

**Requesters' Comments on the Draft Compliance Review Management Action Plan
on the Nenskra HPP Project**

30 June 2020

Dear Ms. Hanes,

Thank you very much for sharing the draft of the Compliance Review Management Action Plan (MAP) on the Nenskra HPP project. We appreciate the opportunity the Project Complaint Mechanism has given us to provide our comments. We sincerely hope that these comments will be taken into consideration by the PCM and EBRD Management when finalising the Action Plan.

First of all, we would like to acknowledge the results of the Nenskra HPP project Compliance Review, the detailed findings and recommendations of the PCM. We are pleased to find that the PCM recommendations closely mirror the expectations laid out in our Request, with one exception - the CRR shied away from recommending that *“the EBRD should trigger PR 7 for the Nenskra HPP project by acknowledging Svans’ self-identification and requests to be treated as Indigenous Peoples”*. Nonetheless, **the findings and recommendations of the PCM Compliance Review on the Nenskra HPP project are highly appreciated, as they bring a sense of justice to requesters and a promise for real redress.**

We also welcome Management’s good faith in addressing the PCM recommendations. It demonstrates that EBRD Management is accountable, it can learn lessons and is willing to take the necessary remedial actions to address the number of non-compliances, **especially on the level of systems**. We respect Management’s efforts to improve EBRD’s new standards and implementation guidance on Indigenous Peoples, cultural heritage, stakeholder engagement and gender.

We kindly offer to provide feedback to the draft of the new PR7 Guidance Note on Indigenous Peoples, in view of the PCM’s recommendations that the Guidance needs to *“outline specific processes and measures to guide clients in applying PR7 in instances where indigeneity is not recognised at the national level”*. The requesters’ point of view and experiences, which are unique for the EBRD regions of operation, can help inform a practical approach forward.

With regards **to the project level actions**, we fully understand that the EBRD will need the collaboration and agreement of third-parties, so we appreciate Management’s commitment to *“endeavour to facilitate those discussions in order to achieve the desired outcomes of the PCM recommendations”*. For us it is important to stress that achieving the desired outcomes of the PCM recommendation will mean bringing the project into compliance with EBRD standards.

Moreover, robust MAP addressing in good faith the PCM project-level recommendations should result in **the restoration of our rights and a remedy for the numerous harms to our ancestral lands, culture and livelihoods that have resulted or could result further from the Nenskra HPP project.** Therefore our comments are focused on the project level recommendations and remedial actions.

General comment

We appreciate that Management has already started action on several project-level PCM recommendations. We are concerned, however, that EBRD Management has referred to signing of the Loan Agreement in relation to several PCM Recommendations (namely 5, 6, 7, 8, 10), as Management indicated that several of the MAP action items “*can only be completed after financing agreement has been agreed with the company*”.

The following important questions arise by the fact that Management intends to sign the Loan Agreement before the expanded assessment on the applicability of PR7 on Indigenous Peoples to the Nenskra HPP project is concluded:

- Is the outcome of the PR7 Indigenous Peoples reassessment expected to potentially influence in a significant material way the other project assessments, such as the Cultural Heritage impact assessment?

- Could the right to Free Prior Informed Consent - in case that the PR7 reassessment concludes that Svans are Indigenous Peoples – be exercised meaningfully after the Loan Agreement is signed?

In other words, will the possible outcome of recognition of Svans as Indigenous Peoples make no difference to the other project assessments and thus the Loan Agreement?

In our view, the recognition of Svans as Indigenous People and the right to Free Prior Informed Consent have the potential to impact the fate of the project very significantly. We are concerned that EBRD Management either does not anticipate that such a recognition will have any material impact, or perhaps Management anticipates only one possible – negative - outcome of the PR7 reassessment.

It is understandable that Management wants to avoid throwing good money after bad and, similar to the Boskov Most HPP project in Macedonia, it wants to secure commitment fees from the client in case the project fails. While this may be considered a prudent approach, to avoid losses on a risky project like Nenskra HPP, signing the Loan Agreement before the conclusion of the PR7 expanded assessment undermines the credibility of the Management Action Plan, as well as the intended outcomes of the PCM Compliance Review Recommendations.

Therefore we request from EBRD Management, the PCM, and the EBRD Board of Directors to ensure that the expanded assessment of the applicability of PR7 on Indigenous Peoples to Svans precedes the signing of the Loan Agreement for the Nenskra HPP project.

