



environmental defender's office new south wales

Comment on the EFIC Draft Environment Policy 2005

19th April 2005

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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Mr Michael Jackson
Chief Operating Officer
Export Finance and Insurance Corporation
Level 10 Export House
22 Pitt Street
Sydney NSW 2000

17th April 2005

Dear Mr Jackson,

Re: EFIC Draft Environment Policy 2005

The Environmental Defender's Office is a community legal centre specialising in public interest environmental law. We made a joint submission with Aidwatch to the EFIC Review of the Environmental Guidelines in October 2003. Please find attached a list of our main recommendations, and we refer you to our full submission which can be found at <http://www.edo.org.au/edonsw/site/pdf/efic.pdf>.

We welcome the opportunity to comment on the Draft Environment Policy 2005, but are concerned that comments are limited to 'drafting issues' while so many key substantive issues remain unresolved.

Drafting of the 2005 Policy

Generally, the Draft Environment Policy 2005 is an improvement on the previous version and acknowledges some of the issues raised in the EDO/Aidwatch submission (noted below). However, recognition of issues has been very broad and conceptual, for example treaty obligations have been noted with a website link, but not explained in a detailed appendix as recommended. Furthermore, the language of the policy is weak and will consequently not ensure the best environmental and social outcomes, for example sponsors are "encouraged" to adopt policy points, rather than required to comply. The Draft Environmental Policy 2005 should be more clearly drafted to provide a comprehensive and positive statement of the environmental values that EFIC will apply in the exercise of its functions. This is discussed further below.

Key issues

We welcome the inclusion in the re-drafted policy of the following issues:

- Agreement to implement the "Recommendation on Common Approaches on Environment and Officially Supported Export Credits" (in clause 1.3);
- A requirement to address relevant guidelines in the World Bank Group's Pollution Prevention and Abatement Handbook (in clause 4.3.4);
- Reference to IFC Safeguard Policies including OP 4.04 Natural Habitats; OP 4.09 Pest Management; OP 4.36 Forestry; OP 4.37 Safety of dams; OP 4.20 Indigenous Peoples; OP 4.30 Involuntary resettlement; OPN 11.03 Cultural Property; and a policy statement on child and enforced labour. (However, EFIC should also make it clear that it will not accept an environmental assessment which does not comply with these standards);

- Reference to treaty obligations in clause 2.5. (However, we note that these would be best be expressed in more detail in an Appendix to the Environment policy);
- Transaction details for category A projects will be made publicly available for comment and in the EFIC annual report (in clause 4.3.11);
- Removal of references to “commercial in confidence”;
- Clause 4.3.10 requires proponents to provide relevant timely information prior to consultation in a “form and language that are understandable and accessible” to community groups; and,
- A review of the policy in 5 years from implementation (in clause 3.5).

However, the draft policy has still failed to address the following key issues:

- A major omission remains the failure to identify environmentally sustainable development (ESD) as the underlying basis for the whole policy (and therefore the principle underpinning the exercise of EFIC functions). We note that the re-drafted version, clause 2.2 acknowledges ESD reporting requirements but fails to define ESD and require all functions to be exercised in accordance with ESD. We recommend that a definition is explicitly included in accordance with s3A *Environmental Planning and Biodiversity Conservation Act 1999* (EPBC Act 1999);
- The drafting of clause 4.1 fails to specifically include cultural and economic impacts in the “Environmental and Social screening process” as required by a comprehensive assessment in accordance with the principles of ESD;
- In clause 4.3.3 the policy states that EFIC “encourages” sponsors to adopt the IFC’s environmental assessment policy and procedures as described in Safeguard Policy 4.01. EFIC should require this, not just encourage it;
- Failure to list projects that EFIC will not support including nuclear, fossil fuel power stations, and projects on indigenous land (without consent) or in protected areas;
- No detailed non-exhaustive list of category A projects;
- Failure to provide more detailed requirements for environmental assessment of category B projects;
- No process has been included in clause 2.7 to ensure good governance of applicants with respect to protecting human rights, combatting bribery and corruption, and protecting labour standards;
- No requirement of compliance with ILO Core Standards in clause 4.3.8;
- No public consultation on category B projects;
- No extension of consultation period to 120 days;
- No mechanism for attaching conditions on loans and insurance relating to environmental and human rights performance;
- Inadequate monitoring requirements, including independent monitoring, on-going monitoring and public access to resulting information;
- No inclusion of a complaints mechanism; and,
- No requirement for a EFIC Board member to represent social and environmental concerns.

