



 <b>CDM: FORM FOR SUBMISSION OF “LETTER TO THE BOARD” (Version 01.1)</b> <i>(To be used only by the Project Participants and other Stakeholders for submitting Letter to the Board as per Modalities and Procedures for Direct Communication with Stakeholders)</i>	
Name of the stakeholder <sup>1</sup> submitting this form (individual/organisation):	Centro de Incidencia Ambiental de Panamá (CIAM)
Address and Contact details of the individual submitting this Letter:	Address: Casa G-14, Urbanización Los Ángeles, Panama City, Panama. Telephone number: (507)236-0866/(507)236-0868 E-mail Address: tarosemena@ciampanama.org
Title/Subject (give a short title or specify the subject of your submission)	<b>PROJECT 7822: BONYIC HYDROELECTRIC PROJECT’S REQUEST FOR REGISTRATION SHOULD BE REJECTED</b>
Please mention whether the Submitter of the Form is:	<input type="checkbox"/> Project participant <input checked="" type="checkbox"/> Other Stakeholder, please specify <b>Admitted NGO</b>
Specify whether you want the Letter to be treated as confidential <sup>2</sup> :	<input type="checkbox"/> To be treated as confidential <input checked="" type="checkbox"/> To be publicly available (UNFCCC CDM web site)
<b>Purpose of the Letter to the Board:</b> Please use the space below to describe the purpose for submitting Letter to the Board. (Please tick only one of the four types in each submission )	
<input type="checkbox"/> <b>Type I:</b> <div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 2px;"><input type="checkbox"/> Request Clarification</div> <div style="border: 1px solid black; padding: 2px;"><input type="checkbox"/> Revision of Existing Rules</div> </div> <ul style="list-style-type: none"> <li><input type="checkbox"/> Standards. Please specify reference</li> <li><input type="checkbox"/> Procedures. Please specify reference</li> <li><input type="checkbox"/> Guidance. Please specify reference</li> <li><input type="checkbox"/> Forms. Please specify reference</li> <li><input type="checkbox"/> Others. Please specify reference</li> </ul>	
<input type="checkbox"/> <b>Type II: Request for Introduction of New Rules</b> <input checked="" type="checkbox"/> <b>Type III: Provision of Information and Suggestions on Policy Issues</b>	
Please use the space below to describe in detail the issue that needs to be clarified/revise or on which the response is requested from the Board as highlighted above. In doing this please describe the exact reference source including the version (if any).	
<b>PROJECT 7822: BONYIC HYDROELECTRIC PROJECT’S REQUEST FOR REGISTRATION SHOULD BE REJECTED</b>	

<sup>1</sup> Note that DNAs and DOEs shall not use this form to submit letter to the Board.

<sup>2</sup> Note that the Board may decide to make this Letter and the Response publicly available



We welcome the decision by the Executive Board to review the request for registration of Project 7882: Bonyic Hydroelectric Project and respectfully request its rejection.

The Bonyic Hydroelectric Project is a 31.8 MW<sup>3</sup> hydroelectric power plant currently being constructed (over 50% complete as of September 2013<sup>4</sup>) on the Bonyic River, within the Bosque Protector Palo Seco Protected Area, in the Republic of Panama. The Bosque Protector Palo Seco is a buffer zone for the Talamanca Range-La Amistad Reserves/La Amistad National Park, which is a World Heritage site and a protected area in Panama and Costa Rica. The affected area is also part of the traditional territories of the Naso indigenous people<sup>5</sup>.

Our main concerns are:

- That the project fails to meet additionality requirements related to project barriers and prior consideration.
- The Designated Operational Entity failed to address all comments by stakeholders.
- Registration of the Bonyic Hydroelectric Project would violate international law requirements regarding common heritage and indigenous people's rights.

We support these statements in the following facts:

**1. The Bonyic Hydroelectric Project fails to meet additionality requirements related to project barriers and prior consideration.**

- a. The project does not comply with Barrier Analysis requirements established by Section 7.2.6 of the CDM Project Standard, the Guidelines for objective demonstration and assessment of barriers, and Section 7.12.12 of the CDM Validation and Verification Standards.

