

Environmental Damages Fund Evaluation



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Acronyms used in the report

CBA	Canadian Bar Association
CEPA	Canadian Environmental Protection Act, 1999
EC	Environment Canada
EDF	Environmental Damages Fund
EPAM	Environmental Protection Alternative Measure
EPS	Environmental Protection Service
FPS	Federal Prosecution Service
PYR	Pacific Yukon Region
TB	Treasury Board

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Executive Summary

The EDF evaluation examined four discrete areas determining first whether the EDF was effectively used consistent with the terms of the original TB submission in the Atlantic Region and thereafter examining areas of potential improvement and utilization of the EDF in other contexts.

Atlantic Region EDF Evaluation

In our opinion we conclude that in the Atlantic Region, the EDF was effectively used, consistent with the terms of the original TB submission. Specifically:

1. TB submission conditions were being met;
2. The contribution program was effective in applying resources to the remediation of projects related to the original prosecutions;
3. Court stipulations were being addressed; and
4. The management structure and operations associated with the EDF effectively supported its use.

Improvement and Use of EDF in other Contexts

The evaluation also considered the use of the EDF with respect to the *Canadian Environmental Protection Act, 1999* (CEPA), specifically, Environmental Protection Alternative Measures (EPAM). In our opinion there was insufficient information and experience available to conclusively assess the degree to which EDF could be used to supplement or enhance the EPAM, although it appears to us that the two programs can complement each other in providing vehicles to effectively enhance prosecutions and as a result, environmental remediation.

The evaluation assessed the familiarity with the EDF for personnel involved in the court process. In our opinion we conclude, that except for the Atlantic Region, those involved in environmental prosecutions were not familiar with the full potential of the EDF. They had little or no experience with the use of the EDF as a mechanism for directing penalties to support remediation of environmental damage.

The evaluation considered the applicability of EDF in the context of court awards for wildlife protection, remediation and we conclude that subject to some clarification, it could provide an effective vehicle to assist in the overall wildlife protection program.

While we reviewed a provincial Fund that initially appeared to be similar to the EDF we concluded that the circumstances under which that Fund operated are not sufficiently similar to draw meaningful comparisons. We could not locate any other provincial or in fact federal funds that were sufficiently similar to make meaningful comparisons.

Introduction

In 1995, at the request of the Minister of the Environment, a special purpose account called the EDF was created by TB to manage financial compensation granted to Environment Canada for restoration of damages sustained by the environment. It created a departmental framework for managing such compensation received to remediate / restore damage to the environment through court order, awards, out of court settlements, international funds or voluntary payments. The department's regions were to administer and manage the fund as well as the damage restoration work.

The TB submission for the creation of the EDF included a condition providing for an evaluation of the EDF some 5 years after its inception. The EDF has only been actively promulgated and operational in one Region. In light of that, this review had four components encompassing both a traditional evaluation for the Atlantic Region as well as three other components focussed more on potential improvements to its current use and its use in both other regions and in respect to other legislation. The components were:

1. An evaluation of the EDF in the Atlantic Region.
2. An examination of and a report on the familiarity with the EDF within EC and personnel involved in court processes.
3. A comparative analysis between the EDF and of how court awards and other monies are handled for the remediation/restoration of the environment in another Canadian provincial jurisdiction.
4. An assessment of the utility of EDF with respect to CEPA, specifically, Environmental Protection Alternative Measures (EPAM) and the use of the EDF in the context of court awards for wildlife protection, remediation.

Review Scope and Methodology

Field Work and Analysis	Details
Review of documents	
A site visit to Atlantic Region EC office	March 2002
A document trace and matching to files at the Atlantic Region EC office	All transactions
Interviews with Atlantic Region EC personnel	3 interviews
Individual file tracking, examination and testing	All contributions
Interviews with Atlantic Region applicants	4 interviews
Interviews with Justice personnel and review of Justice documentation	15 interviews
Interviews with provincial Ministry Officials and other federal officials	4 interviews

Atlantic Region – EDF Evaluation

We determined that in the Atlantic Region of Environment Canada the EDF was being administered in a way which is in accordance with the TB submission conditions.

