Asian Development Bank Accountability Mechanism
Compliance Review Panel

REPORT ON ELIGIBILITY

To the Board of Directors
on
Compliance Review Panel Request No. 2022/2
on the
South Asia Subregional Economic Cooperation Mugling-Pokhara Highway Improvement
Phase 1 Project in Nepal
(Asian Development Bank Loan 3846)

6 October 2022

This document is being disclosed to the public in accordance with ADB’s Access to Information Policy.
ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>AMP</td>
<td>2012 Accountability Mechanism Policy</td>
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<td>AMR</td>
<td>ADB Management’s Response</td>
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<td>CRO</td>
<td>Complaint Receiving Officer</td>
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<td>CRP</td>
<td>Compliance Review Panel</td>
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<td>CSC</td>
<td>construction supervision consultant</td>
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<td>DOR</td>
<td>Department of Roads</td>
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<td>EMP</td>
<td>environmental management plan</td>
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<td>GRM</td>
<td>grievance redress mechanism</td>
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<td>PMU</td>
<td>project management unit</td>
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<td>SARD</td>
<td>South Asia Department</td>
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NOTE

In this report, “$” refers to United States dollars.

In preparing any country program or strategy, financing any project, or by making any designation of or reference to a particular territory or geographic area in this document, the Asian Development Bank does not intend to make any judgments as to the legal or other status of any territory or area.
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. BACKGROUND</td>
<td>1</td>
</tr>
<tr>
<td>II. THE PROJECT</td>
<td>1</td>
</tr>
<tr>
<td>III. THE COMPLAINT</td>
<td>2</td>
</tr>
<tr>
<td>IV. ADB MANAGEMENT’S RESPONSE</td>
<td>3</td>
</tr>
<tr>
<td>V. ELIGIBILITY</td>
<td>5</td>
</tr>
<tr>
<td>VI. CONCLUSION</td>
<td>7</td>
</tr>
</tbody>
</table>

**APPENDIXES**

1. Request for Compliance Review             | 8    |
2. ADB Management’s Response                | 13   |
I. BACKGROUND

1. On 9 August 2022, a request for compliance review (the Complaint) was forwarded by the Complaint Receiving Officer (CRO) of the Asian Development Bank (ADB) Accountability Mechanism to the Compliance Review Panel (CRP) in respect of ADB Loan No. 3846: South Asia Subregional Economic Cooperation Mugling-Pokhara Highway Improvement Phase 1 Project (the Project) in Nepal.¹

2. In accordance with para. 178 of the 2012 Accountability Mechanism Policy (AMP) and associated operational procedures on the Accountability Mechanism,² the CRP carried out an initial assessment and concluded that the complaint fell within the mandate of the compliance review function.

3. As elaborated in this eligibility determination report, the CRP has determined that the complaint is ineligible for compliance review. While the complainants have participated in one meeting with ADB’s South Asia Department (SARD), which is the operations department concerned, at the time of this eligibility determination, these good faith efforts could not yet, in the CRP’s view, be considered to have concluded. The CRP is therefore unable to reach a conclusion that the complainants’ “made prior good faith efforts to resolve issues with the operations department concerned” sufficient to meet the eligibility threshold envisaged by para. 180 of the AMP.

II. THE PROJECT

4. As a feeder road of the South Asia Subregional Economic Cooperation linking Kathmandu to Dhaka (Bangladesh) and Kolkata (India) through Mugling and the East-West Highway, the Project will upgrade the 81-kilometer Pokhara (a tourist center in western Nepal) to Mugling (commercial center) road from a 2-lane to a 4-lane asphalt road, including construction of two main bridges. Para. 2 of ADB Management’s Response (Appendix 2 of this report) further states that the Project will also increase awareness and strengthen the capacity of the Department of Roads (DOR) in road safety and disaster risk reduction. The Project is classified B for environmental impacts; A for resettlement impacts; and C for impacts to indigenous peoples. ADB approved a project loan of $195 million to the Government of Nepal on 29 October 2019. Government counterpart finance is $59 million. The loan was signed on 10 December 2019; made effective on 31 January 2020; and is expected to close by 30 June 2026. As of 25 August 2022, the cumulative contract award is at 54%, and cumulative disbursement is at 10% of the total loan amount.

5. The Ministry of Physical Infrastructure and Transport is the executing agency; Department of Roads (DOR) is the implementing agency; and the Transport and Communications Division of the South Asia Department supported by the ADB Nepal Resident Mission, administers the Project. Road construction contracts were awarded in January and May 2021, respectively, to Anhui Kaiyuan Highway and Bridge Co. Ltd. for Package 01 and China Communications Construction Company Ltd for Package 02. The project construction supervision consultant (CSC) is M/S Renardet S.A.—Soil Test (P.) Ltd.—CEMAT Consultants (P.) Ltd.

¹ Information about the Project is available at https://www.adb.org/projects/52097-002/main.
Although the road expansion will be within the right-of-way of the existing road, Table 3 of the 2019 Resettlement Plan states that 3,985 individuals will be displaced from 810 households to be affected by the Project. An initial environmental examination (IEE), which broadly identified impacts and mitigation measures for key environmental aspects was prepared for the Project and posted in the ADB project website in June 2019.

III. THE COMPLAINT

The complaint was submitted by two individuals residing in Pokhara and who are also members/leaders of national and international bird conservation groups. In an email dated 14 August 2022, the complainants requested non-disclosure of their identities, including their contact details, and this was reiterated in their meeting with the CRP on 15 August 2022. The complaint asserted that the IEE was inadequate and/or faulty; in particular, it was because it had inadequately assessed and addressed bird diversity along the highway. The complainants reported that this had resulted in the loss of a critically endangered slender-billed vulture chick and the destruction of its nest during tree cutting at a specific project site.