Section 7.2.6 of the CDM Project Standard, the Guidelines for objective demonstration and assessment of barriers and Section 7.12.12 of the CDM Validation and Verification Standards all require proof that identified barriers prevent the proposed type of project in the absence of registration as a CDM project activity; and that they do not prevent the implementation of at least one of the alternatives.

The project proponent identifies in the PDD two type of barriers, those related to project location and investment barriers. Concerning project location, the PDD describes three circumstances: the social sensitivity of the situation of the Naso indigenous people due to a longstanding internal crisis (p. 16-18 PDD); the biophysical sensitivity of the area due to its high biodiversity (on p. 16 PDD); and the special requirements related to the project's location in the Bosque Protector Palo Seco protected area (p.18 PDD). Concerning the investment barrier, lack of access to long-term debt, the PDD mentions the Inter-American Development Bank (IDB) refusal to finance the project due to the Naso's conflict and the Central American Bank of Economic Integration and Inter American Corporation for Infrastructure Financing refusal to finance the project due to the project proponent inability to provide the necessary guaranties (p.18-19 PDD).

<sup>3</sup> An amendment of April 2012 to the contract for the electric generation concession between the National Authority for Public Services and Hidroecológica del Teribe, S.A. (HET) raised the capacity of the project from 30 MW to 31.8 MW (not 32.64 MW). Available in Spanish at <http://www.asep.gob.pa/openpdf.php?idresol=AN.No.5264-Elec>.

<sup>4</sup> An amendment of August 2011 to the contract for the electric generation concession between the National Authority for Public Services (ASEP) and HET postponed the date for the end of construction and start of operation from August 31, 2013 to August 31, 2014. HET alleged that obtaining the necessary permits to start construction in the protected area delayed the project 11 months, causing them to achieve only 40% of progress by August 2011. This was the fifth time HET requested and received an extension. Available in Spanish at <http://www.asep.gob.pa/openpdf.php?idresol=AN.No.4735-Elec>.



All circumstances regarding project location and the loss of financial support due to those circumstances would affect similarly any proposed project in the area (be it a CDM project or not) and has no relation with the project being a hydro power plant or more broadly a renewable energy project<sup>6</sup>. Additionally, the project proponents and the Designated Operational Entity have not demonstrated how the CDM alleviates each of the identified barriers; or how the construction of the project can show a progress of more than 50% when the CDM registration that would allegedly neutralized the barriers has not been achieved.

The first barrier, the internal crisis of the Naso indigenous people, has its origins, as the project proponent stated in the PDD, in historical and political factors, and as discussed below, the lack of legal recognition by the Panamanian government of the Naso traditional lands plays an important role in the conflict. In this scenario, compensation given to community leaders recognized as “legitimate” in the mist of such a profound internal crisis cannot possibly alleviate the situation, and has in fact demonstrated to stir more conflict<sup>7</sup>. The second one, the biophysical sensitivity of the area is mainly caused by a high biological diversity, which can hardly be recognized as a barrier when it constitutes a common concern of humankind that requires conservation, sustainable use and equitable sharing of its benefits in accordance with the Convention on Biological Diversity. In this context, if CDM revenues are to be invested in the area, they should be used towards the ends described in the Convention, consequently enhancing the sensitivity, not alleviating it. The third one, the special requirements due to the project’s location in the Bosque Protector Palo Seco protected area, should likewise not be considered a barrier. Obtaining a concession when operating within a protected area is a requirement established by law in Panama<sup>8</sup> and compatible with international law. CDM registration cannot and should not diminish such requirements. Finally, if the IDB has refused to finance a project in the proposed area on the basis that the indigenous community conflict does not allow the bank to comply with its social standards, any other project in the proposed area is likely to obtain the same response until the conflict is resolved. Also the Central American Bank of Economic Integration and Inter American Corporation for Infrastructure Financing refusal to finance has not relation with the kind of proposed project, but to the public nature of its main shareholder, Empresas Públicas de Medellín (EPM), which constrained them from providing the guaranties requested by the financial institutions.