Treasury Board Condition	In Compliance
1. Recipients must be eligible to receive the monies	Yes
2. The contribution is consistent with application and decision	Yes
3. The project meets the court's conditions	Yes
4. The project is cost effective	Yes
5. The recipient possesses the skills necessary to deliver project	Yes
6. Projects undertaken build on partnerships	Yes
7. Proposals are evaluated by program managers and signed off by the RDG	Yes
8. The maximum amount payable is under \$5million	Yes
9. Awards cover allowable expenditures (not basic costs)	Yes
10. Payment methods are on invoice and with statement of expenditures	Yes
11. Equipment purchased belongs to the Project	Yes
12. There exists a right to audit each project	Yes
13. There exists a payment authority	Yes

Recommendations

Familiarity with the Environmental Damages Fund

The EDF as designed was intended as a facilitative tool to allow monetary penalties received in respect of environmental damage that were the subject of prosecution to

be effectively linked to the remediation of the specific environmental damage that occurred. For this framework to function effectively, all parties who could take advantage of it must be aware that it is available for this purpose. These parties include prosecutors, investigators, and judges. Other than in the Atlantic Region, there was a lack of knowledge within this specific community of the use of the EDF. There was an awareness of its existence but no practical experience in its use.

Those who could be familiar with the EDF could include: Federal Justice Staff prosecutors; Federal Justice Agent (ad hoc) prosecutors; Judges, Environment Canada investigators, Transport Canada investigators, and Fisheries Act investigators.

Subsequent to the initial scoping of the evaluation and subsequent to the field work being conducted we were informed that some elements of the EDF process were being used in the Pacific Yukon Region (PYR). Funds, once received pursuant to a Court order were in fact placed in special purpose accounts as contemplated by the terms of the original TB submission. Funds were then identified as being part of the PYR EDF, and were then disbursed in accordance with the terms of the detailed Court order, rather than in accordance with the process forming part of the EDF.

Recommendation #1

That the Assistant Deputy Minister Environmental Protection Service immediately initiate a focused multi party education campaign to inform the potential primary users of the availability of EDF. The following are possible steps that could be considered/taken.

Prosecutors

- Develop a practical, step by step guide to the use of the EDF as a tool for prosecutors with concrete case specific examples and checklists for prosecutions under CEPA, (if possible to include the Justice Department Atlantic Region prosecutor as a contributor). This guide could resemble the well-accepted statute specific Prosecution Guides developed by Justice Canada client department Legal Services Units based upon the original Atlantic Region Workshop.
- Identify and locate coordinates for each Federal Environmental Prosecutor (staff and agent) and assign to each such prosecutor, from the relevant EC region an investigator to develop a primary support responsibility for the prosecutor with respect to use of the EDF.
- Collect at EC headquarters all decisions and references to use of the EDF in a standard one-page format (to be called the "EDF Case Summary") to include:
 - Statute under which prosecution commenced;
 - Name of primary investigator (with coordinates);
 - Name of Accused;

- Brief description of facts upon which prosecution based;
 - Name of Prosecutor (with coordinates);
 - Name of Judge;
 - Procedural Issues Addressed;
 - Location of written decision (if available)
- Identify at EC headquarters a single point of contact to maintain an ongoing relationship with the Federal Prosecution Service (FPS) Environmental Prosecution Coordinator and arrange for quarterly updates and briefings alternating in location between EC and DOJ, from which minutes would be taken and circulated to all Federal Environment Prosecutors.
 - Provide in electronic format copies of the EDF Case Summary to the FPS Environmental Prosecution Coordinator, for his distribution to all Federal Environmental Prosecutors (staff and agent) OR with the consent of the Coordinator and on his behalf distribute the EDF Case Summary to all Federal Environmental Prosecutors (staff and agent) directly.
 - Provide in electronic format copies of the EDF Case Summary to investigators assigned the primary regional support role for all Federal Environmental Prosecutors (staff and agent).
 - Consider the creation of a national Web-site on which all EDF Case Summaries as well as references to statutes, checklists for prosecutors, contact numbers and other links would be located.
 - Consider seeking through the FPS Environmental Prosecution Coordinator the opportunity to sponsor a short session or workshop (60 minutes) at the annual Federal Prosecutor's Conference for the year 2003 at which the effective use of the EDF would be promoted.

Canadian Bar Association

- Consider submitting an article to the Canadian Bar Review on the use of the EDF as a sentencing option for offences related to the environment.
- Consider making a presentation to the CBA Environmental Law Section outlining the use of the EDF as a sentencing option for offences related to the environment.

Judges

- Consider seeking through the Executive Director of the Canadian Association of Provincial Court Judges the opportunity to sponsor a short information session on the use of the EDF in sentencing at the annual education seminars held each fall, commencing in the year 2003 at the St. John's Newfoundland conference.

- Consider seeking the opportunity to submit to the Judges' Journal an article outlining the use of the EDF as a sentencing option for offences relating to the environment.
- Consider developing a standard presentation package (e.g. PowerPoint) that outlines the history, use and future of the EDF and then encourage the local Regional Director General Environment Canada to seek the opportunity to deliver the presentation at the annual meeting of each Provincial Judges' Association.
- Consider seeking the opportunity to deliver the same standard presentation package with speaker to attend at the annual National Judges' Training Session for newly appointed provincial court judges.