During a meeting with the CRP, the complainants explained that a tree along the project alignment, which was felled by project contractors on 2 February 2022, had a nest and a chick of a critically endangered slender-billed vulture. The tree was felled, according to the complainants, despite the conservation group, Pokhara Bird Society's prior communication with local authorities requesting that they postpone cutting of that single tree for 2 to 3 months until the chick had fledged. The complainants considered that the cause of the vulture chick’s death was the failure of the IEE to adequately identify the Project’s impacts on and risks to birds; and a failure to provide adequate mitigation measures and guidance to project contractors on the importance of protecting birds.

On 18 February 2022, one of the complainants met with project officer/staff of the Project Management Unit (PMU) of the DOR and others and formed the impression that one of them was a staff member of ADB. In the meeting, agreement was reached to (i) save another simal tree (which is potentially a habitat of the vulture) adjacent to the cleared tree; (ii) conduct awareness-raising on wildlife conservation and bird breeding seasons for construction workers; (iii) properly, promptly, and efficiently report and coordinate biodiversity sensitive issues within the project team (i.e. the contractor, CSC and PMU) to avoid similar incidents; and (iv) conduct community awareness-raising activities, with the involvement of stakeholders working on bird conservation issues. One complainant explained that he followed up several times with the person he believed to be an ADB staff member to find out what was being done to implement the four action items agreed upon. However, he was not provided with any update and was informed that the person was very busy. Having received no update on the actions agreed at the 18 February meeting, the complainants submitted a complaint to ADB’s Complaint Receiving Officer (CRO) on 30 June 2022. This was later forwarded to the CRP on 9 August after going through the CRO’s process.

The CRP held its first meeting with the complainants virtually on 15 August 2022. The complainants informed the CRP that since they had filed the complaint, the person from the Project with whom they had previously interacted had called them several times a day and had clarified that he was not an ADB staff member but rather a member of the project implementation team. The complainants asked the CRP not to disclose their contact details publicly as these calls were intrusive. The complainants further informed the CRP that the ADB project team from headquarters had virtually met with them on 1 August 2022 and had informed them of updates on agreements reached during the complainant’s meeting with the government project team on 18 February 2022. The CRP summarized the Accountability Mechanism and the compliance review.
process. Describing the eligibility determination stage of the process, the CRP highlighted that one of the criteria for determining eligibility is that the complainants should have made good faith efforts to resolve their issues with the ADB operations department concerned first (since the Accountability Mechanism is the last resort for people adversely affected by an ADB-assisted project). The CRP encouraged the complainants to contact the ADB operations department and subsequently sent them the contact details of the ADB project officer. The CRP formed the view that the complainants understood the significance of the eligibility criterion. The CRP also formed the views: (i) that the complainants were not satisfied with the meeting that they had attended on 1 August 2022 with the ADB project team, and (ii) that they had suggestions for further mitigation actions and systemic improvements that they had not yet fully communicated to ADB.

11. In a second meeting with the complainants on 13 September 2022, the CRP confirmed that the complainants had not contacted the ADB operations department again to offer any further input to them and that no other communication had taken place between the complainants and ADB project team members after the 1 August 2022 virtual meeting. Around the time of the CRP’s second meeting, the complainants had received an invitation at short notice via email and several phone calls to participate in a face-to-face meeting, also on 13 September, to discuss the vulture incident and understood that ADB staff would also be present. However, it had not been possible for the complainants to attend at short notice due to other commitments.

IV. ADB MANAGEMENT’S RESPONSE

12. In accordance with para. 178 of the AMP, ADB Management submitted a response to the CRP dated 7 September 2022 stating its position on the issues raised in the complaint and actions it undertook when they came to know about the vulture incident in February. Aside from describing how ADB adhered to the operational policies and procedures relating to the preparation and implementation of the IEE and the environmental management plan (EMP), para. 4 of ADB Management Response (AMR) stated ‘that (i) the Complaint is not related to ADB’s action or omission in the course of formulating, processing, or implementing the Project; (ii) the Complainants have not made good faith efforts to address the Complaint with the South Asia Department (SARD) of ADB; and (iii) the Complaint does not involve ADB’s noncompliance with its operational policies and procedures.’

13. The AMR recorded that during the IEE preparation, the ADB project team’s comments on the draft IEE had included a request for the inclusion of a list of the flora and fauna in a table showing their status as provided in the list of the International Union for the Conservation of Nature (IUCN) and the Forest and Wildlife Act of Nepal, and for the borrower to highlight that there are no IUCN endangered species or protected species under the local wildlife act in the project area.

14. Following the vulture incident, the AMR stated that when ADB project staff read the 10 February 2022 newspaper article of the 2 February 2022 incident, the project team immediately advised the PMU of the implementing agency to trigger the project level grievance redress procedure to address the issue. The AMR also provided details of the actions taken by the PMU since then. During the initial processing of the complaint, SARD also requested the CRO to provide the complainants with the name and contact details of the ADB project officer, considering that SARD was not aware of who the complainants were at that time. In the ADB-organized virtual meeting with the complainants on 1 August 2022, the project team informed the complainants that three of the four action items agreed upon in the 18 February 2022 meeting had been completed. The last remaining action, i.e., community awareness-raising, is reportedly scheduled to take place after the monsoon season in October 2022.
15. The CRP noted that the AMR did not contain very much information on actions taken by ADB Management itself to follow up on the incident and requested a meeting with the ADB project team to gather further information. This meeting took place on 27 September 2022. Through that meeting, as well as subsequent submission of additional documents and information, the project team explained that ADB was in regular contact with the PMU concerning the vulture incident between February and September 2022, and had also explored options for strengthening the project grievance redress mechanism (GRM). During these meetings with the PMU, the ADB project team requested the PMU (i) to provide further details on the 2 February 2022 incident; and (ii) not to cut any new trees without prior inspection of birds’ nesting habitats. ADB Management had (i) followed up on the implementation of the agreed action items; and (ii) identified areas where the IEE and EMP could usefully be revised. Revisions had not yet been finalized, and the ADB project team indicated that from their side, they were open to hearing the complainants’ further views in light of the vulture incident and the complainants’ own expertise. A revised EMP is now being reviewed by the ADB project team after which the updated drafts of the IEE and the EMP will be shared with stakeholders concerned including the complainants for further consultation. ADB will also require the PMU to instruct the contractors and the CSC to carry out project implementation in accordance with the updated IEE and EMP, which will be monitored.

