date: Fri, 9 Sep 2011 07:11:23 +0100
From: "Puliti, Riccardo" <pulitir@ebrd.com>
To: "Enes Cerimagic" <enes@zelena-akcija.hr>

Dear Mr. Cerimagic,

Thank you for your kind message and the comments you provided us. I am forwarding this to Ms Radonjic who will provide you with the answers in due time.

Best regards,

Riccardo Puliti

Annex 2

----- Original Message -----

Subject: RE: Open letter on the planned Ombla hydroelectric plant (HPP)
Date: Mon, 31 Oct 2011 09:48:13 -0000
From: Lam, Philip <LamP@ebrd.com> <<mailto:LamP@ebrd.com>>
To: Zelena akcija <za@zelena-akcija.hr> <<mailto:za@zelena-akcija.hr>>
CC: Filippova, Olga <FilippoO@ebrd.com> <<mailto:FilippoO@ebrd.com>> ,
Mozingo, Jack <MozingoJ@ebrd.com> <<mailto:MozingoJ@ebrd.com>>

Dear CSO representatives,

Thank you for your interest in the Ombla HPP project which is under consideration by the EBRD and submitting your comments. Please note that all the comments we receive will be summarised along with the results of due diligence for the Board of Directors to take into account as part of their decision-making process.

In addition, we are discussing the concerns raised with HEP, the Borrower, and the most appropriate ways of minimising or mitigating the issues raised as well as how the agreed action plan will be monitored. We will work to provide additional information regarding such issues in due course.

Regards

Annex 2 – Bank’s response

DOCUMENT OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Project	42219 Ombla Hydropower Project, Croatia
Project Team	Operation Leader: Philip Lam OGC: Jelena Madir ESD: Jack Mazingo, Michaela Bergman, Mark King, Mikko Venermo
Date of issue to ExCom	9 December 2011
Date of approval by ExCom	15 December 2011
To: PCM Officer	Anoush Begoyan
From: Corporate Director, ESD Director, PEU	Alistair Clark Nandita Parshad
Date of issue to PCM Officer	19 December 2011

Thank you for your email dated the 23th November 2011, regarding the request for a compliance review of the Ombla Hydropower Project under the EBRD Projects Complaints Mechanism (PCM) by Zelena akcija/Friends of the Earth Croatia. This complaint was officially registered on the 24st November 2011 and this is the ‘Bank Response’ to the Complaint as outlined in *PCM: Rules of Procedure* (Clause 15).

The letter of complaint raises a number of points regarding compliance with EBRD Environmental and Social Policy. The initial paragraphs of this “Bank Response” describe the complex hydropower project and its setting. The remainder demonstrates that there have been no breaches of EBRD Policy and that the project is structured so as to apply the precautionary principle and to minimise the impact of the Ombla project on proposed Protected Areas and potentially sensitive ecosystems and to comply with Croatian law and EBRD Performance Requirements.

The Ombla Hydropower Project

The proposal involves construction and operation of the 68MW Ombla hydroelectric power plant near Dubrovnik, Croatia, by Hrvatska Elektroprivreda d.d. (HEP), Croatia’s state-owned electric utility company. The broader area around the location of the project – Ombla Spring, the Vilina Cave on the mountainside above the Spring, and the Ombla-Vilina karst complex inside the mountain – are all part of the Dinaric Karst Transboundary Aquifer System. Since the time initial permits were issued to the facility, these sites have been nominated by the Croatian Ministry of Culture to be part of the Natura 2000 network upon Croatia’s anticipated accession to the European Union in 2013. All construction will be in Croatia.

The project involves construction of a grout curtain “dam” in the mountain that lies at the head of the Rijeka Dubrovačka bay of the Adriatic Sea, approximately two kilometres from Dubrovnik. The underground “dam” will be 130 meters high x 1300 meters across and will cause the water table to rise about 100 meters for the four kilometres to the border with Bosnia and Herzegovina and for a short distance in that

country. An underground cavern will be excavated for the powerhouse; existing underground conduits that convey water from the aquifer to the Ombla Spring will be blocked with grout, and new tunnels to convey water to and from the powerhouse will be driven. Above ground facilities will include drilling sites where grout will be injected into the underground, access roads, a storage/laydown area, and an underground transmission line to connect the plant to the national grid. In addition, the project includes construction of an expanded conveyance and a filter plant for drinking water which will triple the potable water supply for Dubrovnik and significantly improve its quality. This component of the project will be operated by the local water authority.