Given that Export Credit Agencies (ECAs) are the largest source of public financing for private sector projects in the world, ECAs have a significant and increasing influence on the type of projects that are funded internationally and therefore the development in developing countries. Eighty percent of financing for projects and investment in developing countries currently comes from ECAs due to the hesitancy of companies to invest in risky countries without ECA support. Despite the clear social and environmental impact that ECAs have on patterns of development, ECAs internationally have been slow to introduce any social and environmental or developmental policies.

Whilst we applaud EFIC for introducing environmental guidelines, it is imperative that the Draft Environment Policy 2005 fully comply with the Australian governments commitments to sustainable development. This includes a requirement that all functions be exercised in accordance with the principles of ESD. It is inappropriate to limit comment to the presentation of the document rather than the substance, whilst so many critical issues are still not addressed. The Environmental Policy should be a comprehensive and positive statement of the environmental values that EFIC will apply in the exercise of its functions.

Legal Enforceability

The drafting of the Environmental Policy 2005 will be reduced to a public relations exercise if there is no legal requirement to act in accordance with the policy. The Environment Policy is essentially a non-binding set of guidelines. Nothing in the *Export Finance and Insurance Corporation Act 1991* (Cth) (EFIC Act) requires that the environment be considered in the decision making of EFIC. Further, because the functions of EFIC come into the categories of government decision making and funding, actions by EFIC are not caught by the environmental impact assessment provisions of the EPBC Act 1999 (ss.524-524A).

It is essential that full environmental impact assessment of all projects that EFIC is considering supporting is undertaken in Australia in accordance with Australian or best practice international standards. It is not sufficient to rely on environmental standards in the host country which are often weak, not enforced or undermined by issues such as corruption. Australian governmental corporations should set best practice standards for operations in any country to avoid situations like Ok Tedi in PNG.

While drafting an Environment Policy is a positive step, one way to ensure that environmental and human rights issues are adequately considered by EFIC is to make these considerations legal requirements under the EFIC Act 1991 (for example, by amending section 3(2) to require EFIC to have regard to ESD when performing its functions).

It is insufficient to rely on inclusion of the Environment Policy within EFIC's overall Risk & Compliance Programme to ensure policy implementation (as argued in the "NGO Recommendations and EFIC Responses, March 2005). As noted in our previous submission, the policy should be made legally binding either through inclusion in the EPBC Act 1999 or in the EFIC Act 1991.

Should you require further information, please contact EDO Policy Officer, Rachel Walmsley on 9262 6989 or rachel.walmsley@edo.org.au.

Yours sincerely,
Environmental Defender's Office

Jeff Smith
Director

Attachment: List of recommendations from EDO/Aidwatch submission 2003.

1. Ecologically Sustainable development

- The Environmental Policy states at the outset that EFIC will exercise all of its functions in accordance with the principles of ecologically sustainable development as stated in s.3A of the EPBC Act.

2. Mandate change – from supporting exports to supporting sustainable development.

- The definition of the Category A, B and C projects must be extended to reflect the broad range of sustainable development impacts. This includes potential economic, social and cultural impacts and also must include an assessment of the political and civil rights context of project affected people. Development impact encompassing the economic, social, cultural and environmental factors must be included in project assessment.

3. Standards for Environment Impact Assessment (EIA)

Project Development

- A new heading be inserted entitled ‘Project Development’ stating that all sponsors are to develop their project with reference to the World Bank Group’s *Pollution Prevention and Abatement Handbook* and any other relevant standards.
- Any reference to the AMI Code or any other voluntary code is inappropriate and unnecessary.

Standards for EIA

- EFIC adopts more detailed standards of environmental assessment in its Environmental Policy modelled on the World Bank’s standards contained in OP 4.01.
- The Environmental Policy must make it clear that EFIC will not accept an environmental assessment which does not comply with these standards

Environmental Assessment Instruments

- EFIC adopts a range of environmental assessment instruments that can be applied as appropriate. (World Bank para.7 OP 4.01).

