

ASIAN DEVELOPMENT BANK

SAMUT PRAKARN WASTEWATER MANAGEMENT PROJECT

INSPECTION

MANAGEMENT RESPONSE

TO THE

FINAL REPORT OF THE INSPECTION PANEL

14 FEBRUARY 2002

CURRENCY EQUIVALENTS

Currency Unit - Thai Baht (Bt)

	1995 (Dec)	1998 (Dec)	2001 (Dec)
B 1.00 =	\$ 0.0399	\$ 0.0273	\$0.0228
\$1.00 =	Bt 25.0800	Bt 36.6750	Bt 43.8600

ABBREVIATIONS

ADB	-	Asian Development Bank
BIC	-	Board Inspection Committee
BME	-	Benefit Monitoring and Evaluation
BP	-	Bank Policy
Klong	-	A small waterway, typically a stream or canal
DMCs	-	Developing Member Countries
EEZ	-	Economic Exclusion Zone
EIA	-	Environmental Impact Assessment
EMP	-	Environmental Management Plan
GP	-	Guidelines and Procedures
IR	-	Independent Review
OM	-	Operations Manual
OP	-	Operational Procedures
PCD	-	Pollution Control Department
PPTA	-	Project Preparatory Technical Assistance
SIA	-	Social Impact Assessment
SSTA	-	Small-Scale Technical Assistance
TOR	-	Terms of Reference

NOTES

- (i) The fiscal year of the Government ends on 31 December.
- (ii) In this report, "\$" refers to US dollars.

SAMUT PRAKARN INSPECTION: MANAGEMENT RESPONSE

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SAMUT PRAKARN WASTEWATER MANAGEMENT PROJECT

MANAGEMENT RESPONSE TO THE FINAL REPORT OF THE INSPECTION PANEL

Introduction and Overview

I. Project Description

1. The Samut Prakarn Wastewater Management Project (Project) is designed to improve the health and well-being of residents in Samut Prakarn Province, Thailand, where water pollution poses serious environmental and health risks. It seeks to improve the quality of the province's environmental and public health profiles by providing modern, reliable, and cost-effective wastewater collection and treatment facilities. Complementary programs are being implemented to improve environmental monitoring and enforcement, as well as to promote cleaner production for industry. Some of the specific benefits are listed below:

- (i) About one million residents, particularly the poor, will directly benefit from a cleaner environment and improved water quality.
- (ii) The Project treatment plant will eliminate, annually, about 72,000 tons of organic pollutants and about 90 tons of heavy metals currently discharged with little or no treatment into the Gulf of Thailand.
- (iii) The polluter-pays principle will be implemented where industry, which causes 80 percent of the pollution, will pay 80 percent of the clean-up costs.
- (iv) Industrial establishments will experience cost savings by connecting to the Project's centralized wastewater management system rather than having to upgrade in-house treatment to meet final effluent standards.

II. Background

2. The Project is the first to be inspected under ADB's Inspection Policy, approved by the Board of Directors (BOD) in 1995. The Inspection commenced on 27 November 2000, when we received a letter of complaint signed by three residents of Klong Dan regarding the Project. We responded to the initial complaint on 11 January 2001. On 5 April 2001, the Board Inspection Committee (BIC) received a request for an Inspection from the three Requestors. We were requested to provide a written response to the letter of complaint and did so on 24 May 2001.

3. On 20 June 2001, the BIC recommended to BOD that an Inspection of the Project be carried out and on 10 July, BOD authorized such an Inspection. An Inspection Panel (the Panel) was then appointed and instructed to determine whether ADB had complied with its operational policies and procedures in designing and implementing the Project, under ADB's Inspection Policy. After carrying out its work, on 14 December 2001, the Panel submitted its report entitled "Final Report of Inspection Panel on Samut Prakarn Wastewater Management Project" (the Report) to the BIC. On 17 December 2001, a copy of the Report was provided to the President for a response.

4. This Response to the Report is submitted to the BIC pursuant to paragraph 44 of the Inspection Policy and paragraph 60 of the Inspection Procedures.

III. The Response – Structure and Overview

5. This response is structured in two parts. Part A addresses the findings of the Panel concerning compliance with relevant ADB policies and procedures, the question of direct and material harm caused to the Requestors by alleged failure to comply, and the Panel's recommendations. Part B is concerned with sections 1 and 2 of the Report regarding the validity of the Report itself, the Panel's views on perceptions of ADB staff about the Project, and the management of the Project by ADB¹.

6. We also wish to address some of the Report's findings that raise questions about the thoroughness of the inspection undertaken by the Panel. These are discussed in some detail in this Response and relate to the following:

- (i) the Panel's claim that it has not been able to complete the inspection process for the Project;
- (ii) the Panel's decision to suspend the inspection, and not to interview the Requestors or key ADB and Government of Thailand officials associated with the Project;
- (iii) whether or not due rigor was applied in the Panel's analysis of compliance with ADB policies and procedures (the Panel's questioning of judgement exercised by Management and staff, and its comments on a number of events or issues that have little or no bearing on the assessment of compliance with ADB policies and procedures, are particularly notable);
- (iv) the untenable link between the alleged failure of staff to comply with certain policies and procedures and the alleged consequential direct and material impact on the Requestors; and
- (v) the Panel's recommendations, that demonstrate a lack of familiarity with Project implementation status since many of the recommendations are already in place as regular project activities.

As stated earlier, the Project is the first to be inspected under the Inspection Policy. As such, this will set an example for future cases to ensure the credibility of the inspection process and serve as a vital instrument of internal governance in ADB. However, we are deeply concerned that the Report may fall short of this expectation.

7. Management and staff appreciate that the Government of Thailand has been consistently patient, understanding, and cooperative throughout the inspection process. Although the inspection was aimed at assessing ADB's compliance with its policies and procedures, we regret that certain actions during the course of the inspection, and some passages in the Report, give the impression that the Government was also the subject of inspection. The Government of Thailand was clearly not subject to inspection, and we wish to record our appreciation of the sound professionalism displayed by Government officials in supporting the inspection process.

¹ References to paragraph numbers are to paragraph numbers in the Report, unless indicated otherwise.

8. We would also like to note that Management and staff have been fully committed to the inspection process. Management and staff have also done their best to avoid imposing unduly on the Thai Government, especially the Project authorities, and, at the same time, have ensured the transparency and correctness of ADB's actions throughout the inspection process.

Part A:

I. Compliance with ADB Policies and Procedures

A. Supplementary Financing of Cost Overruns

9. The Report states (paras. 70 - 75) that "*Management thus takes a very narrow view of the purpose of the reappraisal referring to an indicative format for the RRP for supplementary loan proposals attached to the 1989 document. [.....] In the view of the Panel, OM13/BP/OP clearly supercedes the 1983 and 1989 documents.*"² [.....] Thus the Panel is of the view that in not carrying out a reappraisal of the entire Project for the supplementary loan proposal there was non-compliance by the Bank of OM13/BP/OP, 12 December 1995. The omission became a crucial factor from which other consequences followed."

10. The Panel's conclusion is incorrect. The scope of a reappraisal required for a supplementary loan is based on para. 24(ii) of the 1983 policy paper which states: "The review of each project should aim to establish the principal reasons for the cost overrun so that the Bank and the borrower can take remedial steps. With that end in view the analysis should seek to identify: [...etc]"; the text then continues to list issues to be identified, all of which relate to the reasons of the cost overrun and possible remedial actions. The 1989 document, which provides the indicative format for the RRP for a supplementary loan, emphasizes this focus of the reappraisal. Thus, the view taken of the purpose of the reappraisal was neither narrow nor broad; it merely followed the existing policy, no more, no less.

11. The Panel's statement (para. 74) that "*OM13/BP/OP clearly supercedes the 1983 and 1989 documents*" disregards the hierarchical order of policy papers and the OM. Board-approved policy papers cannot be superceded by the OM; the purpose of the OM is to give operational effect to ADB policies, not to replace them. It is worth noting that the indicative RRP format for supplementary loans attached to the 1989 document is fully incorporated in the Guidelines on Operational Procedures on Supplementary Financing of Cost Overruns (GP 13) dated 12 December 1995 (the same date as OM13/BP/OP). GP 13 also repeats the above-cited para. 24(ii) of the 1983 policy paper. While the GP is not part of ADB's "operational policies and procedures" for purposes of the Inspection Policy, it is mentioned here since it shows that the Panel's contention that the 1983 and 1989 Board documents were superceded by OM 13 is also factually incorrect. In short, there was no basis for the Panel's conclusion that Management had taken too narrow a view of the purpose of the reappraisal and, by consequence, there was no failure to comply with the policy on supplementary financing.