Compliance with EBRD Environmental and Social Policy 2008 and Performance Requirements

Complaint 1: Outdated and illegal Environmental Impact Assessment

(citing violations of PRs 1.5, 1.9, 6.15 and expressing concerns that Croatian EIA and nature protection laws have changed since the EIA was accepted by Croatian authorities, and the age of the EIA and thus its relevance to current conditions)

Management response

This complaint has two separate foci, one legal and the other on timing and adequacy of the EIA. Each is addressed separately.

Legal applicability of the ESIA and permits (with reference to PRs 1.9 and 6.15). Just as HEP acknowledged in the response to comments posted on their website, as cited in the Complaint, EBRD also recognizes that “conditions are different at present than at the time of the original EIA,…” This was intended to acknowledge that the Croatian legal framework for environmental impact assessment and for nature protection has changed since the time of the ESIA, and that the project area has been proposed for protection under the Natura 2000 ecological network. However, this does not contradict the validity of the 1999 permit, particularly in light of the shared opinions of Croatian authorities and the Bank’s legal advisors.

During initial environmental and social due diligence for the project, the Bank’s consultants met with officials of the Ministry of Environmental Protection, Spatial Planning, and Construction. At that meeting, officials informed the consultants that they considered the permits issued following the 1999 EIA to be legally valid and in effect. This was later repeated by the officials to representatives of the Bank, and the officials also reported they had no legal basis to require further impact assessment for actions previously permitted.

The Bank retained outside counsel to examine the legal effectiveness of the permits and whether subsequent laws would require further or additional environmental reviews and permitting. The remainder of this response to the legal issues raised in Complaint 1 addresses the specific legal issues raised in the Complaint.

1. Ordinance on Environmental Impact Assessment

While the Complaint correctly cites the second sentence of Article 25 of the Ordinance on Environmental Impact Assessment (Official Gazette Nos. 59/00, 136/04

and 85/06) (the “Ordinance”), which stipulates that “[t]he EIA study prepared pursuant to the Government Directive on Environmental Impact Assessment may be used as an expert basis for the assessment of environmental impact for three months following the date of this Ordinance”, it omits the first sentence of the same Article 25, which states that “[m]easures assessing the environmental impact that had commenced before this Ordinance came into force, shall be completed pursuant to the Government Directive on Environmental Impact Assessment (Official Gazette Nos. 34/97 and 37/97).”

The EIA commenced before the Ordinance came into force in 2000 and, as a result, was completed pursuant to the then-existing Government Directive on Environmental Impact Assessment (the “1997 Directive”). Moreover, the EIA was prepared in May 1999 and was further approved on 25 November 1999 by the Committee that was appointed pursuant to the then-applicable Environmental Protection Act (Official Gazette Nos. 82/94 and 128/99) (the “1994 Act”). On 30 November 1999, the State Directorate for Environmental Protection issued a decision stating that the construction of the Ombla HPP was acceptable for the environment (the “Decision”). As such, before the Ordinance came into force, the EIA for the Ombla HPP had already been completed and approved by the relevant bodies.¹ Consequently, the three-month validity period mentioned in the second sentence of Article 25 of the Ordinance does not apply to the Ombla project. It is important to note that this interpretation is supported by Croatia’s Ministry of Environmental Protection, Physical Planning and Construction, which in its letter from 5 December 2011 to the Bank’s outside counsel in Croatia confirmed that “[t]he request for the environmental impact assessment was submitted before the Ordinance [on Environmental Impact Assessment] came into force, as a result of which the provision set forth in the second paragraph of Article 25 does not apply to the study [on the Ombla HPP], but to those studies for which no request for the environmental impact assessment had been submitted before the Ordinance came into force.”

Notably, also, the location permit, principal permit, and two construction permits for the construction of the Ombla HPP were granted by the Ministry of Environmental Protection, Physical Planning and Construction in 2006, 2010, and 2011, respectively, which further supports the finding of the validity of the EIA.