16. In a meeting with the PMU and the CSC on 5 August 2022, the additional actions that the ADB project team had discussed with the PMU included (i) updating the IEE’s list of the trees to be cut, since the actual number approved for cutting once site conditions on the ground were better known exceeded that initially estimated in the IEE; (ii) updating the impact assessment section of the IEE in respect of tree-cutting activities and related mitigation measures; (iii) updating the EMP accordingly; and (iv) institutional strengthening and capacity building focusing on tree-cutting related activities. The ADB project team also informed the CRP that it is in the process of reviewing the potential project risk associated with bird biodiversity and the inclusion of such risks and their mitigation measures in the IEE and EMP. The CRP also heard that ADB Management intends to apply the lessons learned from the incident to projects under preparation.

17. During their meeting with the CRP, ADB project team members also provided the CRP information on the progress of preparation of a semi-annual monitoring report (EMR) for the period from January to June 2022 and informed the CRP that it would henceforth request that EMRs be submitted semi-annually, not annually as would ordinarily be the case for a project of this nature. The ADB project team reported that it had also provided advice to the PMU on the need to: (i) ensure the visibility of GRM contacts, and (ii) disseminate information about biodiversity to nearby residents. It also fielded a review mission on 12 to 20 September 2022. As confirmed by the complainants themselves, the mission had not been able to meet with them during a consultation on 13 September 2022. The complainants explained that they had been given very short notice of this meeting and were unable to make themselves available to participate.

18. Further discussions and consultations were held during the ADB project team review mission in September 2022. In a meeting with the PMU, CSC and contractor, the need to undertake substantial inspection of trees, photo/video documentation of tree conditions prior to cutting, and coordination with relevant experts prior to cutting were discussed. Meetings were also held with the various mayors, the Chief District Officer, and the Divisional Forest Officer. The ADB mission rechecked the GRM records and the status of implementation along the project road and also requested the GRM records for both road sections (MAP-01 and MAP-02). The ADB project team expressed its willingness to continue engaging with the complainants to resolve the issues.
V. ELIGIBILITY

19. The CRP’s eligibility determination process involved the following steps:

(i) review of the complaint and other documents (including videos) provided subsequently by the complainants to the CRP;
(ii) review of the ADB Management’s Response, including related project documents subsequently requested by the CRP;
(iii) two virtual meetings between the CRP and the complainants; and
(iv) discussions with the ADB project team.

20. The CRP has reached its determination of eligibility in accordance with provisions of paras. 142, 179, and 180 of the AMP, which state:

“142. Complaints will be excluded if they are…
(ii) about matters that complainants have not made good faith efforts to address with the operations department concerned;…”

179. Within 21 days of receiving the ADB Management’s response, the CRP will determine the eligibility of the complaint. The CRP will review the complaint, ADB Management’s response, and other relevant documents. To find a complaint eligible, the CRP must be satisfied that the complaint meets all the eligibility criteria, satisfies the scope, and does not fall within the exclusions (para. 142 and paras. 145-149). The CRP must be satisfied that (i) there is evidence of noncompliance; (ii) there is evidence that the noncompliance has caused, or is likely to cause, direct and material harm to project-affected people; and (iii) noncompliance is serious enough to warrant a compliance review.

180. As part of the eligibility determination, the CRP will review and determine whether the complainants made prior good faith efforts to resolve issues with the operations department concerned. The CRP will forward the complaint to the operations department concerned if the complainants did not make such efforts.”

21. In light of the AMR, the CRP has also considered para. 151 of the AMP, which states, in part, that:

“151. The complaint must specify the following:…
(vii) a description of the complainants’ good faith efforts to address the problems first with the operations department concerned, and the results of these efforts;…”

22. Following these steps, and in consideration of the specific eligibility issue raised regarding ‘prior good faith efforts,’ the CRP decided that it was not necessary to carry out a site visit in order to arrive at a robust determination of eligibility in respect of the complaint. The following paragraphs further elaborate the CRP’s eligibility determination.

23. In accordance with para. 179 of the AMP, the CRP must be satisfied that the complaint meets all the eligibility criteria in the AMP; satisfies the scope; and does not fall within the exclusions set out in para. 142 and paras. 145-149 of the AMP. Para. 179 additionally states that the CRP must be satisfied that: (i) there is evidence of noncompliance; (ii) there is evidence that the noncompliance has caused, or is likely to cause, direct and material harm to project-affected people; and (iii) the noncompliance is serious enough to warrant a compliance review.
24. Para. 180 of the AMP sets out an additional matter that the CRP must address as part of the eligibility determination, i.e., whether the complainants made prior good faith efforts to resolve issues with the operations department concerned which is one of the exclusions under para. 142. If they did not make such efforts, the CRP will forward the complaint to the operations department concerned.