12. The Panel has centered its main findings on the alleged failure to comply with ADB policy on supplementary financing of cost overruns. It has argued that since comprehensive reappraisal was required but not undertaken, several other policies (which were adopted after

² Doc. R115-83, Revision 1, Final, *Review of the Bank's Policy on Supplementary Financing of Cost Overruns of Bank-financed Projects*, 29 November 1983, and Doc. Sec. M48-89, *Simplification of Board Documentation for Supplementary Loans*, 12 September 1989

approval of the first loan for the Project and whose provisions would have been triggered had comprehensive reappraisal been undertaken) were not complied with. In this context, it is crucial to note that a reappraisal of the whole Project was undertaken by ADB staff, but focused on the analysis of the causes of the cost overrun fully in line with Board-approved policy. Therefore, the question of staff failing to comply with other policies that were adopted after December 1995 does not arise. Nevertheless, and without prejudice to our central point made in para. 11, above, we have examined the alleged failures to comply with policies adopted after December 1995 also in substance.

B. ADB's Operational Missions

13. The Panel claims (para. 79) that “*the Bank did not comply with the policy on Bank's Operational Missions OM 32 BP/OP, 13 January 1997.*” This OM states, inter alia, “..a reappraisal mission is sent when substantial or basic changes have become necessary in the scope or implementation arrangements of an approved project or where cost overruns are incurred in its implementation.”

14. OM 32 governs two situations that may require reappraisal, namely, substantial or basic changes in a project's scope or implementation arrangements, and cost overruns. Specific provisions for reappraisal in the case of cost overruns are provided in OM 13 and were complied with (see paras. 10-12, above). The Panel's conclusion that the other changes that occurred in the course of project implementation also required reappraisal seems to be based on the reasoning that these changes together constituted a major change in scope or implementation arrangements and that, by definition, every major change requires reappraisal. We disagree with the Panel's conclusion for reasons explained below.

15. The Panel has argued (para. 80) that “*the cumulative nature of the changes did in fact constitute a major change in the Project; in other words that the whole was greater than the sum of the individual parts*”. This argument disregards the reality of project implementation, which for a project of this size may span a development and construction period of 48 – 60 months. Project implementation is a dynamic process. Changes occur all the time and they need to be dealt with as they occur, as was the case on this Project. Clearly, a decision on whether they are major or minor needs to be taken as and when the changes take place or are anticipated. Changes cannot be considered on the basis of how they might appear in hindsight in combination with other changes that have taken place over the course of several years of project implementation.

16. In order to fully appreciate the circumstances in which the Project cost increased, it is instructive to examine the background. To minimize the impact of severe traffic congestion in Samut Prakarn province, the Government directed its Pollution Control Department (PCD)³ to utilize trenchless technologies for the installation of the sewer collection system in lieu of open cut trenching. Further, rapidly rising land prices in the Project area had prompted a change in the treatment process from the use of waste stabilization ponds to an extended aeration treatment plant. This technology minimizes land requirements. Consequently, the Project cost increased from \$507 million at appraisal of the original project to \$948 million⁴.

³ PCD in the Ministry of Science, Technology, and the Environment is the Executing Agency for the Project.

⁴ The cost, however, declined to \$687 million in July 1997 as a consequence of a depreciation of the value of the Thai Baht following the financial crisis.

17. The likely increase in cost, together with the Government's directions to PCD, was reported by an ADB review mission to senior staff⁵. It was noted by senior staff that although the increase in Project cost was significant, it occurred mainly as a consequence of a change in the method of construction of the sewerage system and in treatment plant technology. It had no impact on the Project's objectives, scope, or implementation arrangements. Further, a review undertaken by PCD, and shared with ADB staff, showed that Project benefits were not compromised and that the Project remained viable in economic and financial terms. Most importantly, it was noted that no financing gaps were likely since the Government of Thailand had decided to finance all of the increased cost from its own resources⁶. Given that none of the Project's most critical parameters had changed as a consequence of the cost increase, it was judged that a reappraisal at that point in time was not required. In other words, even if the increase in cost was considered to be "major" it was not so fundamental in effect or far-reaching in nature as to warrant a reappraisal of the Project. However, a reappraisal of the Project focusing on the reasons for cost overrun was undertaken once a decision was taken to consider the Government's request for supplementary financing in 1998, given that the need for such financing arose from a cost overrun.

18. The Panel has contended (para. 80) that the decision to construct one treatment plant (instead of two as originally considered) and to change the location of the treatment plant constituted a major change that warranted reappraisal. We disagree with this view. The reduction from two treatment plants to one was made for reasons of cost efficiency⁷. Treatment capacity remained unchanged, and one site as opposed to two obviously brought about a reduction in any potential adverse social impacts. There was no change in location, as there was no fixed location(s) initially, as described in the loan documentation; therefore, this cannot be construed as a change in scope, either major or otherwise.

19. The Panel has also contended (para. 80) that the number of turnkey contracts was changed and that this should have been considered as a major change. It should be noted in this context that ADB loan documentation generally defines the mode of procurement for each type of project component. Changing the number of contracts is not unusual, and is regularly done; there is no indirect or direct change in scope.

20. In summary, the alleged major changes were not major either singly or cumulatively by the definitions as obtained at that time, or when viewed by the results of Project implementation so far. ADB's judgement has been vindicated by the smooth implementation of the Project and the conclusions of the numerous independent technical reports, reviews, and studies that have confirmed the Project's technical design and cost effectiveness⁸.

⁵ Back-to-Office Report of review mission dated 15 October 1996.

⁶ The Government of Thailand's request for supplementary financing to the Bank was made only after the financial crisis of mid-1997 seriously undermined the Government's ability to finance the Project's costs from its own resources.

⁷ PCD estimates that it saved 800 million baht as a result of the reduction from two treatment plants to one.

⁸ A sampling of these reviews, reports, and studies is (i) First technical hearing with 22 Thai academics/professionals on the appropriateness of the wastewater management scheme - August 1999; (ii) Second technical hearing with participation of Klong Dan community representatives - October 1999; (iii) Independent Review conducted to assess the environmental, ecological, and health aspects of the Project - March - June 2001; (iv) Detailed environmental studies commissioned under the turnkey contract - June 1999; (v) Kasetsart University tests on the impact of reduction in salinity on mussels - March 1999.

C. Environmental Considerations in ADB Operations

21. The Report (para. 94) states that “*the Panel concludes that the original categorization of the Project lead to a number of subsequent decisions which have resulted in non-compliance with the Bank’s policy on Environmental Considerations in Bank Operations OM Section 21, ...*”. The Panel has questioned the categorization of the Project as B. Assigning environmental categories to projects, however, is a matter of exercise of professional judgement by staff and outside the scope of inspection. Nonetheless, it is instructive to understand why ADB staff categorized the Project as B.

22. OM 21 states “ENVD, after consultation with Projects Department staff, categorizes projects listed in the Country Assistance Plan according to their anticipated environmental impact. Each proposed program or project is scrutinized as to its type; location; the sensitivity, scale, nature and magnitude of its potential impacts; and availability of cost effective mitigation measures.” A review of these criteria by qualified ADB environmental specialists (including the Project Mission Leader) at the time of Project conception accurately resulted in categorization of the Project as Environment Category B - “Projects judged to have some adverse environmental impacts, but of lesser degree and/or significance than those for category A projects.”. The decision to classify the Project as in environmental category B was based on the following considerations:

- (i) Type of Project⁹: Wastewater management projects are intended to improve environmental quality. The potential generic adverse impacts of concern are reduction of human use or ecological values of receiving waters (the aquatic system to which the wastewater treatment plant effluent is discharged), and the deterioration of quality of life of local human populations due to construction and operation of physical facilities (such as land use or value change, short-term nuisance conditions during construction from disruption of traffic or increased dust, etc., or long-term nuisance conditions due to odor from treatment facilities). As noted below, the potential for significant adverse impact was identified as minimal and easily mitigated.
- (ii) Location of the Collection Area¹⁰: The lower Chao Phraya River and coastal canals have had very little ecological value for many years, as a result of discharge of untreated or inadequately treated domestic and industrial wastewater from Bangkok and Samut Prakarn province. The human use values have been limited to transportation (though transportation value of many canals has been reduced by severe congestion due to excess water hyacinth growth which resulted from increased pollution) and as wastewater receiving waters (essentially open sewers). The ecological value of the Upper Gulf of Thailand has been reduced to zero for at least 20 years as a result of (a) overfishing, (b) destruction or degradation of mangroves, and (c) pollution from direct discharge of untreated or partially treated industrial and domestic wastewater, and from polluted river and canal discharge to the Upper Gulf. These conditions were documented in the 1970s, and monitoring by the Government and various research publications by reputable universities

⁹ Staff examined the overall impact the Project would have on the environment and the degree of difficulty in mitigating the adverse impacts.