2. Environmental Protection Act

Section (1) of Article 237 of the Environmental Protection Act currently in force (Official Gazette No. 110/07) (the “2007 Act”) states that “any procedures initiated under the 1994 Act and before the 2007 Act had come into force, shall be completed pursuant to the provisions of the 1994 Act.” Thus, despite the entry into force of the 2007 Act, the 1994 Act would have applied to any procedures already initiated for the Ombla HPP.

The Complaint states that “[a]n interpretation that EIAs are without expiry would be in direct contradiction with the provision of Article 80 of the EPA which states that EIAs are valid for two years and can only be extended once for another two years.” This excerpt from the 2007 EPA omits the section of Article 80 that states that “[a]

¹ If the EIA had not been fully completed, but only in initial stages, it still would have fallen under the first sentence of Article 25 of the Ordinance and would have been completed pursuant to the 1997 Directive, and not the Ordinance.

decision on the acceptability of the project's impact on the environment . . . ceases to be valid if, within two years from the date on which such decision became valid and binding, *a request for the location permit . . . has not been submitted.*" (emphasis added)

Even if the 2007 Act were to apply, HEP submitted its request for the location permit in July 2000, i.e., within two years from the date on which the Decision was rendered. Therefore, it meets the requirements of Article 80.

Finally, the Complaint argues that "[i]n 2008, a similar case of the ... EIA for the HPP Kosinj was overturned by the Ministry ..." The Kosinj case is different from, and cannot be compared to, the Ombla HPP because the entire political system and laws drastically changed in Croatia in the early 1990s, right in the midst of when the Kosinj case was undergoing its permitting procedure (the environmental impact study for Kosinj was done in 1988). In addition, the Ombla HPP is further down the permitting procedure – by way of comparison, in the Kosinj case, the first request for the construction permit was denied by the competent authority, whereas in the Ombla HPP case, two construction permits have already been granted, with the most recent one being granted in May 2011, which is suggestive of the authorities' support for the project and validity of the EIA.

Adequacy of 1999 EIA (with reference to PRI.5) The "gap analysis" conducted by the Bank's international consultant identified a number of areas where the 1999 EIA, including the associated 2007-2008 biodiversity study for Vilina Cave, were not fully compliant with the requirements of the EU EIA Directive and EBRD's 2008 Environmental and Social Policy and associated Performance Requirements. These include missing or inadequate evaluations of impacts due to noise, occupational health and safety, land acquisition/resettlement, and several other areas of concern, including emergency response planning. By far the most important area of concern, however, was the potential impact the project could have on biodiversity, both in the karst system (Ombla Spring, Vilina Cave, and the Ombla-Vilina underground complex) now proposed for protection, and in the downstream Rijeka Dubrovačka. Because there was no legal basis for requiring HEP to undertake a new impact assessment and because most of the potential impacts could be readily identified and mitigated, the Bank determined to focus future study on the biodiversity issue and to structure the project so that any biodiversity impacts could not occur until after the potential for these impacts had been thoroughly evaluated, disclosed, and addressed in a process in line with that required by the EU Habitats Directive.

The remaining potential impacts, including those not covered in the EIA, were summarized in the Non Technical Summary, which also described actions that would be taken to avoid, reduce, or otherwise mitigate these impacts. These actions were also required to be implemented by the agreed Environmental and Social Action Plan, which includes the requirement for a biodiversity study that fulfils the intent of the Habitats Directive and current Croatian law. Thus, the project is structured so it can proceed only if the project can meet the Bank's Performance Requirements, including those cited by the Complaint.

Complaint 2: Failure to hold meaningful public consultation

(citing PRs 1.5, 1.9, 10.10, and 10.15 and expressing concerns that decisions have been taken and options are no longer open, and that information disclosed was not adequate and relevant, with environmental information at an appropriate level of detail)

Management response

Again, the response will address each of the two components of the Complaint.

Decisions are taken and options not open (with reference to PRs 1.9, and 10.15).