4. Categorisation of projects

Projects EFIC will not support

- The EFIC Environmental Policy should contain a positive list of the types of projects that EFIC will not finance including:
 - Arms and other non-productive expenditure
 - Nuclear projects
 - Fossil fuel power stations
 - Oil exploration in frontier areas
 - All phases of the fossil fuel and mining cycles – prospecting, exploration, test drilling, exploitation, as well as the construction of related infrastructure such as pipelines and roads,
 - Projects affecting indigenous lands which do not have the prior informed consent of the indigenous occupants,
 - Projects in protected areas,
 - Projects in countries with poor human rights records,
 - Projects which have a direct and demonstrably detrimental effect on other nations or communities,
 - Projects where extensive prior consultation and disclosure has not been carried out with those groups
 - Projects that undermine the international conventions to which the exporting country is a signatory, not just the host country.
 - Projects that do not comply with international environmental and human rights treaties to which Australia is signatory,

- Projects which do not comply with the national legislation of the sponsor,
- Projects which do not meet with Australian environmental management standards.

Extension of Category A list

- The EFIC Environmental Policy adopts a detailed non-exhaustive list of Category A projects such as that included in Export Development Canada's Environmental Directive

EIA for Category B Projects

- More detailed requirements for environmental assessment of Category B projects be adopted.

5. Compliance with International Instruments and laws

- Compliance with international treaties be publicly reported for all Category A projects.
- A summary of the obligations created by each international obligation be created and included as an appendix to the Environmental Policy.

6. Good governance for applicants

- That a clear process is put in place to ensure the good governance of applicants with respect to protecting human rights, to combat bribery and corruption, and to protect labour standards.

7. Human Rights and ILO Standards

- Protection of human rights and compliance with ILO Core Standards is a condition of application for any facility.
- Mechanisms are put in place to ensure continued compliance with human rights and ILO Core standards.
- Full reporting of company compliance is made publicly available.
- Special attention is given to the human rights of vulnerable groups.

8. Public consultation and transparency

Commercial in Confidence

- References to commercial in confidence should be removed from the Environmental Policy.
- All independent audits and transaction information regarding EFIC Category A projects be made publicly available consistent with international standards such as the World Bank.

Public consultation standards

- Public consultation occur for all Category A and Category B projects
- Public consultation be advertised more broadly for both Category A and Category B projects.
- All documents for consultation be available in both English and the official language of the host country and the language of any affected populations.
- The time period for consultation should be extended to 120 days for Category A projects.

Consultation on indigenous lands

- Sponsors must show they have prior informed consent of affected and indirectly affected indigenous landholders in project-affected areas.
- A report on the consultation including methodology, groups consulted with and the results of consultation should be included in all environmental assessments.

9. Conditions on loans and insurance

- The Environmental Policy include a provision stating that EFIC may place demonstrable and achievable conditions on loans and insurance relating to environmental and human rights performance.

10. Monitoring

- The Environmental Policy includes a provision requiring on-going monitoring and annual reporting for Category A projects, and end of project reporting by Category B projects.
- Annual environment reports be placed on public exhibition.
- Independent monitoring of a project be triggered if significant breaches have been identified.
- Reports of any independent monitoring be made publicly available.

11. Complaints

- The Environmental Policy include a formal mechanism for complaints about projects funded by EFIC.

12. In-house expertise at EFIC

- Environment Australia be the assessment body for all Category A and B environmental impact assessments.

13. Corporate governance measures

- EFIC must establish a clear set of good governance conditions that must be met by companies prior to their making a formal application to EFIC

14. Push for international common standards

- The EFIC review of Environmental guidelines incorporates the Revision 8 of the Draft Recommendations on Common Approached on Environment and Officially Supported Credit Guarantees.
- That EFIC actively supports the Revision 8 at all OECD Working Party on Export Credits and Credit Guarantees meetings.

15. Regular reviews of the guidelines

- A regular policy review is made of the EFIC Environmental guidelines with affected communities and domestic and international civil society invited to participate.

16. Internal governance

- That a clear and consistent process is established whereby all Category A projects are approved by the EFIC Board.
- The approval process is publicly stated.
- At least one member of the Board that represents social and environmental concerns.