¹⁰ Staff examined the environmental conditions of the Project location, i.e. Samut Prakarn province, and the level of adverse impact the Project would have on the existing environmental conditions.

- confirmed a continuous and accelerating degradation of the potential receiving waters for the Project effluent. The potential adverse impact area of the Project was identified as being the area of construction of treatment facilities, and the area affected by discharge of effluent treated wastewater- the lower Chao Phraya River, coastal canals, and/or Upper Gulf of Thailand.
- (iii) Location of the Treatment Facilities: A large area of undeveloped land with low human population and little ecological value was identified as being suitable for location, resulting in no involuntary relocation of households or businesses, and insignificant loss of productive use of land or impact on ecological values. As it turned out, there was no involuntary relocation of households or businesses, and the site for the treatment facility is on land with no significant ecological value, because of earlier degradation caused by conversion of the coastal area to aquaculture - later abandoned.
 - (iv) Sensitivity, scale, nature and magnitude of potential impacts: At the time of environmental categorization, ADB environment specialists knew that the Project would not affect ecologically sensitive areas. Due to the environmental degradation of the Project area, it was determined that the nature of the impacts are generally beneficial with minor potential for significant adverse impacts. This is supported by the fact that the Project would result in minimal, if any, relocation of households or businesses, and the dilution/dispersion capacity of the receiving waters would result in a small area of influence.
 - (v) Availability of cost effective mitigation measures: The potential adverse impacts of a wastewater management project were recognized as being readily mitigated by proper environmental management and with compensation for any significantly affected persons. In view of the location of the Project and in anticipation of effective implementation of a sound environmental management plan, such mitigation was expected to be limited to compensation of a small number of households or businesses.

23. Since the Project was classified as being in environmental category B, an environmental impact assessment (EIA) was not required. The Report (para. 92) refers to the original feasibility study in which “...a more detailed EIA for any selected strategy option is recommended.” However, the Report fails to mention that this recommendation was made on the basis of treating the wastewater to primary effluent quality prior to discharge to canals with very limited dispersion and poor dilution capacities and then into the Gulf of Thailand, as recommended in the feasibility study. Both the Government and ADB rejected this recommendation in favor of a higher quality secondary treatment to be discharged directly to the Upper Gulf resulting in effluent with much less potential to cause adverse impacts in the receiving water ecosystems. This is an example of exercise of professional judgement by ADB staff that the Panel has overlooked.

24. The Panel’s conclusion (para. 94), therefore, that the Project’s “original categorization” led to a number of subsequent decisions which have resulted in noncompliance with OM 21, is invalid. The reasons for ADB staff determining the Project as being in environment category B were professionally legitimate as demonstrated above. Consequently, the question of their leading to noncompliance with OM 21 does not arise. At any rate, the Panel has not provided any technical evidence to controvert the professional judgement of ADB staff. Moreover, the Panel has overlooked the point that OM 21 concerns itself with the process of environmental

considerations in ADB operations once project categorization has been done; it does not detail the process of categorization since this clearly requires the application of technical expertise and judgement.

D. Involuntary Resettlement

25. The Report (para. 102) contends that there has been “...*non-compliance with the Bank’s policy on involuntary resettlement...*” based on the assertion that if ADB failed to comply with its policy on supplementary financing of cost overruns, it equally failed to comply with the policy on involuntary resettlement. Since we have argued (paras. 10-12) that there was no failure to comply with ADB policy on supplementary financing of cost overruns then, following the Panel’s reasoning, there can be no failure to comply with ADB policy on involuntary resettlement.

26. The Report (para. 103) also contends that “...*it is the finding of the Panel that the Bank failed to do.....a resettlement plan that covered potential impacts of the Project on the livelihood of the local community.....(OM Section 50/OP, paragraph 6).*” The argument here is that OM 50 was issued on 7 January 1997, and should have been considered at the time of supplementary loan approval. Three points should be noted here. Firstly, the reappraisal was necessarily limited to focus on the cost overrun (paras. 10-12, above). Secondly, a treatment plant site had been acquired that involved no resettlement, and was located well away from any community – the closest community, Klong Dan, is over 1.5 kilometers away. Thirdly, under the turnkey approach adopted, detailed design was in progress in 1997-98. It was necessary to complete detailed design work to determine the exact size and location of the economic exclusion zone (EEZ) around the marine outfall. Unless this was done, it was not possible to identify the affected people and consider compensation. The detailed design work was not completed until 2000 and the final boundaries not determined until 2001. The conclusion, therefore, is that even if OM 50 had been theoretically applicable in 1998, it was both practically not required and technically impossible to apply.

27. It should be noted that the EEZ during construction affected only a single fish stake license. Based on surveys to date, it is expected that not more than 3-4 licenses will be affected at full operation. During construction the affected licensee has been financially compensated on a mutually agreed basis, and will continue to be so compensated until the Project facilities are commissioned. Upon commissioning, the Project authorities, together with the Fisheries Department, will provide the licensees with alternative license areas for aquaculture development, and will help introduce advanced mussel farming methods to enhance production.

28. As a final point, it should be noted that, in spite of the inapplicability of the OM in practical and technical terms as discussed above, ADB staff were conscious of the need to protect the interests of people who might be adversely affected as a consequence of activities in the Project area. The requirement that a resettlement and compensation plan will be submitted to ADB for approval in the event of any activity that required people to be resettled and their livelihoods restored, was incorporated into the loan documents. A compensation framework is currently under discussion between PCD and the affected persons.

E. Good Governance

29. The Report states (para. 109) that “...*the Bank failed to ensure that the basic element of participation was properly taken care of.....This leads the Panel to conclude that the Bank failed to comply with its policy on Governance.* In support of its conclusion, the Report first quotes (para. 109) from OM 54: “*Participation implies that government structures are flexible*

enough to offer beneficiaries, and others affected, the opportunity to improve the design and implementation of public policies, programs, and projects” and then continues: “The Panel did not obtain evidence that the Requesters and the community of Klong Dan were given such opportunity. The current efforts for community consultation are too late in the sense that implementation of the Project is in a rather advanced stage.”

30. The Panel's conclusion implies that it is ADB's responsibility under the governance policy to establish government structures for community participation and to ensure their effectiveness. However, ADB's role is to promote and support the Government's efforts to put appropriate structures in place for community participation and seek the community's feedback through such mechanisms. In the case of the Project, PCD has consulted with stakeholders both through the existing government structures, in particular through meetings with elected representatives at the lowest administrative level of government (sub-district level) of Klong Dan and through meetings with wider stakeholder groups. In supporting and promoting the extensive efforts made by the Government, ADB has complied with the governance policy.

31. The governance policy enjoins participation in broad terms. However, it does not set levels and degrees of participation. Clearly, these will vary with the nature and service area of a project. This is in line with the statement in OM 54, para. 13: “The Bank will also take account of the need for flexible (i.e., non-doctrinaire) and country-specific approaches.” For a large, technically complex project such as the Samut Prakarn Wastewater Management Project that covers an entire province, participation obviously cannot mean that each of the over 600,000 (eventually 1 million) stakeholders gets involved in the actual design of the project components. It, however, does mean raising awareness, public consultation, listening to concerns of stakeholders and taking these concerns into account in completing detailed design and in otherwise implementing the project. In this context, it should be noted that the need for community participation and public consultation was implicit in paras. 13-14 of Schedule 6 of the Loan Agreement which required a public information campaign to commence within 3 months of loan effectiveness and to extend throughout project implementation. These covenants have been complied with. Also, PCD, through the provincial and district administration, kept the public informed of the principal project objectives, the proposed general locations of project facilities, service areas, expansion plans, and cost recovery plans.

32. The entire service area in Samut Prakarn province was covered by the public consultation program initiated by PCD. Additionally, civil society's views were taken into account through two technical hearings, an independent review (IR), direct efforts of PCD staff, and through the media. This involvement of stakeholders, including the Klong Dan community, has led to a major reconfiguration of the treatment plant design, the final siting of pumping stations and sewers in many areas, and community friendly construction methods and times (see para. 38, below). Attachment gives an overview of meetings held with stakeholders since award of the turnkey contract in 1997.