25. The CRP notes that the complainants thought that the ‘Environment Safeguard Specialist PD ADB’ who was present in the 18 February 2022 meeting was an ADB staff member. Upon request from SARD, the CRO provided the name and contact details of the ADB project officer to the complainants on 5 July 2022. The ADB project team organized a virtual meeting with the complainants on 1 August 2022, which was the first direct contact/communication by the ADB project team with the complainants. The CRP heard from the complainants that they were not satisfied with this meeting. Equally however, some of the additional suggestions and insights that the complainants shared with the CRP had not yet been put to the ADB project team. At the time of this eligibility determination, there had been no follow up meeting by the ADB project team with the complainants or vice versa after the 1 August 2022 meeting.

26. The CRP understands that since first learning of the vulture incident the ADB project team has been in regular communication with the PMU of the DOR. However, almost 6 months passed between the 18 February 2022 meeting with the complainant and the PMU of the DOR and the complaint filed with the CRO, during which the complainants were not provided with any update on agreed actions despite their efforts to seek this. Having initially requested that the PMU trigger the GRM after it became aware of the incident, the CRP is of the view that the ADB project team should have ensured that the complainants were given updates on the action items agreed at the subsequent meeting. Furthermore, to ensure that the complaint was being addressed and to seek direct feedback on the effectiveness of complaint handling through the project level GRM, the ADB project team could have also checked with the PMU the contact details of attendees of the 18 February 2022 meeting and contacted the complainants directly. While the CRP recognizes the proactive effort of ADB to reach out to the complainants on 1 August 2022, this could have been done earlier.

27. The CRP notes that paras. 10, 11, and 25 of the AMR point to lack of good faith efforts on the part of the complainants at that time to resolve their issues with the operations department. In the complaint form, the complainants stated that they made prior good faith efforts to raise their complaint with the ADB project team. It later became clear to them that a member of the PMU of the DOR was not an ADB staff member. The CRP is satisfied that following its two meetings with the complainants, they understood that the 18 February 2022 meeting with the PMU staff could not be considered as part of good faith efforts with the ADB operations department concerned, for the purposes of applying para. 142 (ii) of the AMP. While the CRO provided the ADB Project Officer’s contact information to the complainants on 5 July 2022 and the complainants did take part in one virtual meeting initiated by the ADB project team on 1 August 2022, no further action was taken by them to resolve their issues with SARD. The AMP clearly states that the Accountability Mechanism is a ‘last resort’ process for dealing with problems and compliance issues that were not prevented or solved at the project and operational levels (para. 105). This provides an indication of the significance of the exclusion from eligibility, under para. 142 (ii), of complaints that are “about matters that complainants have not made good faith efforts to address with the operations department concerned.” The CRP concludes that in the specific circumstances of the present case, the exclusion is applicable. Good faith efforts on the part of the complainants cannot yet be considered to have been exhausted, though it is for the complainants themselves to decide whether they wish to engage further with the operations
department. In light of its conclusion on the applicability of para. 142 (ii), it has not been necessary for the CRP to consider the remaining eligibility criteria and exclusions set out in the AMP.

VI. CONCLUSION

28. Pursuant to the exclusion set out in para. 142 (ii) and referred to in paras. 179 and 180 of the AMP, the CRP determines that the complaint is ineligible for compliance review.

29. In accordance with para. 180 of the AMP, the CRP will forward the complaint to SARD, the operations department concerned, for the resolution of complainants' issues.

30. The CRP notes that SARD tracks the process and results in resolving the complainants' issues as required by para. 195 of the AMP and further suggests that the ADB project team updates the CRP on a quarterly basis, or more frequently if appropriate until issues raised by the complainants have been resolved. The CRP further requests that, at the end of the process, SARD provides the CRP with a copy of the report summarizing the complaint, issues, actions taken to address the problems or issues, decisions or agreements by parties concerned, results, and lessons, in accordance with para. 196 of the AMP.

31. The CRP notes that following any further engagement with SARD, if the complainants feel that their good faith efforts to resolve the issues are unsuccessful, they are free to submit a new complaint to the Accountability Mechanism through the CRO.

Elisea Gozun  
Chair, Compliance Review Panel

Halina Ward  
Member, Compliance Review Panel

Vaideeswaran Sankaran  
Member, Compliance Review Panel
# REQUEST FOR COMPLIANCE REVIEW

**Asian Development Bank (ADB), Accountability Mechanism, Complaint Form**
*(Add rows or pages, if needed)*

## A. Choice of function – problem solving or compliance review *(Choose one below)*
- [ ] Special Project Facilitator for problem solving *(Assists people who are directly and materially harmed by specific problems caused, or is likely to be caused, by ADB-assisted projects through informal, flexible, and consensus-based methods with the consent and participation of all parties concerned)*
- [x] Compliance Review Panel for compliance review *(Investigates alleged noncompliance by ADB with its operational policies and procedures in any ADB-assisted project in the course of the formulation, processing, or implementation of the project that directly, materially, and adversely affects, or is likely to affect, local people, as well as monitors the implementation of remedial action relates to the harm or likely harm caused by noncompliance)*

## B. Confidentiality
- Do you want your identities to be kept confidential?  
  - [ ] Yes  
  - [x] No

## C. Complainants *(Anonymous complaints will not be accepted. There must be at least two project-affected complainants.)*

<table>
<thead>
<tr>
<th>Name and designation (Mr., Ms., Mrs.)</th>
<th>Signature</th>
<th>Position/Organization (If any)</th>
<th>Mailing Address</th>
<th>Telephone number (landline/mobile)</th>
<th>E-mail address</th>
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Authorized Representative or Assistant (if any). (Information regarding the representatives, or persons assisting complainants in filing the complaint, will be disclosed, except when they are also complainants and they request confidentiality.)