Detailed comments

Below we present our comments to the project-level Recommendations 5, 6, 7, 8, and 10, and kindly ask EBRD Management and the PCM to take them into consideration in the finalisation of the MAP:

PCM Recommendation 5: *Take steps to ensure that an expanded assessment of the PR 7 eligibility criteria is conducted for the Nenskra HPP Project, which incorporates all IFI GIP methodologies outlined in the Compliance Review Report, including a) a diversity of views and expertise and b) community consultation regarding each ESP PR 7 eligibility criterion.*

We appreciate that Management has already started a reassessment of the applicability of Performance Requirement 7 on Indigenous Peoples to the Nenskra HPP project, in response to **PCM Recommendation 5**. We are not sure, if the reassessment is in fact an expanded assessment, as recommended by the PCM?

In addition, we are concerned about the role envisioned for the “*Georgian ethnographer familiar with Georgian society and culture*”, who will assist the independent IP specialist in the field study. We note, first, the “*utmost sensitivity*” of the assessment, and second, the lack of sufficient studies of Svan language, culture, customary laws and traditional governance institutions. The clear reluctance among Georgian scientists to consider that Svans possess unique characteristics is no secret, as this reluctance has strong political undertones.

Furthermore, we need to underline that Svans, in particular representatives of the Svan Council called Lalkhor, possess the best knowledge and expertise required for the PR7 expanded assessment. Their knowledge and insights can compensate for the lack of sufficient studies of Svan language, culture, customary laws and traditional governance institutions.

Therefore we request that Svan expert(s), such as qualified representative(s) of the Lalkhor, should be engaged to work closely with the independent IP expert in the Phase Two field study. The involvement of Lalkhor expert(s) will ensure the much necessary counterweight to the Georgian ethnographer in facilitation of community consultations, and in preparation and presentation of the Report on Applicability of PR7 to PCM and Bank Management. Including Svan specialists on equal footing with the Georgian ethnographer will ensure the legitimacy of the overall assessment process in front of the project-affected people, it will demonstrate respect to Svan traditional governance structures and will enable a balanced and meaningful consultation with Svans throughout the expanded assessment.

In addition, we need more clarification regarding the following statement: “*Furthermore, a broader PR7 applicability assessment may be considered as part of this reassessment – in line with the recommendation of the PCM Compliance Review – for the wider Svan community (beyond the project area) so that a position statement can be developed regarding the application of PR7 to the Svans in a broader context.*”

Is the quote above suggesting that the action planned by EBRD Management is intended to implement only partially the PCM Recommendation 5 on the PR7 expanded assessment? If so, will a partial implementation of PCM Recommendation 5 remedy fully the non-compliance? Will a partial reassessment be in line with Good International Practice?

EBRD Management states that the field study envisions direct engagement with “*other critical stakeholders*”. **We insist that the wider Svan community should be considered a critical stakeholder that should participate in the expanded assessment.** In our view, it will be inconceivable to eventually recognise Svans from the Chuberi and Nakra villages as Indigenous Peoples, but leave the question open for the rest of Svaneti, given that the entire population of Upper Svaneti is estimated at around 11000 people.

The EBRD has invested in other projects in Upper Svaneti, such as small hydropower projects¹, and the Board of Directors is expected to approve on 22 July 2020 a Power Grid Enhancement Project² that includes associated facilities of the Nenskra HPP project. Sustainable EBRD investments are welcome in our region, as long as they respect the Svans and take sufficient measures to protect our nature and resources, livelihoods and unique culture, all of which are under various threats. This is yet another reason why we find it more reasonable to conduct the PR7 expanded assessment for the whole region of Svaneti, taking into account the cumulative impacts of the current and future EBRD investments.

In conclusion, we kindly ask EBRD Management to consult with requesters and with the wider Svan community the exact purpose, scope and methodology of the Indigenous Peoples expanded assessment. Project Affected People and the wider Svan community need to understand the purpose, scope and the methodology of the PR7 assessment before they can engage meaningfully in the process. We request that the wider Svan community should be included in the expanded PR7 assessment.

We request from the PCM to ensure that the Management Action Plan is intended to implement fully PCM Recommendation 5, in order to address fully the Compliance Review’s finding of non-compliance of the Nenskra HPP project with Performance Requirement 7 on Indigenous Peoples. We request that the wider Svan community should be included in the extended PR7 assessment.