33. It is a truism in development work that community consultation should be an on-going process. We disagree, therefore, with the Panel's conclusion (para. 109) that the *“current efforts for community consultation are too late in the sense that implementation of the Project is in a rather advanced stage”*. In fact, the review by the IR team in 2001 offered an excellent opportunity for the Requestors and others to bring their concerns to the attention of the IR team and discuss possible solutions. The IR team made several useful suggestions to improve the design and operation of the treatment plant, which will be implemented. It is unfortunate that the Requestors boycotted the IR team and thus missed the chance to participate in the discussions on design improvements. However, looking forward, ADB remains willing to fully support the

ongoing development of mechanisms for community involvement in monitoring the treatment plant operations.

34. The Panel has also not taken into account that the Bank is assisting the Government in a number of ways to establish a sound institutional and regulatory framework in conjunction with the Project. Cost recovery policies for wastewater management based on the polluter pays principle are being developed. An institutional framework for sustainable operation, involving public/private partnerships is being established, and appropriate regulatory frameworks for wastewater discharge are being developed. Finally, a comprehensive monitoring program to demonstrate the impact of the project has been designed and put in place. Individually and cumulatively, these initiatives are designed to “... *help ensure that governments actually deliver to their citizens what they say they will deliver*” and thus meet the ends of the Governance policy.

F. Incorporation of Social Dimensions

35. The Panel has concluded (para. 118) that “*the Bank did not comply with its policy on the incorporation of social dimensions (OM Section 47, issued 7 January 1997) in ADB operations.*” This conclusion is again based on the premise that this policy was in force when the supplementary loan was processed in 1998 and had reappraisal been comprehensively undertaken, the policy on social dimensions would have been attracted. We disagree with this conclusion for reasons explained in paras. 10-12, above.

36. Even if we assume, for argument’s sake, that OM 47 was applicable at the time the first loan was processed for approval in 1995, the requirement for a social impact assessment (SIA) had been complied with. A comprehensive SIA for the entire Project area (Samut Prakarn province) was undertaken as part of the project preparatory technical assistance (PPTA). The potential impacts that were identified then are no different from the ones that are currently being addressed. There are two impacts. First, the discharge of the effluent into the sea – this is being managed adequately by the EEZ, as testified by all the qualified experts, and as predicted by modeling. It is true that the SIA did not identify the number of fisherfolk that would be affected by the EEZ, but it is important to note that had an initial social assessment been undertaken specifically for the Klong Dan area at the time of the reappraisal for the supplementary loan, this would not have been any different. As explained in para. 26, above, the detailed design work was only completed in 2000, and the boundaries of the EEZ only finalized in 2001. Only thereafter could persons affected by the EEZ be identified. A second identified potential impact relates to odor. The potential for odor problems (that have been predicted to be insignificant by the modeling exercises), will be monitored by a committee that includes community representatives. Further, the Project design incorporates odor control techniques and these will be exercised should odor rise to nuisance levels.

37. The Panel has quoted (para. 113) from OM 47, para. 5 “...*The Policy...requires...[the social assessments]...to continue with more and more refinement in the succeeding stages of project processing.*” It is implied that this did not occur. In the context of this implication, and the Report’s assertion that the social assessments should continue, we note that subsequent to the SIA made during implementation of the PPTA in 1995, a social study was conducted in July 1999 for Klong Dan. A further social assessment for Klong Dan was conducted as part of the small-scale technical assistance (SSTA) 3517: Community Assessment and Development, in 2001. Social assessments were, therefore, not lacking. More importantly, the assessments have led to PCD actively incorporating community suggestions and concerns in Project design in a significant way.

38. Three examples illustrate the seriousness with which community concerns were incorporated in the Project's implementation. Firstly, the original treatment plant layout was reconfigured so that the pretreatment ponds, potentially the most odorous component, were relocated to the far southern end of the site (near the coastline) to minimize the risk of odor impacting adversely on the community. To further allay community concerns about odor, support columns were added to the pretreatment ponds so that, if found necessary, covers could easily be installed in the future to contain odor. Secondly, the plant design was modified so as not to divert the Klong Don (a canal which traverses the plant site) which is used as a traditional access route to the sea by Klong Dan residents. Thirdly, the construction method for the marine outfall was changed from open-cut to tunneling in order to reduce disturbance of the seabed.

39. In para. 117, the Report refers to the Requestors' allegation that "*the ADB persists in its failure to take community concerns into account.*" This allegation is untrue. Two points are important in this context. Firstly, the Government is the only party that can legitimately take action on the Project regardless of whether such action arises from community concerns or other concerns. ADB can and does request the Government to take certain actions to mitigate concerns. Further, ADB can and does offer technical assistance for this purpose. In addition, ADB can take certain actions as described in the Loan Regulations, should the Government violate any of its obligations under the Loan Agreement. The Panel seems to have misunderstood the limitations of the role of ADB (para. 40). Secondly, even though ADB is a step removed from the community, it has proactively been trying to facilitate a more constructive dialogue between the Government and the residents of Klong Dan Municipality. In 2000, two meetings were held between ADB staff and the Requestors to explore ways to move toward a constructive dialogue. These efforts were rejected by the Requestors. Subsequently, a further attempt was made by a Thai NGO, Protection and Conservation of the Environment and Natural Resources, to mediate. This, too, was rejected. Finally, efforts have been made under SSTA-3517 to establish a base for constructive engagement. Despite efforts by the Requestors to derail this attempt, it seems that many in the community do want to move toward a constructive engagement. It is hoped that this initiative can progress further in the near future.

G. Benefit Monitoring and Evaluation

40. The Report states (para. 126) that "*While the Panel recognizes that efforts have been made at a late stage to establish reliable benchmarks for a monitoring program, it has to conclude that this is not fully in compliance with the spirit of the policy as laid down in OM 22, 7 January 1997.*" Earlier, in paras. 123-125, the Panel speculates as follows (emphasis added): "*....another group of legitimate stakeholders who potentially could be adversely affected...there is little evidence in the monitoring schedule of any intent for ongoing monitoring of the socio-economic parameters of a community whose livelihood may potentially be impacted.....once a proposed facility starts to become a reality, the baseline data can start to shift quite dramatically.*"

41. As explained earlier (paras. 10-12), processing the supplementary loan did not require a full reappraisal. Therefore, OM 22 on Benefit Monitoring and Evaluation, issued some 14 months after the date of approval of the original loan, falls outside the scope of inspection. It should be noted that even though not bound by the provisions of OM 22, ADB staff incorporated a comprehensive program on benefit monitoring and evaluation (BME) in the Project that is reflected in paras. 10-12 of Schedule 6 to the Loan Agreement. The requirement of a comprehensive BME program was fully spelt out including the need for the program to be based

on the guidelines contained in ADB's "Benefit Monitoring and Evaluation Handbook" and tailored to meet the Project conditions.

42. The Panel's comment (para. 126) that "...efforts have been made at a late stage to establish reliable benchmarks for a monitoring program..." is unclear. Benchmarking of socioeconomic and environmental parameters as close in time to the commissioning of project facilities is considered international good practice. Para. 10 of schedule 6 of the Loan Agreement stipulates: "Baseline indicators for such BME activities shall be established at the time of commissioning of the central wastewater treatment facilities...". Work on data collection and refinement to develop the necessary indicators is now well advanced.

43. Socioeconomic data has been collected on Klong Dan as part of the Environmental Management Plan (EMP); this builds on the provincial data collected during the SIA under the PPTA. The EMP also provides a framework for the collection and assimilation of further data, prior to and following commissioning of the Project facilities – Summary of Environmental Impact and Mitigation Measures and Monitoring program, Table 3. In this regard, it is not clear why the Panel concludes that the EMP only contains a brief overview of the socioeconomic situation in the Klong Dan area. In fact, the EMP includes comprehensive baseline data on existing social and environmental conditions (204 pages, excluding survey and data sheets), significant environmental impacts, mitigation measures, and monitoring programs. Specific information on the Klong Dan area is covered under these sections. In addition, further socioeconomic data has been collected as part of SSTA-3517. Thus, there is a wealth of information and the level of detail is commensurate with the anticipated impacts on Klong Dan. Currently, data is being collected to establish a baseline situation at start-up; this will then be used as a basis for measuring impacts, post start-up. Clearly, therefore, and especially when viewed in the context of the totality of actions taken, the spirit of the policy on benefit monitoring and evaluation has been followed by ADB staff.

II. Assessment of Direct and Material Harm

44. The Panel has failed to establish a causal link between the alleged failure of ADB to comply with certain policies and direct and material harm to the community. Its analysis (paras. 150-155) is incorrect. To begin with, since the Panel states (para. 151) that it has been seriously disadvantaged in making a fair assessment of the direct and material harm on the rights and interests of the Requestors, this raises the question about the basis on which it has made its assessment.