<table>
<thead>
<tr>
<th>Complainant represented</th>
<th>Name and designation (Mr., Ms., Mrs.)</th>
<th>Signature</th>
<th>Position/ Organization (if any)</th>
<th>Mailing Address</th>
<th>Telephone number (landline/mobile)</th>
<th>E-mail address</th>
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D. Project

<table>
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<tr>
<th>Name</th>
<th>NEPAL: SOUTH ASIA SUBREGIONAL ECONOMIC COOPERATION MUGLING–POKHARA HIGHWAY IMPROVEMENT PHASE 1 PROJECT</th>
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<tbody>
<tr>
<td>Location</td>
<td>Gandaki Province, Nepal</td>
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<tr>
<td>Brief description</td>
<td>The project will develop the main road link from Pokhara to Kathmandu in Nepal, which feeds two SASEC corridors linking Kathmandu to Dhaka (Bangladesh) and Kolkata (India). The highway will be widened to four lanes to reduce travel times and lower transport costs. The project will increase access to domestic markets, jobs, and social services; give Nepal a wider gateway to international markets; and facilitate tourism to Pokhara. Design standards will feature enhanced pavement and drainage and an intelligent traffic system to improve sustainability and safety awareness.</td>
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E. Complaint:

What direct and material harm has the ADB-assisted project caused, or will likely cause, to the complainants?

The faulty EIA of NEP: SASEC Mugling–Pokhara Highway Improvement has resulted in the loss of a Critically Endangered Vulture (Slender-billed Vulture and its nest). A recent study shows that there are less than 75 individuals of this species in Nepal and only 6 active nests are recorded till the date and that nest was one of them. Since 2018, Slender-billed Vulture has successfully bred from the nest on that tree.

The IEE report does not clearly address the present scenario of bird diversity along the highway from Pokhara –Mugling (IEE report Page 38, point 135). As, the project is already in action, trees are almost cut down without any precaution and seriousness in bird’s issues even we request them to wait for a couple of month till chick left the nest.

Referring to the IEE report, any bird expert in Nepal will be surprised to know only 9 bird species were recorded on a 90 km highway. Many species are missing and different studies have already mentioned Globally Threatened species of vulture’s White-rumped vulture, Red-headed vulture, Egyptian vulture, Steppe Eagle and their movements are already noted along Pokhara-Mugling highway. A detailed survey is needed to know the either nesting or roosting sites near the highway.
Have the complainants made prior efforts to solve the problem(s) and issue(s) with the ADB operations department including Resident Mission concerned?

Yes. If YES, please provide the following: when, how, by whom, and with whom the efforts were made. Please describe any response the complainants may have received from or any actions taken by ADB.

On Feb 2022 the loss of the Slender-billed Vulture and its nest, during the project implementation was published in National daily. Yub Raj Dhakal, Environment Safeguard Specialist, PD ADB for this project contacted me and I suggested him some recent mitigation methods and possible compensation for the loss. We had a short meeting and he convinced me on some points where we (PBS, the Project manager, and Yubraj) signed the file. I am sorry to say there is no implementation on what they agreed and it’s already been more than 3 months. It would be my pleasure to know about the progress and our possible involvement for the mitigation of the issues.
SASEC Muglin-Pokhara Highway Improvement Project Package-II

Meeting Minute

Date: 18th February, 2022

Meeting heading: Bio-diversity Conservation Concerns while extending the road

Participants of meeting:

<table>
<thead>
<tr>
<th>SN</th>
<th>NAME</th>
<th>DESIGNATION</th>
<th>SIGNATURE</th>
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<tbody>
<tr>
<td>1.</td>
<td>Amit Shrestha</td>
<td>Project Manager, SMPHIP (MAP 02)</td>
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<tr>
<td>2.</td>
<td>Bishnu Om Bade</td>
<td>Procurement Specialist, PD ADB</td>
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<tr>
<td>3.</td>
<td>Kamal Shrestha</td>
<td>Resident Engineer, SMPHIP (MAP 02)</td>
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<tr>
<td>4.</td>
<td>Yub Raj Dhakal</td>
<td>Environment Safeguard Specialist, PD ADB</td>
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Issues Discussed:

1. Tragedy was happened on 2nd February, 2022 due to clearance of sinal tree located at Gachhepani (CH 68+200) resulting the collapse of tree branch having a nest of Slender Billed Vulture residing on the same.
2. Another sinal tree located adjacent to the cleared tree could be potential habitat of the vulture, therefore, that tree should be saved to the possible extent.
3. Awareness about wildlife conservation has to be created to the construction workers, focusing breeding season of birds in Falgun-Baisakh month.
4. There should be proper coordination within the project team (Project Manager, Consultant and contractor) and prompt and efficient mechanism of reporting for biodiversity sensitive issues e.g. breeding birds has to be developed.
5. Conservation awareness needs to be created to the workers/community through the project with the involvement of stakeholders, working on conservation activities.
F. Optional Information

1. What is the complainants’ desired outcome or remedy for the complaint?
   We are more concerned with the endangered vulture conservation issues and our desired outcomes would be more focused on vulnerability assessment, awareness and advocacy campaigns. Besides these remedies we also suggest for refuge development (safeguard of potential trees and plantation).

2. Anything else you would like to add?
   We already have a great loss (impacted its nesting population), compensation to recover this loss is necessary. We are more concerned if the project has to face the same issues again in upcoming days during the implementation of the project. On behalf of [redacted], we would like to make the concerned authorities of ADB aware of this project so that there won’t be another loss again. So many precautions are supposed to be applied in sensitive areas along with the project in the upcoming days. A proper mitigation needed to be applied as soon as possible.