The Complaint's central premise, that decisions are final and the disclosure process is complete, is not correct. The EBRD's Board of Directors approved the project on 22 November 2011. Consistent with that approval, the financing agreement between the Bank and HEP includes both the agreed ESAP and explicit conditions that must be met before the Bank will provide financing. To that end, HEP have agreed to undertake no activities that could have a material adverse effect on the proposed Natura areas (both surface and underground components), and EBRD will not disburse funds that could result in such activities, until the completion of a biodiversity study that fulfils the intent of the Habitats Directive satisfactory to the Bank. That, in turn, means that any potential impacts will be fully described and mitigated. If there are significant adverse effects that cannot be mitigated and the project is deemed to be of sufficient public importance, appropriate compensation, as intended by the Habitats Directive, will be provided. This process will be fully transparent, in keeping with the Habitats Directive. The Croatian competent authority will be appropriately involved and other stakeholders consulted during the process.

For these reasons, therefore, decisions on the biodiversity issues cannot be considered to be final; there will be adequate time to study, provide information, and discuss options and any necessary mitigation measures with stakeholders. The fundamental decision of whether to proceed with fully funding the project has not been made. Options are also open concerning the selection of construction techniques and the ultimate design of the project if these are considered to be necessary to mitigate adverse effects and/or to compensate for unavoidable effects. Only if such options exist can HEP move forward with Bank financing.

With regard to the complaint that meaningful consultations should be based on recent information and in compliance with national law (PR10.15), we note that the Croatian authorities did not consider further consultations were needed for a project that had received key permits, and they reported there was no legal basis for such consultations under applicable law. The EBRD, however, requires a disclosure and consultation process prior to Board consideration of a Category A project, and therefore, disclosure of the ESIA package and public consultations were undertaken in 2011 because of EBRD requirements. As noted in the response to Complaint 1 above, the 1999 EIA had been supplemented by a 2007-2008 study of bats in Vilina Cave, and these documents were part of the ESIA package that was disclosed for public review and comment in 2011, along with a Non Technical Summary that identified all major environmental and social resources that could be affected and identified the actions that would need to be taken to avoid or reduce those impacts to acceptable levels. The ESIA package also included a Stakeholder Engagement Plan, Resettlement Action Plan, and Environmental and Social Action Plan. In addition, as the biodiversity study proceeds and are completed, there will be further disclosure and, if necessary,

opinions of the general public will be obtained in line with the intent of the Habitats Directive.

Thus, the Complaints that there has not been meaningful consultation, and that decisions are made and options closed, are without merit.

Information disclosure not adequate and irrelevant (with reference primarily to PR1.5 and 10.10). See the response to Complaint 1 and the first part of the response to Complaint 2 above. As noted in the response to Complaint 1, the 1999 EIA and associated disclosure were considered by the EBRD not to fully meet applicable EBRD requirements, and therefore, additional information was disclosed in 2011. This included not only the 2007-2008 biodiversity study required by Croatian authorities, but also the Non Technical Summary (NTS) and the ESAP so as to give people an opportunity to understand the commitments being made as well as the mitigation measures agreed. As noted, the NTS identified the potential environmental and social impacts and actions that would be needed to reduce these impacts to acceptable levels. This in turn allows appropriate attention to be paid to the key biodiversity issues, which will be addressed in a biodiversity study that meets the goals of the Habitats Directive, including disclosure and discussion with stakeholders prior to decisions by the Bank and others.

It is important to note that the key issues shown in the NTS and addressed there and in the Environmental and Social Action Plan were in part identified during scoping completed in Dubrovnik and Zagreb during March and April 2011 by the EBRD and independent consultants. Local stakeholders consulted during scoping included representatives of:

- Dubrovnik Water Company
- City of Dubrovnik
- Dubrovačko Neretvanska County
- State Administration Office in the Dubrovačko Neretvanska County
- ACI boat marina in the Rijeka Dubrovačka Bay
- Dubrovnik Tourist Board
- Individuals who could be affected by land acquisition.

In addition, a meeting with the local NGO Eko Ombla was scheduled but was subsequently cancelled by the NGO. However, complaints about the Ombla project that had been made previously were made available to the EBRD.