45. The discussion below aims to demonstrate why we disagree with the Panel's reasoning and conclusions. For the sake of argument, it is assumed here that ADB indeed failed to comply with its policies and procedures in the areas determined by the Panel.

46. A key question is whether earlier and more effective involvement of the community would have resulted in a different project design or location. We believe that the answer to this question is in the negative. The treatment plant had to be located somewhere within a technically and economically feasible distance of the wastewater collection points; the length of the conveyance system was a key factor in feasibility. The Klong Dan area¹¹ was eventually chosen because it was relatively sparsely populated – the site itself was uninhabited. No physical relocation was involved. The nearest human habitation was, and is, over 1.5

¹¹ The Klong Dan area was within the boundaries of the overall area identified during feasibility study as being optimal for situating the Project facilities.

kilometers away. The land was already heavily degraded. Furthermore, as stated elsewhere, community concerns were incorporated in the Project design as also in the EMP.

47. Likewise, classification of the Project as a Category A project in terms of ADB's environmental guidelines, and the preparation of an EIA at an earlier stage, would not have resulted in a different project design. In fact, both the independent technical design review undertaken in 1998 and the IR undertaken in 2001 confirmed that the project design was environmentally sound. In the course of both reviews, the independent experts made recommendations for certain improvements, all of which have been incorporated in the EMP. In short, had the project been classified as a Category A project and had a detailed EIA for the Klong Dan site been prepared at an earlier stage, the decisions as to the project location and the environmental mitigation measures would not have been materially different.

48. Compensation for the few mussel farmers who would be affected by the establishment of the EEZ could not have been determined earlier than 2001 when its boundaries were finalized. However, as mentioned in para. 27, above, compensation during construction was being paid to the affected party all along. Even now, PCD and the Fisheries Department are seeking to provide the affected person with a new fish stake license in nearby areas. They are also helping introduce new farming methods designed to increase production. There is no evidence of material harm caused to the mussel farmers by the demarcation of the EEZ. At any rate, this would not have led to a different location of the plant or the EEZ, which was demarcated based on technical and health considerations.

49. The Panel has claimed (para. 154) a potential impact on fish farmers in the vicinity of the EEZ. This ignores the work of all the world-class experts engaged from Thailand and overseas in the various reviews of the Project, and in preparing the EMP. It is clear from their reports that there will be no adverse impacts outside the EEZ, either in terms of salinity, pathogenic contamination, or heavy metals. There will, however, be positive impacts in terms of reduced pollution loads and reduced levels of heavy metals; there will be no significant impact on salinity outside the boundary of the EEZ. In fact, during the IR in 2001, the size of the EEZ was doubled as an extraordinary precautionary measure. In addition, a monitoring program, detailed in the EMP, will be conducted to ensure that no impacts will occur outside the boundary of the EEZ. This program will be complemented by a further in-plant monitoring program that ensures the design standards for the effluent are not exceeded.

50. Contrary to the Panel's hypothesis that earlier community involvement might have led to different solutions of the concerns mentioned as potentially harmful effects in the Report (para. 154), the EMP categorically specifies the only possible mitigating and risk averting measures. The timing of community involvement has no impact on the nature of the potentially harmful effects. The modeling exercises have indicated that odor is not likely to be a significant problem. Nonetheless, the Project design incorporates odor control techniques and these will be exercised should odor rise to nuisance levels. Also, a committee that includes community representatives will monitor odor problems as and when they arise. With regard to sludge, it should be noted that wastewater sludge will be properly managed under the Project for the first time in the province. Currently, inappropriate disposal of sludge from all sources is giving cause for concern in terms of unacceptably high levels of contaminants in the environment. The Project provides for sludge storage for a period of five years from the date of commissioning. This is done so that the waste characteristics can be established during operation, and an appropriate management action plan implemented. A sludge management strategy exists and a sludge management master plan that considers options is currently under preparation, and will form the basis for the action plan following commissioning and evaluation of the sludge

characteristics. There will be no adverse impacts arising from sludge management. In fact, the implementation of a sludge management master plan will bring about positive benefits for the local environment.

51. The Panel has stated (para. 154) that it “...has no means of assessing the impact on property values....but considers it as an area of potential material harm to the local community.” The subject of property values is highly speculative and open to conjecture. ADB staff, too, and indeed the Government, have no means of assessing impact. However, what is known, and documented in the EMP, is that Klong Dan is highly polluted, and has strong odors emanating from the klong. This is likely to detract from property values. With the introduction of the wastewater management system under the Project, and with the potential for the Klong Dan community to connect to the system, the environment will be vastly improved. In this context, it would be possible to argue that with an improved environment property values would rise and not decline. Regardless, however, of where property values go, there is no causal relationship between property values and ADB’s alleged failure to involve the community at an earlier stage.

III. Recommendations

52. The Panel’s recommendations (paras. 165-166) have been derived from its conclusion that ADB failed to comply with some of its policies and procedures. We have argued that there was no failure on the part of ADB staff to interpret and administer ADB policies correctly. Nonetheless, it may be useful to examine the Panel’s recommendations and determine their relevance and implementability. The Panel’s recommendation to institute negotiations with the Klong Dan community is based on a series of misconceptions. These are discussed below.

53. As has been explained in this Response, the Klong Dan community is not adversely affected by the Project. The significant impacts are all positive and include broad public health and environmental benefits. The potential for adverse impact is limited and has been addressed both in the design of the Project and in its operating arrangements. The only affected persons are expected to be a very small number of mussel farmers granted fish stake licenses in the EEZ for whom compensation measures are being developed in accordance with a framework under discussion between PCD and the mussel farmers. Against this background, the Panel’s recommendation to negotiate adequate compensation with the community fails to appreciate the actual situation.

54. Moreover, the recommended negotiation of compensation shows a misunderstanding of the Inspection Policy. The purpose of the inspection process is to determine if ADB has failed to comply with any of its policies and procedures and, in case such failure is found to have occurred, to “make recommendations, if appropriate, for any remedial changes in the scope or implementation of the inspected project” (see Inspection Policy, para. 43). The negotiation of a settlement of potential damages lies outside the scope of recommendations that an inspection panel can make. Indeed, an inspection is not a judicial process and its purpose is not to adjudicate awards for damages or make suggestions for the settlement of possible damages.

55. The Panel’s recommendation that compensation for potential damages should be negotiated appears to imply that the Thai Government should provide such compensation. However, the Thai Government is not a party to the inspection process and any failure by ADB to comply with any of its internal policies or procedures does not lead to any liability of the Thai Government for any possible damage resulting from such non-compliance by ADB. The only form of compensation that ADB can, and under its Policy on Involuntary Resettlement must, ask the Thai Government to offer people affected by the Project is compensation for those who

would face resettlement or lose their livelihood as a result of the Project. In this case, there is no physical displacement and indeed, PCD is developing a compensation package (in line with the ADB's Policy on Involuntary Resettlement) for the mussel farmers who would lose their livelihoods as a result of the establishment of the EEZ.

56. In so far as the Panel's recommendations in para. 166 (iii) are concerned, it should be noted that:

- (i) baseline data for the socioeconomic parameters of the Klong Dan community have already been developed and incorporated in the EMP; they are being continuously reviewed and refined and are central to the Project's monitoring arrangements;
- (ii) mechanisms for the "*meaningful community involvement in the risk assessment of future problems*" are under development as recommended in the EMP; for example, the community will be represented on the Project's odor management committee that is tasked to determine significant odor levels and means to deal with them; and
- (iii) mechanisms for the "*timely public notification of actual exceedances of limits for odor and effluent parameters*" are also being developed as recommended in the EMP.

Part B:

I. Conduct of the Inspection

57. The manner in which the inspection was undertaken, as described in section 1 of the Report, raises crucial questions about the adequacy and effectiveness of the inspection process, including whether the inspection was carried out in accordance with the Inspection Policy. It also impacts on the credibility of the Report. There are three important issues that are discussed below. These pertain to the Panel's proposal to visit the Project area, the scope of the inspection itself, and the Panel's decision to suspend the inspection.