Management Response:

Agree in principle with the recommendation. The detailed action items have associated resource implications, which will need to be assessed and addressed. The Environmental Emergencies Program is planning a joint regional and headquarters workshop, being co-ordinated by the Atlantic region and the Environmental Emergencies Branch, in early Fall 2002, to review all aspects associated with the assessment and restoration of environmental damage component of the Environmental Emergencies program. Decisions will also be taken and resources reallocated or sought as part of the CEPA accountability process as well. Following both processes, the Director General, National Programs Directorate will, by December 2002, determine which portions of the education campaign will be subsequently undertaken.

Recommendation #2

That the Assistant Deputy Minister Environmental Protection Service immediately communicate with the responsible Regional Directors General advising them that when they employ the EDF that it must be used in accordance with all of the terms of the original TB decision including both the process for the receipt of the funds as well as the process for payment out of the funds, otherwise the use of the EDF may be in contravention of the TB decision.

Management Response:

Fully agree and support. Notwithstanding the fact that such a message was sent when transmitting the TB decision in 1996. It is time to reiterate and reinforce the message again; the ADM, EPS will advise the RDGs in writing by December 2002.

Use of Environmental Damages Fund under "Other" Statutes

The EDF as designed was intended as a facilitative tool to allow monetary penalties received in respect of environmental damage that were the subject of prosecution regardless the statute under which the prosecution was conducted to be effectively

linked to the remediation of the specific environmental damage that occurred. Prosecutions under a number of statutes could take advantage of this tool, but apparently do not. Some regions reported that they had developed similar *ad hoc* mechanisms to achieve a similar, but not identical result under similar statutes such as the *Fisheries Act*. Those who developed these similar *ad hoc* mechanisms were reluctant to change their practices absent a demonstrated advantage or improvement. Some expressed the view that they were not aware that the EDF could in fact be utilized for any statute except CEPA. Others expressed an interest in taking advantage of the EDF should the opportunity present itself.

Other statutes that had been identified included: *Migratory Birds Convention Act, 1994*, *Fisheries Act*, *Canada Shipping Act*.

Recommendation #3

In order to clarify the applicability of the EDF to prosecutions conducted under statutes other than the CEPA, EC should, through a direction from the Assistant Deputy Minister EPS, request the Director of Environment Canada Legal Services to ask for a formal legal opinion from the Justice Administrative Law Section on the following questions:

- Under what statutes may a prosecution make use of the provisions of the Environmental Damages Fund to permit contributions to be made to the Environmental Damages Fund?
- Specifically, is the EDF available to be used for prosecutions commenced pursuant to the *Fisheries Act*, the *Canada Shipping Act*, the *Migratory Birds Convention Act, 1994*, the *Species at Risk Act* and if so under what circumstances?

Upon receipt of the legal opinion, it should be circulated to all Federal Environment Prosecutors (staff and agent) jointly by the Director of Legal Services Environment Canada and by the Director FPS. It should also be circulated to all Department of Justice Regional Office Group Heads for Prosecution for dissemination to all prosecutors within their areas of responsibility.

This opinion should form part of the Prosecution Guide in support of the use of EDF.

Management Response:

Agree in principle with the recommendation. The Director General, National Programs Directorate will clarify the applicability of EDF. Environmental Emergencies Branch will further investigate, in consultation with Legal Services, by December 2002, if a legal review is required and will initiate one, if needed, through a formal request to Legal Services. We do know that TBS did not limit the use of the EDF to just CEPA, hence it has been used to manage funds received under other federal statutes or voluntary contributions. Based on the response from TBS and/or Legal Services, the next steps for further communication will be determined by March

2003. Our request for clarification will include the need to investigate potential application under provincial statutes.

***The Environmental Damages Fund and the Environmental Protection
Alternative Measures - EDF and EPAMs***

Since the creation in 1995 of the EDF as the first Environment Canada specific prosecution assistance tool to permit monetary penalties to be applied to remediation of environmental damage, CEPA has undergone some amendments which have added yet another tool to assist in the effective prosecution of offences and remediation of environmental damages. One such tool is the Environmental Protection Alternative Measure or EPAM. This allows for the negotiated settlement of certain offences between an accused and the Crown after charges are laid but before a prosecution is conducted. The accused must consent to negotiate and must accept responsibility for the offences.

An agreement is reached which may include a variety of options including training, monetary contributions to the EDF, contributions to research institutes, publications of descriptions of the offending behaviour. This tool could provide prosecutors with substantial flexibility in determining the appropriate penalty (There has been only one use, as of this evaluation). These non monetary consequences are to be monitored by the EC regional office. The accused, if he completes the conditions successfully, may be entitled to have the charges withdrawn or stayed at the end of the period during which the conditions are completed, or in the event of non compliance, the accused may be convicted and punishment imposed. The alternative measures program (EPAM) was modelled on a similar program for Young Offenders with the result that judges are becoming familiar with tools that operate to divert accused from the traditional trial and sentencing process.