National-level stakeholders in Zagreb also were consulted, including:

- Ministry of Environmental Protection, Physical Planning and Construction - Directorate of Environment Assessment and Industrial Pollution
- Ministry of Economy, Labour and Entrepreneurship - Directorate of Energy
- Ministry of Regional Development, Forestry and Water Management - Directorate of Water Management and the Directorate of Water Policy and International Projects
- Ministry of Culture - Directorate of Nature Protection and the Directorate of Cultural Heritage.

Besides allowing key issues to be identified, scoping results were used to design the draft Stakeholder Engagement Plan, which as noted in the response to Complaint 1 was disclosed for public review as part of the ESIA package.

The ESIA package was disclosed on 25 May 2011 for a 120-day period. During the disclosure period, a series of consultation meetings were held in Dubrovnik, including a public meeting on 6th October, a meeting with local authorities on 6th October, and a meeting with local NGOs on 7th October. There was also a consultation meeting with NGOs in Zagreb on 10th October and on the same date an informational meeting with the Ministry of Culture and Ministry of Environment, Spatial Planning, and Construction. There was also a consultation meeting on 28th October with members of the community to be most directly affected by construction activities. Finally, a meeting was held with key stakeholders in Bosnia and Herzegovina on 17 November. Although many comments were made on the project and the 1999 EIA, no comments were received on the Stakeholder Engagement Plan.

Thus, it can be concluded that information disclosure was both adequate and was relevant.

Complaint 3: Incomplete biodiversity assessment

(citing PR6.6, with concerns that the project has been approved in the absence of an adequate baseline, and also about the relationship between the required biodiversity study and the existing permits)

Management response

By virtue of having accepted the 1999 EIA, it can be assumed that the relevant Croatian authorities considered that baseline conditions were sufficiently characterized, with the notable exception of bats in Vilina Cave, where further surveys and mitigation were required; authorities also required further studies of other biota and habitat, as noted in the ESAP. At the onset of the EBRD's involvement, it was recognized that, although baseline conditions were generally known to some degree, additional work was needed in order to meet Bank requirements. Therefore, the project was structured so additional information would be collected both before and after Board of Directors approval, and so there would be restrictions on any activities being undertaken that would affect the primary resources at risk until a study and decisions equivalent to those required under the EU Habitats Directive were completed.

The initial draft ESAP to which HEP agreed required studies to be initiated and a preliminary screening assessment to be completed. This screening assessment was done during the disclosure period. Following the consultation period, the final ESAP that is part of the financing agreement was strengthened on the biodiversity issues because of concerns expressed during consultations and because the screening assessment showed that adverse impacts on the proposed Natura area could not be ruled out. The final ESAP now requires a study equivalent to an *Appropriate Assessment* to be completed, and decisions taken in accordance with the EU Habitats Directive, before the Bank will disburse any funding that could affect Ombla Spring, Vilina Cave, and the underground karst complex. As required by the Habitats Directive, the biodiversity study will fully characterize key environmental conditions,

including the conservation objectives established for the proposed protected area. Thus, the project is structured so it will be able to meet EBRD PRs.

It is also important to note that the EBRD has agreed to fund the project only on the condition, among others, that prior to any disbursement that could affect the proposed protected areas, a biodiversity study would be completed. The study will need to result in mitigation to the integrity and the conservation objectives of the sites, or compensation to ensure overall integrity of the Natura 2000 network is protected, in order for the Bank to provide financing for activities that could affect the resources of concern.

To address the concern about the relationship between the approved permits and the EBRD requirements, it is only necessary to say there is no conflict between the two. The Croatian authorities reported they do not have the legal authority to require further study or assessment. The absence of such national requirements does not constrain the EBRD, however, as additional requirements become a condition of financing and do not affect the permitting. It is common for the Bank to require actions that go beyond local/national laws if that is necessary to meet our 2008 Environmental and Social Policy and PRs and if there is no conflict with national law. The final ESAP does not conflict with national law; however, it does demonstrate that the client is willing to go beyond the national requirements in order to address the issues associated with the project in line with good international practice.