A. Visit to the Project Area

58. The Inspection Policy expressly provides (para. 41) that " Any part of the inspection to be conducted by the Panel [...] in the territory of a borrowing country will be carried out only if the country has no objection". In the event of a Government objecting to a visit, the Inspection Procedures require the Panel (para. 52) to "modify its work plan accordingly and carry out its review on the basis of reports and other information available to the Panel and the Bank". In this case, the Panel was repeatedly advised that the Thai Government had legitimate concerns about the law and order situation with respect to the proposed visit. In an earlier instance, the Government officials in charge of the Project were detained by demonstrators for several hours. Because of these concerns the Government offered to consider a short visit by panel under certain conditions; these conditions were subsequently moderated when the Panel proposed to limit its visit to Bangkok (letter of 28 November 2001 from the Government to the Chairman of the BIC). However, both the Panel and BIC interpreted the Government's letter as an objection to a visit.

59. Regardless of whether or not the letter of 28 November 2001 should be interpreted as an objection to a visit by the Panel, the fact is that the Inspection Policy allows the Government concerned to state an objection to a visit. The Inspection Procedures provide clear guidance on how to complete the inspection in such a case. However, the Panel chose to suspend its information gathering and not to have any further formal interviews with any persons who could have provided relevant information, notably the two mission leaders, with whom no official interviews were held¹² and staff from PCD, all of whom were available for discussion with the Panel and could have provided information. Also, the Panel did not explore alternative means for communicating (e.g. telephone or video conferencing) with the Requestors and others it may have wished to consult, or obtaining visual information on the Project area through video films, aerial photos, or satellite imagery. Further, since both the Panel and BIC had decided¹³ that the expressions of the Government's concerns constituted an objection to the visit, it was incumbent on the Panel to comply with the provisions of the Inspection Policy and to complete the inspection. The Panel's declaration that the inspection is incomplete because the visit to the Project area did not materialize is invalid since the visit is not a requirement under the Policy.

B. Scope of the Inspection

60. In asserting (para. 32) that the Government imposed "impossible" conditions for a visit to the Project area, the Panel has essentially criticized the Government for exercising an option allowed by the Inspection Policy. Further, by stating that "*the conditions imposed by the Government of Thailand fundamentally undermine the effectiveness and soundness of the inspection system*", the Panel has exceeded its mandate. The Panel's role was to assess ADB's compliance with its policies and procedures, not to question the adequacy of any of ADB's policies including, notably, the Inspection Policy. The adequacy of ADB's policies is a matter for the Board to decide and is outside the scope of an inspection (see Inspection Policy, para. 31 (e)).

C. Suspension of the Inspection

61. The Panel's decision to suspend the inspection process is questionable. Such suspension is not provided for in the Policy. The reason given by the Panel that it was not allowed access to the Project area, is invalid because the Policy recognizes this possibility (para. 58, above) and specifically provides for an alternate plan. In summary, the Panel's actions in declaring the inspection process to be incomplete, suspending the inspection, not making efforts to obtain information relevant to its terms of reference (TOR), and in not officially communicating with key ADB and Government staff, and the Requestors, have impacted adversely on the inspection process.

II. **The Panel's Views on Perceptions of ADB Staff**

62. Both the Inspection Policy and the Panel's TOR require the Panel to give "due consideration to the exercise of professional judgment by ADB's Management, staff and consultants in interpreting and applying ADB's operational policies and procedures." The Panel has disregarded this requirement. In its comments on the handling of Project changes and the environmental categorization of the Project, the Panel has substituted its own judgement on

¹² While the Panel interviewed both mission leaders informally, and advised them of the informal nature of the interviews, it chose to quote one of them in its Report.

¹³ Letters dated 15 October and 5 December 2001 from the Chairman, BIC to the Permanent Secretary, Ministry of Finance, Government of Thailand.

how to prepare and administer a project for the professional judgement of ADB staff and Management. This is clearly outside the purpose of the inspection, and hence outside the competence of the Panel.

63. The Panel's TOR required it "to determine whether ADB has complied with its operational policies or procedures in processing or implementing the Samut Prakarn Wastewater Management Project in Thailand". In assessing the "management of the Project by the Bank", and in providing an "overview" of such management, the Panel went beyond its TOR. In doing so, it did not give due consideration to understanding ADB's organization and processes. ADB-financed projects are managed by the Governments concerned, while ADB is responsible for administering the loan approved by its Board to finance part of the project costs.

64. Notwithstanding its irrelevance to the inspection as mandated in the TOR, most of section 2 of the Report does not present a rational analysis of the key events germane to the Project. To illustrate, section 2.1 deals with the Panel's observations on "certain common perceptions" of ADB staff; however, it does not demonstrate how these perceptions were either professionally *mala fide* or otherwise impacted adversely on the ADB following its operational policies or procedures. Similarly, the relevance of section 2.2 that reviews "certain events in the Project cycle" is questionable given that the Panel has not established the relationship of these events to the alleged failure to comply with ADB policies and procedures. Regardless, however, of these aspects, the discussion below examines and addresses the main points raised by the Panel in section 2 of the Report.

A. Perceptions about the Project

65. It is true (para. 38) that staff believe that since the Project is designed to arrest and reverse the severe environmental degradation of the Project area, its environmental impacts will be mainly positive. It is equally true that staff believe that if the Project were not implemented, the Project area population would be worse off. However, the Panel has ignored the professional nature of the beliefs held by staff; these beliefs are anchored in rigorous feasibility and other technical studies including one of the most comprehensive environmental management plans developed for any ADB-financed project. Accordingly, it is incorrect for the Panel to portray professionally valid beliefs as mere perception. It is also incorrect for the Panel to suggest that because staff believed that this was "*a good environmental project*" ADB's policies were "*viewed as easily met.*" ADB staff are required to exercise professional judgement which is in compliance with ADB's policies and procedures.

B. Perceptions about the changes made in the Project

66. The Panel has alleged (para. 39) that "*there has been a tendency to view that many important changes in the Project made subsequent to the Loan approval are only changes of technical nature. As a result they are viewed in each individual case as a minor change. Over time, and viewed cumulatively, these changes.....have become major changes.*" As explained earlier, there was no such tendency on the part of staff. There are administrative processes in place for dealing with changes in scope, costs, or implementation arrangements. Further, by substituting its opinion as to the categorization of the changes for the judgement on this matter by ADB staff and Management, the Panel has stepped outside the scope of inspection.

C. Perceptions about the responsibility of the Staff

67. Para. 40 alleges that ADB staff seem to feel that they are not required to “*do the work themselves, their responsibility is to ensure that the work will be carried out by others.*” Although the Panel has not specified, it is assumed that the reference is to responsibilities in connection with social and environmental issues. We believe that the Panel’s view demonstrates a misconception about the responsibilities of ADB staff in preparing and implementing projects. There is a clear division of responsibility between ADB staff, who should ensure that the preparation and implementation of a project is done in accordance with ADB policies and procedures and the legal agreements governing the project loan, and the borrower’s executing agency that is responsible for actual project implementation. For instance, Governments consult with communities during the design and implementation of a project, while ADB staff encourage and often assist this process. Staff cannot undertake such consultation directly on behalf of the Government. Any other view of the role of ADB staff is incorrect.

D. Perceptions about the Turnkey Contract

68. The Panel has made (para. 42) several generalizations in its attempt to establish a staff “perception” of turnkey contracts. It is true that the bid documents required the contractor, and not the Government, to be responsible for land acquisition. However, it is unclear what the Panel meant when it stated that this “*might have impacts on the bidding process and the price of land*”. The facts are that the bidding process was uniform, and the price of land finally charged to the Government was verified and approved by the Bureau of Land, PCD, and the Ministry of Finance before the land was transferred to Government ownership. Further, it is not clear what this has got to do with staff perception of turnkey contracts.

69. The Panel has stated that a turnkey contractor might have a potential conflict of interest in undertaking certain functions that “*would normally be carried out by an independent and reputable contractor*” (it is not clear whether the Panel is implying that turnkey contractors are not independent and are disreputable). By way of example, the Panel has said that a turnkey contractor asked to undertake a study of project impact on a community would be cost-biased particularly if the contractor was responsible for mitigation of costs under the contract. However, the Panel’s illustration is simplistic. It would be valid only if the parameters for the study were not clearly established, and the resulting mitigation costs not set within upper and lower bounds. It would stand to reason that most agencies would guard against such open-ended turnkey contracts. Further, when the Panel states that “*the ADB or the owner should...have an objective third party to review the output of the turnkey contractor*”, it seems to be unaware of the fact that PCD has¹⁴ a full-fledged project management and construction supervision team comprising international and Thai specialists in various disciplines to advise it on a continuous basis on the implementation of the turnkey contract.

70. The conclusion in para. 43 of the Report that “*the staff and managers have the perception that since the Project is implemented by a turnkey contract, all the Project implementation issues should be taken care of by the turnkey contractor*” is unfounded. Staff and managers have no such perception. They understand unambiguously the responsibilities of the turnkey contractor and those of PCD as executing agency in regard to project implementation and management.