Name of the person who completed this form: [redacted]

Signature: [redacted] Date: 2022-7-12

Please send the complaint, by mail, fax, e-mail, or hand delivery, or through any ADB Resident Mission, to the following:

Complaint Receiving Officer (CRO), Accountability Mechanism
ADB Headquarters, 6 ADB Avenue, Mandaluyong City 1550, Philippines,
Telephone number: +63-2-6324444 local 70309, Fax: +63-2-6362086,
E-mail: amcro@adb.org
ADB MANAGEMENT’S RESPONSE

Memorandum
South Asia Department

7 September 2022

To: Elisea G. Gozun
Chair, Compliance Review Panel and concurrently Head, Office of the Compliance Review Panel

Through: Shixin Chen
Vice President (Operations 1)

From: Kenichi Yokoyama
Director General, South Asia Department

Subject: Loan 3846-Nepal: South Asia Subregional Economic Cooperation Mugling–Pokhara Highway Improvement Phase 1 Project (Project No. 52097-002) – Management’s Response to the Compliance Review Panel

I. Introduction

1. Through the Memorandum from the Chair of the Compliance Review Panel ("CRP") dated 12 August 2022, the CRP requested Management’s response on the request for compliance review forwarded by the Complaint Receiving Officer ("CRO") to the CRP on 9 August 2022 ("Complaint") in relation to the South Asia Subregional Economic Cooperation Mugling–Pokhara Highway Improvement Phase 1 Project ("Project") in Nepal ("Borrower").

2. On 29 October 2019, the Asian Development Bank ("ADB") approved a loan from ADB’s concessional ordinary capital resources in an amount of $195,000,000 for the purposes of the Project. The Loan Agreement dated 10 December 2019 between ADB and the Borrower ("Loan Agreement") became effective on 31 January 2020. The Project will finance the first phase of upgrading the Mugling–Pokhara Highway, and will (i) rehabilitate and widen to four lanes the 81-kilometer road section between Abukhaireni and Pokhara ("Project Road"), and (ii) increase awareness and strengthen the capacity of the Department of Roads ("DOR") in road safety and disaster risk reduction. In compliance with ADB’s Safeguard Policy Statement (2009) ("SPS"), the Project’s safeguard categories are as follows: Environment (Category "B"), Involuntary Resettlement (Category "A"), and Indigenous Peoples (Category "C"). The Ministry of Physical Infrastructure and Transport is the executing agency of the Project ("EA") and the DOR is the implementing agency of the Project ("IA"). The Project Directorate (ADB) of DOR is the project management unit ("PMU").

3. On 12 July 2022, CRO received the Complaint which was sent to the ADB Project team on 13 July 2022. The Complaint was filed by the Secretary of the Pokhara Bird Society ("PBS") who is also indicated in the Complaint as a member of the International Union for Conservation of Nature ("IUCN") Vulture Specialist Group, and the President of the PBS ("Complainants"). The

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1 The Project Organization Structure is set out in detail in Figure 1 of Section III. C. of the Project Administration Manual (https://www.adb.org/projects/52097-002/main).
2 Section F. 2. of the Complaint indicates that the Complainants are acting on behalf of the Pokhara Bird Society.
Complaint alleges that: (i) the Initial Environmental Examination ("IEE")\(^3\) has resulted in the loss of a critically-endangered vulture (slender-billed vulture and its nest), (ii) the IEE report does not clearly address the present scenario of bird diversity along the highway from Pokhara to Mugling, (iii) trees were cut down without any precaution and seriousness for bird’s issues even though they had requested for the tree cutting to be postponed for a couple of months until the chick left the nest;\(^4\) and (iv) no implementation on agreed action items. The Complainants have also indicated in the Complaint that they have made prior efforts with the ADB operations department concerned which is not factually correct as the Complainants had mistakenly contacted a PMU staff (and not ADB).\(^5\)

4. Management respectfully notes that: (i) the Complaint is not related to ADB’s action or omission in the course of formulating, processing, or implementing the Project;\(^6\) (ii) the Complainants have not made good faith efforts to address the Complaint with the South Asia Department of ADB;\(^7\) and (iii) the Complaint does not involve ADB’s noncompliance with its operational policies and procedures.\(^8\) Section V below provides the rationale and basis of Management’s view to respectfully exclude the Complaint from compliance review by the ORP pursuant to the Accountability Mechanism Policy 2012 ("AMP").

II. Project Grievance Redress Mechanism

5. The ADB Project team first noted the 2 February 2022 incident reporting the clearing of the tree which had a nest of a slender-billed vulture on 10 February 2022 from a Nepali local newspaper article. On the same day, ADB requested the PMU to trigger the Project Grievance Redress Mechanism ("GRM") and resolve issues raised in accordance with the GRM.

6. The GRM, documented in the IEE\(^9\), comprises four tiers. The first two tiers are rapid response tiers with the first tier involving redress of grievance(s) through contractors, construction supervision consultants ("CSC") and the project manager ("Project Manager") on site and the second tier involving redress through the PMU. The third tier involves activation of the Grievance Redress Committee which is constituted by the EA. The fourth and final tier involves redressal through the country’s legal court system; however, the Complainants can seek legal redress at any time. In accordance with the first two rapid tiers of the GRM (please see paragraphs 7-9 below), the Project Manager, with assistance from the PMU’s safeguard focal person, commenced addressing the Complaint.

7. On 11 February 2022, a meeting was held at the District Administration Office among the chief district officer of Tanahun, district forest officer, district police office, district national investigation office, PBS, CSC and local media. It was agreed during this meeting that arrangements should be made to protect the simal tree adjacent to the cleared tree as it could be a potential nesting site for vultures.

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\(^3\) The Complaint refers to the EIA (Environmental Impact Assessment) which is required for projects categorized as "A" for environment. The Project is categorized as 'B' for environment and therefore an IEE was instead prepared under the Project.

\(^4\) In reference to the link provided by the Complainants, PBS contacted the local municipality (Shuklagandaki Municipality) and sent a memorandum to the division road office in Damauli.