Complaint 4: Incomplete biodiversity assessment

(citing PR6.6, 6.13, and 6.14, expressing concern that the robust monitoring program will characterize the site only after approval, what would happen if the studies required are negative [that is, show unacceptable adverse impacts], and concern about the relationship of the studies and permitting)

Management response

The response to Complaint 1 noted that the 1999 EIA process and the 2007-2008 study of bats were still not entirely adequate to meet EBRD requirements, and that further clarification of impacts and mitigation were required. These requirements are for specific mitigation measures in the ESAP and include the requirement for a comprehensive biodiversity study to meet the intent of the Habitats Directive, which will overcome current data shortcomings for the most important issue. Until that occurs, the Bank will not provide financing for activities that could adversely affect the proposed Natura 2000 sites. Thus, the concern about the effect of the Bank's approval is unfounded.

It is important to note that the final ESAP to which HEP agreed, now includes somewhat modified requirements for biological monitoring, although the principle is the same as the draft ESAP cited in the Complaint. The primary differences are a more direct reference to the study being equivalent to what would be required under the Habitats Directive and the requirement that the process be completed before disbursement of financing for construction that could affect the future Natura 2000 areas. As made clear in the responses to comments that is posted on the HEP website (and which was provided to the EBRD Board of Directors prior to their approval of the project), is that this study "...will examine potential adverse impacts in more

detail, and also will specify actions needed to mitigate or reduce unacceptable impacts, or develop appropriate compensation.” There must be “...adequate mitigation to the integrity and the conservation objectives of the sites, or compensation to ensure overall coherence of the Nature 2000 network is protected.” Otherwise, no financing will be provided for construction that could affect the conservation values or network coherence.

As for the relationship between the biodiversity studies and the permits that have been issued, it is premature to speculate at this time. If the studies show that impacts can be satisfactorily mitigated and/or compensated, there is no issue. If, however, the studies show unacceptable impacts that cannot be mitigated or compensated adequately, the Croatian authorities will have to make decisions regarding the permits..

Complaint 5: Damage to habitat without adequate justification

(citing PRs 6.13 and 6.14, expressing concern about effects on critical habitat and compliance with due process related to such habitat)

Management response

The EBRD’s Performance Requirement 6 provisions on protected areas and critical habitat protection, as cited in the Complaint, are not being breached. On the contrary, the project is structured to ensure they are not breached. The purpose of the biodiversity study required by the ESAP are to make the determinations that PR 6.14 requires, specifically including the importance of Ombla Spring, Vilina Cave, and the Ombla-Vilina complex to endemic or geographically restricted species and sub-species. In addition, the studies will ensure the conditions of PR6.14 are met, including particularly the need to ensure that no actions compromise “...the persistence of a viable and representative host ecosystem.”

Complaint 6: Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local spatial planning documents

(citing PR6.15 and expressing concern that development is not legally permitted and that due process was not been complied with by Croatia)

Management response

As noted in the response to Complaint 1, the project is legally permitted, in the opinion of the competent Croatian authority, and this has been confirmed by outside counsel to the Bank.

As stated in the response to comments on the ESIA package, under the Environmental Protection Act (OG 110/07), the Government of the Republic of Croatia in June 2008 adopted the Regulation on strategic environmental assessment of plans and programmes (OG 64/08), the Regulation on information and participation of the public and public concerned in environmental matters (OG 64/08) and the Ordinance on the Committee for Strategic Assessment (OG 70/08), with which the provisions of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment were fully transposed into Croatian legislation.

The EBRD acknowledges the importance and benefits of Strategic Environmental Assessment (SEA) as a key tool for sustainable development and for assessing the

cumulative impacts of plans and programmes on the environment, including SEAs prepared according to EU SEA Directive or the Protocol on Strategic Environmental Assessment (Kiev, 2003) to the Convention on Environmental Impact Assessment (EIA) in a Transboundary Context. Where the Bank does not have ownership of such plans and programmes, it will liaise with governments, regional bodies and those multilateral institutions most appropriately placed to use SEAs as a government decision making tool and will structure its projects in accordance with the conclusions of relevant SEAs, where available.

The Ombla HPP project itself was not subject to an SEA and was permitted based on the 1999 EIA approval, therefore the completion of an SEA on the Croatian Energy Strategy was not deemed to be a legal requirement for the implementation of the project.