- b. The project does not comply with Prior Consideration requirements established by Section 4.1 of the CDM Project Cycle Procedure, Section 6.3 of the CDM Project Standard and Section 7.12.9 of the CDM Validation and Verification Standards.

<sup>5</sup> <http://www.edlc.org/cases/communities/naso-of-panama/>.

<sup>6</sup> Guidelines for objective demonstration and assessment of barriers: “Most projects face some type of barriers. An objective barrier analysis separates those projects out from other projects for which it can be demonstrated that the CDM has an actual impact on alleviating barriers. Such analysis rejects projects that face the same barriers with and without the CDM and where no impact of the CDM can be objectively demonstrated on the barriers.”

<sup>7</sup> Despite the lack of mention in the PDD and the Validation Report, factions of the Naso indigenous people have maintained open opposition to the project. Closings of the project’s access road in 2011 are mentioned in the August 2011 amendment to the contract between ASEP and HET (footnote 2). In recent days a faction of the Naso have again protested against the project <http://www.laestrella.com.pa/online/impreso/2013/08/21/cierran-paso-a-la-obra-hidroelectrica-bonyic.asp> and <http://www.laestrella.com.pa/online/noticias/2013/08/22/martinelli-ordena-a-jefe-policial-abrir-via-hacia-hidroelectrica-bonyic.asp>.

<http://m.prensa.com/impreso/nacionales/se-debilita-monarquia-naso/204490>

<sup>8</sup> See Article 66 of Law 41 of 1998.

[http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF\\_NORMAS/1990/1998/1998\\_159\\_0225.PDF](http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1998/1998_159_0225.PDF); Resolution AG-0365-2005 and AG-366-2005 [http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF\\_GACETAS/2000/2005/25354\\_2005.PDF](http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2005/25354_2005.PDF).



The PDD establishes and the Validation Report confirms that the start date for the project activity is 28/08/2007, accordingly the project is considered as an existing project (with a start day on or before 02 August 2008)<sup>9</sup>. For existing projects, Section 4.1 of the CDM Project Cycle Procedure requires project participants to demonstrate that CDM was seriously considered in the decision to implement the project activity.

To demonstrate serious consideration, Section 6.3 of the CDM Project Standard and Section 7.12.9 of the CDM Validation and Verification Standards require, first, “evidence of their awareness of the CDM prior to the start date of the proposed project activity, and that the benefits of the CDM were a decisive factor in the decision to proceed with the project”. The only document mentioned in the PDD and Validation Report that is directly related to this issue is the minute of an EPM Executive Board meeting, where EPM allegedly decided to finance the project by themselves, considering the CDM benefits. This minute is referenced in the PDD as Minute 1408 of August 14<sup>th</sup>, 2008<sup>10</sup> and in the Validation Report as Minute 1490 of August 4<sup>th</sup>, 2008<sup>11</sup>. This minute would only prove that CDM was considered to continue the project without external funding after its start date, August 28<sup>th</sup>, 2007. No other minute, contract or document was referenced to in the PDD or the Validation Report to indicate the CDM being a decisive factor to proceed with the project previous to its start date.

Secondly, Section 6.3 of the CDM Project Standard and Section 7.12.9 of the CDM Validation and Verification Standards require “evidence that continuing and real actions were taken to secure CDM status for the proposed project activity in parallel with its implementation”. Section 7.12.9.2 of the CDM Validation and Verification Standards further elaborates on the gaps of time allowed between documented evidence. While the Validation Report sustains that there is less than 2 years of a gap between the documented evidence, many gaps surpassed that amount and some documents without direct relation to obtaining the CDM status are included to account for some gaps. Additionally, the contract with MGM for developing the project as a CDM project was signed on March 10<sup>th</sup>, 2008, after the start date of the project.