¹ RSF – TBC Bank – Svaneti HPPs, see EBRD Project Summary Document, <https://www.ebrd.com/work-with-us/projects/psd/rsf-tbc-bank-svaneti-hpps.html>

² EBRD’s Power Grid Enhancement Project includes “*the North Ring component, including construction of (1) 57km 220kV double-circuit overhead line (OHL) Nenskra-Mestia; (3) 500/220/110kV substation Nenskra; (4) 2km 500kV OHL Kavkasioni tie to substation Nenskra*”. See Project Summary Document: <https://www.ebrd.com/work-with-us/projects/psd/51422.html>

Recommendation 6: *Address the identified gaps in the Cumulative Impact Assessment (CIA).*

We understand that Management has been in the process of conducting additional studies, such as the climate risks study mentioned in the PCM Compliance Review. As mentioned above, the EBRD has invested in other projects in Svaneti, such as small hydropower projects, and the Board of Directors is expected to approve on 22 July 2020 a Power Grid Enhancement Project that includes associated facilities of the Nenskra HPP project. We are concerned that, first, these additional studies need to take into account the results of the expanded assessment for applicability of PR7 on Indigenous Peoples to Svans, as its conclusions can have a material impact for the project and on all additional assessments.

Second, the additional CIA studies were not done in a participatory manner following Good International Practice, as recommended throughout the PCM Compliance Review on the Nenskra HPP project. If any lessons were learned from the PCM Compliance Review of the Nenskra HPP Project, and if the PCM recommendations are to be implemented meaningfully in line with Good International Practice, then Management needs to reconsider its approach to consultations with Svans as part of conducting the assessments (starting with defining the scope), and not limit consultations to the outcomes of already concluded assessments, which was found by the PCM to constitute non-compliance.

Recommendation 7: *Address the identified gaps in the analysis of the Project Alternatives*

The PCM found the EBRD non-compliant *“with its commitments to seek to ensure the Client’s compliance with PR 1, in accordance with paras. 4, 5, 6 and 36 of the 2014 ESP”*. The Bank should have ensured that the Nenskra HPP project’s ESIA *“will include an examination of technically and financially feasible alternatives to the source of such impacts, including the non-project alternative, and document the rationale for selecting the particular course of action proposed”*, in accordance with PR1 para 10.

In addition we recall the findings of the ADB’s Compliance Review Panel, which noted in their 2018 Report on Eligibility that the decision for the Nenskra HPP *“was not subject to any alternatives assessment as the location choice is only politically driven.”*

Therefore Management statement to exclude the Project Alternatives assessment from the ESIA lacks justification: *“the cost/benefit analysis for the project has been progressed on parallel lines and will continue to do so as is appropriate under Good International Practice, rather than included with the environmental and social elements of the alternatives assessment.”*

This proposal is totally unacceptable, as it undermines the finding of the PCM Compliance Review report. No reference to Good International Practice is made by Management or what is the rationale behind the cost/benefit analysis *“progressing on parallel lines”* as proposed.

It should be underlined that a societal cost/benefit analysis of all project related alternatives has to be an integral part of the alternatives assessment and respective decisions on least cost options have to be made. It is required by the Georgian legislation, too, namely the Environmental Assessment Code of Georgia, which has so far been fully ignored by the national authorities. According to the Article 10 (3) of the Code³ an EIA report is required to include: *"g) the assessment of irreversible effects on the environment and justification for causing such effects, which implies a comparison of the loss resulting from the irreversible effects on the environment and the profit gained in environmental, cultural, economic and social terms"*.

In view of the above, **the EBRD needs to uphold its own policy commitments and the rule of law in Georgia, and thus ensure that a proper societal cost/benefit analysis of alternative options is done.**

The full cost/benefit analysis of the alternatives of the Nenskra HPP project has never been publicly released either by the Banks nor by the client. Therefore it is not clearly justified on what basis the decision on the project has been made. As pointed out by the PCM Compliance Review, such an approach is even more alarming if we take into account the contradicting fiscal assessments of the project conducted by the International Monetary Fund⁴ and by the World Bank⁵.

Therefore we find unacceptable that *"[...] management emphasises that this assessment will be focused on project level alternatives and does not extend to a review and comparison of strategic level options and scenarios"* **in contradiction to its policy commitment to ensure an ESIA that includes "technically and financially feasible alternatives to the source of such impacts, including the non-project alternative"**.

We respectfully request from the EBRD Management to come true to its policy commitments and to remedy the non-compliance of the Nenskra HPP project by doing exactly as its Environmental and Social Policy requires, namely: provide to Project-affected People and Georgia's tax payers a clear justification that the Nenskra HPP project is:

- a) the technically safest option for the environment and communities;
- b) the financially most feasible option, and
- c) that there are no better technically and financially alternatives to ensure energy security to Georgia?