\(^5\) The person indicated by the Complainants in the Complaint is a staff of the PMU and not a staff of ADB.

\(^6\) Accountability Mechanism Policy 2012, paragraph 142(i) requirement.

\(^7\) Accountability Mechanism Policy 2012, paragraph 142(ii) requirement.

\(^8\) Accountability Mechanism Policy 2012, paragraph 143(i) requirement.

8. On 18 February 2022, a meeting was held in the field among the PBS, CSC, Project Manager and PMU. In this meeting, four action items were agreed with the Complainants: (i) saving another tree adjacent to the incident site, (ii) raising awareness on wildlife conservation and bird breeding seasons for the contractor’s workers, (iii) establishing a proper coordination system to manage biodiversity issues between the contractor, CSC, Project Manager and PMU, and (iv) raising awareness on biodiversity conservation for local communities along the Project Road (Attachment).\textsuperscript{10}

9. In accordance with the GRM, the PMU undertook follow-up actions to ensure that the agreed action items were to be carried out. The first three action items have already been completed.\textsuperscript{11} On 23 July 2022, the PMU met the PBS to provide an update on the status of the agreed action items. The fourth action item on community awareness raising is scheduled to be conducted after the monsoon season in September/October 2022. In this meeting, the PBS reiterated that they are preparing an awareness program in the Project area, and as requested by the PMU, agreed to share with the PMU information following finalization of the PBS awareness program. The PMU stated that it was considering supporting the PBS awareness program through the CSC. The PBS also informed the PMU in the meeting that they have received from the CRO the email address of the ADB Project Officer.

III. ADB’s Actions

10. While the ADB Project team provided instantaneous guidance to the Borrower on resolving issues through the GRM immediately after reading the newspaper article published in a Nepali local newspaper on 10 February 2022 (please see paragraph 5 above), the ADB Project team formally met with the Complainants “virtually” on 1 August 2022.

11. In response to the CRO’s request to confirm whether the initial complaint pertains to an ADB project, on 4 July 2022, the ADB Project team while providing the requisite confirmation, also requested CRO to provide the ADB Project Officer’s contact information to the Complainants given that the Complainants did not request confidentiality. However, the Complainants did not get in touch with the ADB Project Officer. Following consultation with the CRO, the ADB Project team reached out to the Complainants and was able to arrange a meeting with them on 1 August 2022. Key points discussed in the meeting were:

- Clarification that three of the four agreed action items have already been completed.
- Clarification that the IEE disclosed on the ADB website is a living document and can be revisited, as and when necessary.
- Assurance that ADB will closely monitor the progress of the last remaining agreed action item.
- Clarification that if the Complainants have any further concerns in the future, the communication will be faster if they directly contact the Project Officer by searching for the Project on the ADB website.
- Assurance that precautionary measures will be taken to avoid negative impacts on birds in the Project.

\textsuperscript{10} The meeting minute of action items is also attached to the Complaint.

\textsuperscript{11} The tree beside the cut tree has not been cut; awareness on environment safeguards including avoiding impacts on biodiversity has been conducted by the contractor for its workers on 17 February, 29 May and 4 July 2022; and a coordination mechanism to manage biodiversity issues has been established between the contractor, CSC, Project Manager and PMU.
• Clarification that the PMU environment focal person who attended the meeting on 18 February 2022 was not an ADB staff.

IV. Compliance with Relevant ADB Policies and Procedures

12. The IEE for the Project was finalized in June 2019 (please see footnote 9) and was prepared in accordance and in full compliance with the SPS and the Operations Manual ("OM") Section F1/BP (Safeguard Policy Statement). Following the SPS, the Project was screened by ADB. The screening categorized the environmental impacts as Category "B". While the road widening was evaluated to have some adverse environmental impacts, they were assessed as less than Category "A". Based on the information available during the categorization, the impacts were not assessed as irreversible, diverse, or unprecedented. The categorization was reviewed and approved by the Safeguards Division ("SDSS") of the Sustainable Development and Climate Change Department ("SDCC") and the Chief Compliance Officer ("CCO") on 23 May 2019.

13. Following the SPS, the Borrower prepared an IEE which was reviewed by the ADB Project team to ensure compliance with the SPS. It was also reviewed and cleared by the SDSS of SDCC as part of the inter-departmental review of the Report and Recommendation of the President and linked documents for the Project. The IEE was disclosed on the ADB website on 16 July 2019 before the Project Management Review Meeting which was held on 17 July 2019. The CCO issued the Safeguard Policy Compliance Memorandum for the Project on 16 July 2019.

14. Field surveys for collecting environmental baseline data, including on flora and fauna, for the IEE were carried out across the years 2016, 2017 and 2018. In addition to the surveys, secondary literature was also analyzed. No vulture species were identified during the field surveys. The Project location is in central Nepal (Figure 1), and the IUCN red list database documents that the vulture specie is extremely rare in eastern Nepal and uncommon in west and central Nepal.  

15. Consultations were held with the affected people and concerned stakeholders as part of the IEE preparation. Concerns raised during the consultations included minimizing loss of forest area, ensuring proper roadside tree plantation, consideration of landslide and soil erosion issues, compensation for land acquired and management of electric poles along the Project Road and others. Impact on birds and vulture species was not raised as a concern by anyone during these consultations. The ADB Project team also conducted a consultation mission and visited the Project Road in February 2019. Based on the observations from the site visit, it was determined that the key environment safeguards issues would be slope stabilization and erosion control. These were highlighted in the Aide Memoire of the consultation mission. Key fundamental comment provided by SDSS during the inter-departmental review was also on this issue.