Finally, Section 6.3 of the CDM Project Standard and Section 7.12.9 of the CDM Validation and Verification Standards require an implementation timeline and a timeline of the events and actions taken to achieve CDM registration. However, the project timeline included in the PDD, as implementation timeline, does not include the date when the investment decision was made, the date when construction works started, the date when commissioning started or the date of start-up; and, as a CDM registration timeline, it does not include any main pre-registration activity, such as contract with consultant for CDM/PDD services, grant of Letter of Approval, publication of the PDD, consultation process, agreement with DOE for validation and so on. Regarding the commissioning date, it is important to mention that HET obtained the contract for the electric generation concession from the National Authority for Public Services (ASEP) in 1999. The first deadline imposed by the contract for end of the construction and start of operation was 2005, but since 2002 HET has requested five extensions to ASEP. The last extension was obtained by appealing a decision to deny a further extension, and it sets the start of operation in August 2014.

<sup>9</sup> p. 13 of the PDD and p. 18 of the Validation Report

<sup>10</sup> p. 13 of the PDD.

<sup>11</sup> p. 18 of the Validation Report.



**2. The Designated Operational Entity failed to take into account all comments by stakeholders.**

Section 7.5 of the CDM Validation and Verification Standards requires the DOE to take into account all the comments received during the validation of the proposed project activity and to report the details of the actions taken to take due account of the comments received. However, several important comments submitted by stakeholders were not taken into account. Some examples are:

a. From the submission by the Alianza para la Conservación y el Desarrollo (ACD):

Concerning local stakeholders participation, ACD notes that the PDD fails to mention the actions by Naso protesters who since October 2007 conducted blockades that prevented the advance of the Project during many months, as well as the disproportionate response by police officials hired by HET and employees. The DOE did not include this comment in the validation report and hence provided no response regarding the issue.

Concerning additionality of the project, ACD denounces lack of consideration of other 86 hydropower projects in Panama's pipeline (36 with granted concessions) in the common practice analysis; legal reforms to promote hydropower generation in 1997 and 2004; and equal prices paid in the spot market of Panama for hydropower and thermo-electric generators despite the cost of generation of the second is higher. Once more, the DOE did not include this comment in the validation report and hence provided no response regarding these issues.

b. From FERN:

FERN expresses concern about the inadequacy of an agreement of direct use of 25% of CDM-derived income to compensate the indigenous communities. The DOE replies: "By means of the review of Social and Environmental Management Plan and interview carried out with Naso-Teribe community, ICONTEC confirmed that HET has a social commitment with the community. In the same way, an Agreement was signed with the Naso Teribe community which states that 25% of CDM-derived income would be transferred to the indigenous community". Since the concern raised was not about the existence of an agreement with the community, but about it being an unsuitable mean of compensation for resettlement, this response is inadequate.

FERN refers to the international obligations concerning the UNESCO World Heritage site (explained below). The comment was ignored by the DOE in its validation report.

c. From Asociación Ambientalista de Chiriquí (ASAMCHI):

ASAMCHI raises its concern for the negotiation with King Tito Santana when Nasos consider him not legitimized to perform those functions. The DOE replies mentioning interviews with Tito Santana and other members of the community who consider that all processes have been done properly, but mentions nothing about trying to reach the Naso faction that opposes the project.

ASAMCHI states its concern about the Panamanian government having attempted to obtain approval to construct the Bonyic Project since 1998. The DOE replied: "The CDM prior consideration was assessed by ICONTEC in accordance with the UNFCCC's standards and guidelines, as it was stated in clause 3.5.1 on this report." However, plans to construct the project since 1998 are not mentioned in clause 3.5.1 or anywhere else in the Validation Report.



Also to challenge additionality, ASAMCHI mentions HET's objective to export energy to Costa Rica. The DOE replies: "The BHP complies not only with the applied baseline and monitoring methodology but also is align with the Panamanian electrical regulatory framework." This response is inadequate since it is not on point to the comment.

d. From Oscar Reyes:

Oscar Reyes mentions 31 new hydroelectric projects expected to be added to the grid in 2013. The DOE does not explain how these project affect or don't affect the project's common practice analysis and baseline and monitoring methodology.

Oscar Reyes challenges the use of the risk of environmental damage as a barrier to project implementation. The Validation Report ignores this comment.

e. From International Rivers:

International Rivers mentions the 17 other projects with less than 20 MW in Panama not accounted for in the additionality analysis. The sections to which the DOE referred do not mention those projects.