In the absence of such persuasive assessments and justification, the EBRD should not continue to support a project that is driven by unclear motives and can bring irreversible harm to impacted Svan communities and to Georgia's economy in the long term.

³ <https://matsne.gov.ge/en/document/view/3691981?publication=2>

⁴ <https://www.imf.org/en/Publications/CR/Issues/2017/09/27/Georgia-Fiscal-Transparency-Evaluation-45274> Page 54;

⁵ http://greenalt.org/wp-content/uploads/2018/09/Assessment_of_HPP_Cost_2018.pdf

Recommendation 8: *Comprehensive gender impact assessment for the Nenskra project.*

The MAP does not reflect the PCM recommendation at all. Instead of a comprehensive gender impact assessment, which is recommended by the PCM, Management chooses to focus on a *“Technical Cooperation project to build the capacity of women living the valleys and to develop the capacity of regional institutions providing vocational training for local women (and men) in the long term.”*

We request from PCM, EBRD Management and the EBRD Board of Directors that the PCM Recommendation 8 is fully addressed in the Management Action Plan and that Management should ensure that a comprehensive Gender Impact Assessment for the Nenskra Project is conducted.

The Nenskra HPP project can impact significantly local women, men and communities as a whole through a range of important factors and risks, such as: risks of incidents threatening the safety of the community and separate individuals; risks associated with the influx of workers, such as risk for gender based violence and harassment; risks of conflicts between work force and the community; increased road safety risks; increased health risks due to air and water pollution during construction; prevented access to the rivers, lands, forests and pastures that provide vital natural resources to the community; changes of hydrology in the area threatening water availability for the households and crop production; change of microclimate; risks for subsistence food production and commercial agricultural production; etc. Such impacts and risks can influence men and women differently.

In our understanding, the PCM Compliance Review on the Nenskra HPP project has found that the existing Environmental and Social Impact Assessment of the Nenskra HPP project has not assessed gender impacts properly. The PCM has thus recommended that this non-compliance is remedied by a comprehensive gender impact assessment. It is unclear how a capacity building Technical Cooperation project can address the PCM Recommendation 8 and so can bring the project into compliance. The PCM reiterates that Community Investment Programme *“is not a compensation for negative impacts”*⁶. Similarly Technical Cooperation is not a substitute for an assessment or an adequate mitigation measure for negative gender impacts.

In addition, we kindly request that when conducting a comprehensive Gender Impact Assessment for the Nenskra Project, Management needs to take into account the results of the expanded assessment for applicability of PR7 on Indigenous Peoples, as its conclusion can have material impact. Last but not least, the comprehensive Gender Impact Assessment should be done in a participatory manner following Good International Practice, as recommended throughout the PCM Compliance Review on the Nenskra HPP project.

Recommendation 10: further layer of cultural heritage impact assessment.

We kindly request that when conducting further Cultural Heritage impact assessment Management needs to take into account the results of the expanded assessment for applicability PR7 on Indigenous Peoples to the Nenskra HPP project, as its conclusions can have material impact. We echo the findings and recommendation of the PCM Compliance Review that the tangible and intangible cultural heritage assessment needs to be done in a participatory manner.

We kindly ask the EBRD Management to include in its Action Plan participatory assessment and consultations of our cultural heritage in line with the respective bank's policy requirements, Good International Practice and the PCM recommendations.

Recommendation 11: Ensure that all members of the Client's environmental and social team possess the necessary competencies and abilities to manage the complexities and sensitivities of the Project.

We highly appreciate Management's efforts in "*making sure the Client will undertake an environmental and social governance review and assess the project capacity requirements*".

In conclusion, we respectfully ask the PCM, EBRD Management and Board of Directors to ensure that the Nenskra HPP Compliance Review recommendations are fully addressed in the finalisation of the Management Action Plan, thus ensuring that all project level assessments are conducted in an inclusive and participatory manner, in line with Good International Practice.

The full implementation of PCM recommendations will ensure the full compliance of Nenskra HPP project with EBRD's standards. A partial implementation of the PCM recommendations means a partial remedy for the harms associated with the project.

We appreciate all the efforts made by the PCM to date and note that the hardest part and the real test will be the "last mile", the monitoring stage of the good faith implementation of the Management Action Plan that should aim at nothing less than restoration of Svan's rights and protection of Svaneti's nature, resources, livelihoods and unique culture.