¹⁴ Since 15 November 1996.

E. Perceptions about the interpretation of ADB requirements

71. The Report states (para. 44) *“Even in situations where common sense approach is needed, the most restrictive interpretation was adopted”*. This statement lacks specificity, has no substantiation, and should, therefore, be disregarded. The implication that ADB staff do not use common sense in their judgments is unfounded. ADB staff are encouraged to apply ADB policies and procedures in a balanced way with emphasis both on the letter and spirit of the policy or procedure. Secondly, the Panel’s role is to determine whether ADB complied with its policies and procedures. Under its TOR, the Panel must respect the professional judgement of ADB staff. This sets the boundaries for the Panel’s review of ADB actions. Thus, if a strict interpretation of the regulations leads to the conclusion that ADB has complied with its requirements, the Panel cannot argue with the conclusion.

F. Perceptions about the Requestors

72. The Panel has contended (para. 45) that ADB staff perceive the Requestors to be a small group of people organized by certain specific interest groups and that the views of this *“small group of people do not represent the views of the majority in the Klong Dan community.”* It is true that some ADB staff associated with the design of the Project, or the administration of the loans, hold the view that the Requestors do not represent the views of the majority of the Klong Dan community. However, the Panel has not demonstrated how the holding of this view by certain ADB staff has interfered with adherence to ADB policies or procedures.

III. Review of Certain Events in the Project Cycle

A. The 1995 Loan

73. The Panel’s review of “certain events” in section 2.2 of the Report is arbitrary and has little or no bearing on the alleged violation of ADB policies or procedures. For example, the Panel has quoted selectively (para. 49) from the minutes of a Board meeting of 7 December 1995 where a Director expressed the hope that *“the ADB would continue to work with the Government to ensure community participation and education...”*. The fact is that ADB staff not only worked with PCD to ensure community participation but also encouraged PCD to work on its own. Numerous Project preparation and review missions emphasized this aspect. In this context, it is important to note that from as far back as 1999 the Requestors made it difficult for PCD to ensure that any meaningful dialogue took place.

74. In paras. 51-52 the Panel states that it *“was not possible for the Panel to find out whether there was any review of the Project after loan approval and before the signing of the Loan Agreement and, if indeed there was a review, at what level such a review was carried out.”* The Panel also gained an *“impression”* that *“since the Government was willing to cover the cost of the increases¹⁵, there was no need for the Management to be involved.”* If the Panel had asked, staff would have informed it that they learned of the Government’s decision to change the sewer construction method and its decision to finance the additional costs from its own resources in October 1996, i.e. after the loan agreement was signed in July 1996. A formal communication to this effect was received from the Government only in March 1997. In any event, staff did raise the issue of the cost overrun with Management.

¹⁵ The Panel is referring to an increase in the Project cost from \$507 million at appraisal to \$948 million when the Supplementary Loan was processed in 1998.

75. In para. 56, the Panel states that it was unable to verify whether the location of the treatment plant at Klong Dan, or the decision to use the turnkey process, was based on considerations of land availability. Two points may be noted in this context. One, that the Panel's verification of this aspect has no demonstrable bearing on its assessment of compliance with ADB policies and procedures. Two, that a simple inquiry from the Panel to the Government would have established the fact that the decision to site the treatment plant at Klong Dan was based, among others, on the availability of 303 hectares of a single plot of uninhabited, mainly degraded land adjacent to the sea, and at a safe distance away from human habitation.

76. In para. 56 also, the Panel has contended that an addendum to the bid documents to permit alternative bids for a single plant site was not approved by the ADB as required under procurement procedures. Quite apart from the fact that the ADB's procurement procedures are outside the scope of inspection, the correct position is that PCD sought ADB's approval to the issue of an addendum, and such approval was considered and granted.

77. The Panel has concluded (para. 58) that "*it is not clear*" whether the changes to the Project were reviewed by the managers, or the Management of the ADB. Unfortunately, even though the Panel remained unclear on these aspects, it has stated definitively that "*the lack of clear evidence on the issue of sufficient attention by the senior level of ADB managers including the Management, raised the important question if the necessary experience and policy guidance were made available to the staff whose focus would be understandably different from that of the senior officials of the ADB.*" It is difficult to speculate on the Panel's comment since the Panel has not indicated the exact areas where decisions on changes were not managed by adequate experience or policy guidance and how this impacted on compliance with ADB policy and procedures¹⁶.

B. Appraisal of the 1998 Supplementary Loan

78. In terms of meeting the requirements for reappraisal to justify the supplementary loan, staff had clearly followed the provisions incorporated in ADB policies and procedures. The process, and its procedural basis, has been explained in paras. 10-12, above. The Panel, however, has concluded that Management adopted a narrow interpretation of the procedures. It has further stated that "*the judgement to ignore other important issues in the appraisal was not a sound judgement expected from a respected professional organization such as the Bank.*" The Panel's comment seems misplaced since a question of judgement was not involved. The policy clearly specified that reappraisal should focus on the reasons for the cost overrun. Staff simply followed the policy.

C. Amendment of 1996 Loan Agreement

79. The Panel has commented (para. 61) on the likelihood of the Board having been misled on the amendment of the 1996 Loan Agreement. The fact is that there was no formal amendment of the 1996 Loan Agreement. However, by the time the 1998 Loan Agreement was submitted to the Board, together with the RRP for the Supplementary Loan, the reduction from two treatment plants to one had been approved in the context of the procurement process. Thus, the project description in the 1996 Loan Agreement, which mentioned two treatment plants, was no longer accurate and had to be amended. Whether this amendment was documented through a formal amendment of the Loan Agreement, or through the minutes of the

¹⁶ The Panel would have benefited in obtaining clarity in this matter if it had formally interviewed ADB staff responsible for Project administration at that time.

Procurement Committee meeting and subsequent correspondence with the Government, is immaterial. The full details of the reduction from two treatment plants to one were given in the accompanying RRP and, thus, the Board was fully informed about this change. Therefore, there is no basis whatsoever for the Panel's observation that the wording in the Loan Agreement could have served to mislead the Board.

D. Community Consultation

80. In the context of staff reliance on PCD to deal directly with the Klong Dan community, the Panel has concluded (para. 65) that "*this reflected the perception of staff that such activities were the responsibility of the agency...*" It should be noted that this is not a question of perception but of fact. Dialogue with a community on a sustained basis cannot be the responsibility of ADB staff; it is necessarily a Government responsibility. In this case, staff could only assist in facilitating a dialogue between the community and the Government; staff could not carry out such dialogue with the community independently and directly. Even when staff typically consult with communities during project design or implementation to determine needs, preferences, design issues, and implementation problems, such consultation is invariably with the cooperation of the Government agency concerned.

Conclusion

81. This Response has carefully considered the findings of the Panel concerning compliance with relevant ADB policies and procedures, whether there was direct and material harm caused to the Requestors through alleged failure to comply, and the recommendations contained in the Report. Taking these into account, we conclude that:

- the Panel's assessment that there was failure by ADB staff to comply with ADB's operational policies and procedures is unfounded; in particular, the Panel's assessment that there was failure to comply with the policy on supplementary financing of cost overruns, and consequential failure to comply with other policies and procedures is incorrect;
- the Panel's assessment of direct and material harm to the Requestors and the Klong Dan community has no factual basis;
- there is no causal relationship between the alleged failure of ADB staff to comply with ADB policies and procedures and the direct and material harm to the Requestors and the Klong Dan community as assessed by the Panel;
- the Panel's recommendations are misplaced;
- the Panel strayed materially from its TOR in several respects;
- the Panel's action in suspending the inspection was not governed by the Inspection Policy and impacted adversely on the inspection process; and,
- in criticizing the Government of Thailand for not permitting a visit to the Project area and for thereby allegedly undermining the inspection process, the Panel acted outside the bounds of the Inspection Policy.