Annex 3 – Client’s response

Hrvatska elektroprivreda d.d.
Hydro Power Project Ombla
Department Director: Ljubica CveniĆ
Zagreb, 16th December 2011

Complaint to the EBRD’s Project Complaint Mechanism regarding the Hydro Power Project Ombla submitted by Mr Enes Ćerimagić, environmental NGO Zelena akcija
Complaint registered by EBRD: 24th November 2011

Official response on the Complaint

According to EBRD’s invitation to Hrvatska Elektroprivreda (HEP) to submit an official response to the complaint, please find below our standpoint regarding individual complaints:

Complaint No 1: Outdated and illegal Environmental Impact Assessment

HEP’s position is that the procedure of environmental impact assessment has been carried out in accordance with applicable laws and regulations and that the decision issued by the competent Ministry determining that the project is environmentally acceptable, is legally valid.

Specifically, the EIA is the first of the administrative procedures that an investor needs to carry out in order to obtain a document on the basis of which the construction can begin – this is a valid building permit. After the procedure of environmental impact assessment, and in compliance with the law, HEP launched next in line administrative procedure – the procedure for obtaining a location permit. This administrative procedure has been successfully completed and the conditions were created for HEP as an investor to launch the third administrative procedure aimed at obtaining a preliminary building permit. Since this procedure, too, has been successfully completed and a preliminary building permit issued in 2010, HEP started the final stage of preparing the construction of the project – the procedure for obtaining a final building permit pursuant to which the construction can commence. Today, HEP has two building permits (of seven required by the preliminary building permit) which are legally valid, and so are all the above documents.

Hereby we would like to emphasize that the preparation for construction is a process that consists of statutory steps that are more time consuming for more complex projects, and less time consuming for less complex projects. Of course, during this process the laws governing the implementation of some of the steps can change; however, the change in laws governing the "step" that the investor has already passed does not bring him back to the beginning, but provides a

legal security and validity of already obtained permits, and enables him to further develop the project.

This is exactly what we want to highlight regarding legal arguments ad 1 and 2, in which the interpretation and quotations of legal provisions, from which the conclusion was drawn about outdated and invalid environmental impact assessment, are incomplete and selective, omitting that part of the provisions that confirm the validity of the decision on the acceptability of the project's impact on the environment.

Complaint No 2: *Failure to hold meaningful public consultation*

HEP is of the opinion that the public consultation and public participation during the procedure of environmental impact assessment were conducted in accordance with the law and that in the period from May 2011 onwards the interested public was extensively informed about the project through available media and repeatedly invited to communicate, thus we believe that the transparency and active public participation requirements have been fulfilled.

The public insight into the project (disclosure) and public meetings about the project and public participation in the procedure of environmental impact assessment were conducted during the administrative procedure by the competent Ministry, fully in accordance with the procedure stipulated by the law. During the procedure the public responded to issues of concern through discussions, comments and requests, about which there are official records. The Commission appointed by the competent Ministry formulated such public responses and stakeholder responses as requirements within the Decision on the Acceptability of the Project and in the location permit.

We would like to stress that the procedure of public engagement, as it was implemented in 1999, was identical as regards duration and the manner of implementation to the procedures carried out pursuant to effective legislation (complying with the applicable EU legal framework).

In the period from the approval of the Environmental Impact Study up to the time when the preparation of construction is nearly finished, Hrvatska Elektroprivreda deemed it unnecessary to involve the public in every phase of project development.

However, since the project is now ready for implementation and the cooperation with the EBRD started in terms of examining the opportunities for project financing, in May 2011 HEP has disclosed to the public detailed information about the project, in the manner and form agreed with the EBRD. The Environmental Impact Study, the NonTechnical Summary, the ESAP and additionally developed studies were uploaded to the website, and the following communication channels have been made available to the interested public:

- At the corporate level - constantly available contact address;
- At a separate website of the project - contact e-mail address and the names and surnames of contact persons, with the address at Dubrovnik location and telephone numbers.

Please note that the general public and NGOs were informed about it but have not availed of these communication opportunities.