### **3. Registration of the Bonyic Hydroelectric Project would violate international law requirements regarding common heritage and indigenous people's rights.**

Panama is a Party to the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO World Heritage Convention)<sup>12</sup>, which establishes Panama's duty to ensure the protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory.

In 2010, the World Heritage Committee identified the construction on the Changuinola and Bonyic rivers as "highly likely to result in the direct loss of up to 16 species of migratory fish and shrimp, as well as having potential negative secondary impacts on biodiversity"<sup>13</sup> within the Talamanca Range-La Amistad Reserves/La Amistad National Park site. Since then, the Committee has repeatedly asked Panama "to halt all dam constructions until a detailed transboundary strategic environmental assessment process is undertaken."<sup>14</sup>

In its most recent session in July 2013 the Committee:

"Regret[ted] that construction of the Bonyic dam has continued without prior consideration of the results of the on-going Strategic Environmental Assessment (SEA), and urge[d] the States Parties to complete it as a matter of priority and in line with international standards of best practice."<sup>15</sup>

It is also important to highlight that Section 7.13 of the CDM Validation and Verification Standards also requires the assessment of transboundary impacts.

Lastly, indigenous peoples' rights to communal property and to consultation regarding effects to their property are recognized by the United Nations Declaration on the Rights of Indigenous Peoples<sup>16</sup> and the International Labour Organization Convention 169.<sup>17</sup> The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has indicated that while the States have the duty to protect indigenous peoples' rights, companies have a duty to act with due diligence not to violate those rights. This duty includes "that companies must not contribute to States' failure to meet their international obligations in relation to indigenous rights, nor should they endeavour to replace States in the fulfilment of those obligations."





In August of this year, Special Rapporteur Anaya visited Panama and in his report on the visit recognized the territorial insecurity of the Naso people as particularly alarming and urged the Panamanian government to grant recognition and protection to their property rights. The Inter-American Development Bank (IDB) has also recognized the extent of this crisis and, as mentioned above, in 2005 it stopped considering the Bonyic Hydroelectric Project for financing due to concerns that the crisis would jeopardize “the processes of information, consultation and building of consensus.”

Panama’s failure to legally recognize the Naso homeland as an autonomous indigenous territory (comarca) despite their presence in the area for centuries has made them a particularly vulnerable population. Numbering around 3,500 people, the Naso are in serious danger of disappearing as a culture. Until the government legally recognizes the Naso’s territory and until internal conflict is resolved, it is unlikely that projects developed in Naso lands will ensure respect for their human rights. The CDM Executive Board, as a United Nations body, has an obligation to ensure universal respect for and observance of human rights and fundamental freedoms, and should do all in its power to prevent violations to the fundamental human rights of the Naso people.

Please use the space below to any mention any suggestions or information that you want to provide to the Board. In doing this please describe the exact reference source including the version (if any).

We respectfully request the above information be used in the review of Project 7882: Bonyic Hydroelectric Project and that its request for registration be rejected.

If necessary, list attached files containing relevant information (if any)

- None

**Section below to be filled in by UNFCCC secretariat**

Date when the form was received at UNFCCC secretariat	27 September 2013
	2013-309-S

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**History of document**

Version	Date	Nature of revision
01.1	09 August 2011	Editorial revision.
01	04 August 2011	Initial publication date.

<sup>13</sup> <http://whc.unesco.org/archive/2010/whc10-34com-20e.pdf>

<sup>14</sup> Id. See also UNESCO reports in 2011 and 2012: <http://whc.unesco.org/archive/2011/whc11-35com-20e.pdf>, <http://whc.unesco.org/archive/2012/whc12-36com-19e.pdf>

<sup>15</sup> <http://whc.unesco.org/archive/2013/whc13-37com-20-en.pdf>

<sup>16</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

<sup>17</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169) While Panama has not yet ratified International Labour Organization Convention 169, Panama is a party to the American Convention on Human Rights and the Inter-American Court has established that “the obligation to consult, in addition to being a conventional standard, is also a general principle of International Law.” (Sarayaku v. Ecuador)



**Decision Class:** Regulatory  
**Document Type:** Form  
**Business Function:** Governance