Other Similar Provincial Environmental Funds

In Canada we could only identify one other fund that was even superficially similar to the EDF. That fund was the Ontario Fish and Wildlife Fund which has been used in the province of Ontario over the past several years, the use of which has recently been subject to review and reconsideration. It differed in its use and in its administration.

Special purpose funds like EDF and alternative measures for sentencing like EPAMs have certain characteristics in common. They also each have some unique characteristics as illustrated by the table below.

	EDF	Other Statutes ¹	EPAM	Wildlife
Understanding the tool	Limited to those in Atlantic Region	Dependent on interest of prosecutors	Unable to assess at this time - too soon to tell	Unable to assess
Accountability for use of funds	Subject to conditions of TB grants and contributions	Not subject to any formal accountability	Subject to court review; publish in Environment Registry	Funds not segregated by transaction
Non monetary orders	Not possible directly but indirectly available through project approval	No limit on nature of order	Possible	Possible
Tax deductible	No	No	No	Possible
Mandatory use for remediation	Yes	No	Possible	Possible
Relation with other statutes	EDF is not an authority for sentence, merely a vehicle for use of penalties	Penalties could provide basis for use of EDF subject to a confirmatory legal opinion.	Can integrate with EDF	Related to Ontario Provincial Offences Enforcement Act

The view was expressed that when the EDF was first promoted that it took some time for those who could take advantage of it to actually become familiar with it and that it took a significant length of time for any real interest in using it to develop. This was the case even in support of prosecutions under CEPA. Only recently has there been some experience in using EDF in support of other prosecutions in the Atlantic Region. The view was also expressed that as those familiar with prosecutions of environmental offences became more familiar with EDF and as more precedents for its use became available that it was somewhat better understood and more accepted as a vehicle. As it continued to be an Environment Canada vehicle there was a perception in some quarters that it should not be use for other than Environment Canada statutes.

What distinguished the EDF from all other similar statutory alternative measures and the Ontario Fish and Wildlife Fund was that after the monetary penalties were received:

- The monies were fully accountable;
- Monies dispensed by the fund were supervised by Environment Canada personnel with an interest in remediation rather than the court process;
- The projects funded were directly related to the environmental harm that occurred; and
- Projects were undertaken on a partnership basis by interested parties.

¹ Fisheries Act, Migratory Birds Convention Act, 1994, Canada Shipping Act

Monitoring

Recommendation #4

The EDF should be monitored within the EPS nationally by the Director General National Programs and regionally by Regional Directors General to ensure that it continues to operate as a unique, accountable, transparent and effective tool that works in a complementary fashion with the penalty sections of legislation that support prosecutions of environmental offences. Monitoring should occur no less frequently than once per year and it may form part of the annual Client Driven Services exercise conducted by Justice and Environment Canada.

Environment Canada should take steps (as set out in above in recommendation #3) to ensure a clear understanding of how EDF functions and its availability as a tool to complement the sentencing authorities contained in other statutes.

Management Response:

We support the recommendation in principle. If the results of the annual monitoring are positive for the first few years, we may in subsequent years decide to make it every two years. The Director General, National Programs will implement the monitoring process with the first reporting cycle starting in April 2003. In addition, the application to EPAMs will need to be further investigated and clarified. Please note that fines are specifically excluded.

Conclusion

The manner in which the Atlantic Region has implemented the EDF should be adopted in the other Environment Canada regions, including the frameworks for project approval, project teams and approval process. It is effective and has grown based upon the interest and enthusiasm of those who use it.

Where the EDF has been only partially used, (i.e. PYR) the potential beneficiaries of this innovative approach are being deprived of the benefit of allocating funds received in accordance with the provisions of the original TB decision.

The availability of the EDF should be communicated to the broader user community. While we express no opinion on the matter, it would appear that there is a prevailing myth that the EDF is only available for CEPA prosecutions. This should be clarified.

There is an opportunity available now to both enhance the effectiveness of the EPAMS and enshrine the EDF as an effective tool for managing the receipt and payment out of environmental penalties that EC should consider. All prosecutions that have as a basis an environmental event should be considered for inclusion explicitly within the EDF framework.

EDF was a ground-breaking mechanism to permit a transparent transfer of monies received in respect of environmental penalties to respond to the need to remediate the damages that occurred. Its use can be enhanced if it is well communicated to those who would employ it. That is the challenge that faces Environment Canada if it wishes to continue to have fund that is relevant, successful and effective.