Along with this mode of communication with the public, HEP has organized two detailed presentations of the project in Dubrovnik in October 2011 for

- general public
- administrative bodies at city and county level.

Special meetings with NGO representatives in Dubrovnik and Zagreb were also organized.

HEP has also organized a meeting with residents living near the future Ombla HPP to inform them about the details of project implementation.

Please note that all communication channels are continuously available.

We would also like to point out that this model of communication with the public, which was developed for the purposes of the Ombla HPP in cooperation with the EBRD and which includes the presentation of the project, specific communication channels and addresses and a website dedicated exclusively to the project, is now applied to the Plomin C TPP development and construction project, which is in progress.

Complaint No 3: *Incomplete biodiversity assessment*

HEP is of the opinion that the overall exploration activities carried out so far and surveys and studies of the Ombla HPP project area have provided a broad and high quality basis that allows comprehensive assessment of project impact on the environment and nature.

Firstly, we believe that the Environmental Impact Study of 1999 (which included sectorial studies), has maximally explored the area, examined the impact and identified measures to protect the environment and nature, even though Natura 2000 area had not been established at that time nor the criteria of the Habitat Directive.

Secondly, in the period up to 2011, HEP conducted additional research on the impact on nature - particularly in the area of Vilina Cave, which resulted in measures that are embedded in technical solutions for final design of the

structure. Here we wish to emphasize that, so far, the only scientifically based and professionally elaborated explorations of the wider area of the Ombla were organized and conducted by HEP.

Thirdly, HEP has signed a loan agreement with the EBRD by which HEP commits itself to the implementation of the Environmental and Social Action Plan, which has already started, and we hereby declare that all the obligations under the ESAP will be met with due diligence and at the highest quality. Also, we guarantee that we will expand the obligations arising from this document wherever reasonably possible, both qualitatively and quantitatively.

We would like to emphasize that one of strategic baselines of HEP is its commitment to sustainable development. At this point, HEP develops four important energy projects (each of larger scale than the Ombla HPP), and applies and abides by current legislative provisions in each step, whereby it should be noted that the Croatian legislation is fully compatible with the EU regulation governing environmental protection and nature conservation.

Note also that the elements of ESAP structure and the structure of other documents developed in cooperation with the EBRD experts are now being embedded at the corporate level, because we have assessed that this will significantly improve the existing practice in terms of quality.

Complaint No 4: *Damage to habitat without adequate justification*

HEP reiterates its position in relation to the impact of the Ombla HPP project on the environment and nature, i.e. that the experts and relevant government agencies have determine on the basis of previous explorations, analyses and studies, that the impact of the project is acceptable for the environment and nature.

HEP is fully aware that the construction of the Ombla HPP will have an impact on the area in which it will be carried out, but it is essential for the assessment that the areas of impact and the intensity of this impact have been identified and that adequate measures have been foreseen to avoid or mitigate such impact, which particularly applies to the population of bats in Vilina Cave.

Specifically, the complaint primarily addresses the impact on Vilina Cave and the water regime around the spring. HEP reiterates its standpoint, which has been presented in all our previous explanations and statements, i.e. that no construction work will take place in Vilina Cave, nor shall any part of the accessible cave system be affected during the construction of the power plant and its operation. Our statement can be verified by examining the technical solution and the description of construction details, which have been detailed in final designs and supporting documents such as drawings, geodetic surveys, photos of the underground cave system, carried out measurements and calculations.

The same applies to the water regime, which in its natural state is characterized by continuous rise and fall of water level in the hinterland, depending on precipitation.

This information has been clearly explained to the public and NGOs during the above mentioned presentations.

The existing monitoring system (water level and quality, flow quantity and velocity, seismicity, etc.) will be upgraded in accordance with the monitoring program as prescribed and conditioned. HEP is also required to provide information (some in real time) to competent institutions and bodies, as referred to in the ESAP document.

We believe that such procedure meets the criteria of transparency and verification of monitoring results.

Complaint No 5: Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local spatial planning documents

HEP is not in a position to comment on this complaint.

HEP can point out that the hydro power plant at this location has been included in the Physical Plans of the Republic of Croatia and that the development of this project and related administrative procedures and the procedures for obtaining necessary permits started in 1999.