**ADB/PCD's Consultation Efforts
Since Award of the Turnkey Contract in 1997**

Date	Consultation
Aug 1997	<ul style="list-style-type: none"> ▪ Turnkey contract was awarded
Sep 1997	<ul style="list-style-type: none"> ▪ Panel discussion was held at the Community Center (next to the City Hall) comprising government officials and representatives from business sector, villages, and other interested parties to discuss the Project.
Jan 1998	<ul style="list-style-type: none"> ▪ Pollution Control Department (PCD) met with Klong Dan subdistrict administration organization (SAO) to explain about the Project ▪ SAO submitted a letter of consent on behalf of Bang Bo district agreeing to the use of the land for implementation of the wastewater plant
Aug 1998	<ul style="list-style-type: none"> ▪ PCD met with Klong Dan SAO and Klong Dan Municipality to discuss about the Project
Dec 1998	<ul style="list-style-type: none"> ▪ PCD met with the Klong Dan SAO and Mr. Chalao (one of the Klong Dan residents who wrote complaint letters to ADB) to discuss about the Project
Mar 1999	<ul style="list-style-type: none"> ▪ PCD met with Klong Dan residents at the treatment plant site to answer questions regarding the Project
Apr 1999	<ul style="list-style-type: none"> ▪ Eleven Klong Dan residents went to PCD to submit a letter seeking clarification on several project-related issues
Apr 1999 cont'd	<ul style="list-style-type: none"> ▪ PCD presented details of the Project to community representatives at Samut Prakarn provincial administration offices ▪ PCD met with 500 Klong Dan residents at the treatment plant site to explain the details of the Project
May 1999	<ul style="list-style-type: none"> ▪ PCD met with ten Klong Dan residents at the Parliamentary Committee on local administration ▪ PCD met with Klong Dan residents at the treatment plant site to provide further clarification
Jun 1999	<ul style="list-style-type: none"> ▪ At the Government House, Klong Dan residents requested the Project be suspended/stopped (15 June) ▪ PCD met with the Klong Dan residents at the Government House to clarify issues. PCD officials were restrained for a day by the Klong Dan residents. ▪ PCD met again with the Klong Dan resident at the Government House (22 June) ▪ The Attorney General's Office confirmed that there is insufficient justification to have the Project stopped/suspended
Aug 1999	<ul style="list-style-type: none"> ▪ Klong Dan residents, PCD, and the Minister of Ministry of Science, Technology and Environment (MOSTE) discussed issues (at a temple) related to the Project on TV. ▪ First technical hearing was held with 22 Thai academics/professionals on the appropriateness of the wastewater management scheme.

Date	Consultation
Oct 1999	<ul style="list-style-type: none"> ▪ Ten representatives of the Klong Dan community participated in the second technical hearing to raise technical questions
Mar 2000	<ul style="list-style-type: none"> ▪ PCD organized a study tour to Australia for PCD officials and Klong Dan residents including the Mayor and the Head of SAO to enhance their awareness on wastewater treatment plants
May 2000	<ul style="list-style-type: none"> ▪ Klong Dan representatives participated in mass demonstrations during ADB Annual General Meeting (AGM).
Jun 2000	<ul style="list-style-type: none"> ▪ Two ADB staff (C. Steffensen and G. Jackson) visited the Project site. Klong Dan residents expressed their concerns about the project ▪ The visit started with an inspection of the mussel farming areas. Subsequently, there was a gathering of several hundred demonstrators chanting anti-ADB slogans. A meeting of about 20-30 people in which Ms. Dawan (one of the Klong Dan residents who wrote complaint letters to ADB) launched an aggressive verbal attack on ADB staff followed this. Since the atmosphere was not conducive to any meaningful dialogue, ADB staff just listened to Ms. Dawan's concerns. After the meeting, ADB staff were handed a petition
Aug 2000	<ul style="list-style-type: none"> ▪ Assembly of NGOs for Protection and Conservation of the Environment and Natural Resources (PCENR) agreed to facilitate meetings between Klong Dan residents and PCD to enable an effective dialogue. ▪ With help from PCENR, ADB (G. Jackson) met with Klong Dan representatives and NGOs in Bangkok to explore ways to improve communications.
Aug – Sep 2000	<ul style="list-style-type: none"> ▪ Ms. Dawan and Mr. Chalao expressed that they prefer to work with NGO Coordinating Committee on Development (NGO-COD) which had been undermining efforts of PCENR in bridging the gap between PCD and the Klong Dan residents. NGO-COD have been encouraging the Klong Dan residents not to have a dialogue with PCD/ADB
Aug – Sep 2000 cont'd	<ul style="list-style-type: none"> ▪ PCENR met with Klong Dan residents and PCD separately with a view to bringing the two parties together ▪ PCENR's efforts started reasonably well, but were eventually rejected by Ms. Dawan and Mr. Chalao, as they claimed they could not trust the PCENR.
Sep 2000	<ul style="list-style-type: none"> ▪ PCD organized a study tour to the US for PCD officials and Klong Dan residents including the Mayor and the Head of SAO to enhance their awareness on wastewater treatment plans
Nov 2000	<ul style="list-style-type: none"> ▪ ADB announced commissioning of the independent review (IR) to assess the environmental, ecological and health aspects of the project and main concerns expressed by civil society
Dec 2000	<ul style="list-style-type: none"> ▪ ADB posted the draft terms of reference (TOR) of the IR on ADB website inviting comments from the public (22 Dec)

Date	Consultation
Jan 2001	<ul style="list-style-type: none"> ▪ ADB transmitted the Thai translation of the draft TOR to the 3 Klong Dan residents including the Mayor to seek comments from the community (9 Jan) ▪ ADB decided to extend the period for receiving comments from the public at the request of several NGOs (21 Jan) ▪ ADB received a letter from the 3 Klong Dan residents stating that they didn't agree with the IR process and demanding ADB to stop disbursements under the Project. It did not include any specific comments (31 Jan)
Mar 2001	<ul style="list-style-type: none"> ▪ ADB posted the final TOR on ADB website and issued a news release informing the public of commencement of the IR. ADB invited the public to contact the IR team in Bangkok to raise additional questions and issues (19 Mar) • ADB transmitted the Thai translation of the final TOR to the 3 Klong Dan residents including the Mayor (22 Mar) ▪ Ms. Dawan informed the aquatic specialist of the IR team and threatened that she would ensure IR team get no data from the community (27 Mar) ▪ Ms. Dawan instructed the consultants under SSTA: Community Awareness and Development Program to stand down until after AGM and Or Por Tor elections. This was also subsequently expressed by the Head of Or Por Tor by telephone as he was concerned for their safety (30 Mar)
Apr 2001	<ul style="list-style-type: none"> ▪ IR team transmitted a letter to Ms. Dawan to initiate consultation (4 Apr) ▪ Board Inspection Committee received the request for inspection from Klong Dan residents (11 Apr)
May 2001	<ul style="list-style-type: none"> ▪ Participatory workshop held in Bangkok (PCD/ADB/JBIC/NGOs/public) to discuss the IR findings (3 May)
On-going	<ul style="list-style-type: none"> • PCD has been communicating with the Project affected communities in Samut Prakarn province through the provincial administration network

SAMUT PRAKARN INSPECTION REQUEST: CHRONOLOGY OF EVENTS

Date	Event
27 November 2000	President received Complaint on 29 November 2000
5 December	President acknowledged receipt of Complaint
11 January 2001	Management's response to the Complaint sent to Requesters
11 April	Board Inspection Committee (BIC) received Request for Inspection dated 5 April 2001
11 April	Assistant Secretary acknowledged receipt of Request
17 April	BIC Chairman acknowledged receipt of Request
2 May	Request for Inspection referred to Management for response
24 May	Management's response received by BIC
31 May	BIC forwarded Management's response to Requesters with a request for further information, if any
6 June	BIC received response from Requesters
20 June	BIC submitted recommendation to the Board (Sec.M35-01)
10 July	Board authorized inspection of the Project
10 July	Inspection Panel was selected
12 July	BIC requested confirmation from Government of no objection to Panel's visit to Project site
27 August	Panel commenced inspection
4 September	Panel's TOR finalized and draft work plan prepared by Panel
3 October	Formal resignation of a Panel member
8 October	Formal appointment of a Panel member to replace resigned member
18 October	Panel invited Requesters to come to Manila for interviews
24 October	Requesters declined invitation to come to Manila
2 November	Panel started interviewing ADB staff
8 November	Panel informed BIC of its decision to suspend the inspection
12 November	BIC requested the Panel to submit an interim report by end November 2001
27 November	Panel submitted interim report to BIC
7 December	BIC requested the Panel to prepare its Final Report by end December 2001
14 December	Panel submitted Final Report to BIC
17 December	BIC forwarded final report to Management for response
20 December	Management requested to extend deadline for response from 15 January 2002 to 14 February 2002, approved by BIC Chairman on 26 December 2001
14 February 2002	Management submitted to BIC its response to Panel's report
25 February	BIC held consultation meetings on remedial steps with Exec. Director Othman and Management
28 February	BIC to make a recommendation to the Board
21 March	Board to consider BIC's recommendation together with Panel's Report and Management's response