16. Based on the review by the ADB Project team of the IEE and observations made during the site visit in February 2019, the ADB Project team requested the Borrower to (i) include landslide and erosion as a major anticipated impact, (ii) document flora and fauna in the Project site, identifying status under the IUCN and status under the Borrower’s National Parks and Wildlife Conservation Act of 1973, and (iii) confirm that there were no IUCN endangered species or protected species under the National Parks and Wildlife Conservation Act of 1973 within the Project area. No vulture species were included in the list prepared by the Borrower.

12 https://www.adb.org/project/52007-012#main
13 https://www.iucnredlist.org/species/22259893/104716113#geographic-range
17. The IEE states that the Project area lies outside the biodiversity conservation sites (National Parks, Protected Nature Reserve, Wildlife Reserve, Hunting Reserve, Conservation Area, and Buffer Zone) officially declared by the Borrower. The forest areas within the Project area are parts of the Government Managed National Forests, some part of which are handed over to the communities as community forests for management purpose. The Project Road section does not fall under any protected or buffer zone area.

18. As for the Complainants’ allegations regarding the “faulty EIA” (please see footnote 3) and unclear coverage of the “present scenario of bird diversity”, the SPS requires that the level of environmental assessment should be commensurate with the significance of potential impacts and risks, and mitigation measures must be responsive to such impacts and risks. Accordingly, the environmental management plan (“EMP”) prepared as part of the IEE included measures to address potential impacts and risks that had been identified. The Project scope includes the expansion of an existing road. The land use type along the Project Road is mostly agricultural land and has human settlements with no important biodiversity areas within the immediate vicinity of the Project Road. Based on these factors, the assessment of potential impacts and risks on birds included in the IEE was deemed to be adequate.

19. As for the Complainants’ allegation regarding the tree cutting “without any precaution and seriousness in bird’s issues”, since removal of trees was a key activity needed for the expansion work of the Project Road, the IEE clearly stipulates the responsibilities for tree clearance. These responsibilities fall under the scope of the district forest office (“DFO”), department of forest, and the DOR. Additionally, the EMP attached to the IEE clearly sets out avoidance and mitigation measures for tree cutting and requires that trees may only be felled after receiving the requisite permission from the concerned authorities. The requisite permission for tree felling was secured from the DFO on 25 October 2021. The permission process included two rounds of conducting detailed inventory of trees along the Project Road by a team comprising staff from the DFO and the contractor. Tree cutting was carried out only after securing this permission from, and in the presence of, the DFO.

20. The SPS and OM Section F1/OP (Safeguard Review Procedures) require periodic environmental monitoring for environment category “B” projects. The Loan Agreement, the Project Administration Manual, and the IEE for the Project require submission by the Borrower of annual environmental monitoring reports. Semi-annual environmental monitoring reports have been prepared for the Project and disclosed on the ADB website (please see footnote 12). Although these environmental monitoring reports adequately captured the status of tree cutting along the Project Road, no potential impacts or risks concerning birds were identified in these reports. Since loan effectiveness, virtual review missions were also fielded in January and August 2021 during which no bird-related issues were raised.

21. Based on the information provided above, the ADB Project team has followed the roles and responsibilities of ADB staff as provided in paragraph 71 of the SPS and the general procedures set out in paragraphs 4 to 30 of OM Section F1/OP in the preparation and implementation of the Project.

22. Considering that the IEE and the EMP are living documents, and following the discussions held with the Complainants as provided in paragraph 11 above, the ADB Project team will request the Borrower to further review the IEE and the EMP in line with the requirements of the SPS, and update the IEE and EMP to prevent and/or minimize any potential impacts on birds and

biodiversity. The ADB Project team will also work with the Borrower to further build their capacity on strengthening biodiversity risk screening and impact assessment procedures.

V. Eligibility of the Complaint

23. In order for the Complaint to be eligible for compliance review, pursuant to the AMP, the CRP must be satisfied that the Complaint meets the eligibility criteria prescribed by the AMP, satisfies the scope for compliance review, and does not fall within the stated exclusions. Moreover, the CRP must be satisfied that: (i) there is evidence of noncompliance with ADB policies; (ii) there is evidence that the noncompliance has caused, or is likely to cause, direct and material harm to project-affected people; and (iii) the noncompliance is serious enough to warrant a compliance review.\footnote{Accountability Mechanism Policy 2012, paragraph 179, paragraph 142 and paragraphs 145-149.}

24. There are three grounds to exclude the Complaint from compliance review pursuant to paragraphs 142(i), 142(ii) and 148(ii) of the AMP. Each ground is specified below, and any one of these grounds alone would be sufficient to exclude the Complaint from compliance review.

25. Lack of Good Faith Efforts from Complainants. As noted in paragraphs 10 and 11 above, the Complainants have not made good faith efforts to address the Complaint with the South Asia Department of ADB.\footnote{Paragraph 180 of the Accountability Mechanism Policy 2012 provides that the CRP will forward the Complaint to the operations department concerned if the Complainants did not make prior good faith efforts to resolve issues with the operations department concerned.} Although the CRO provided the Complainants with the contact information of the relevant ADB Project Officer, the Complainants did not get in touch with the ADB Project Officer. Conversely, the ADB Project team took the initiative and “virtually” reached out to the Complainants on 1 August 2022.

26. Complaint Unrelated to ADB’s Actions. The Complaint is about actions that are not related to ADB’s action or omission in the course of formulating, processing, or implementing ADB-assisted projects. As set out in paragraphs 12 to 22 above, ADB has complied with all relevant ADB policies and procedures including the SPS and OM Section F1 in the formulation, processing, or implementation of the Project.

27. Complaint Not Involving ADB’s Noncompliance. The Complaint does not involve ADB’s noncompliance with its operational policies and procedures. As set out in paragraphs 12 to 22 above, ADB has complied with all relevant ADB policies and procedures including the SPS and OM Section F1 in the formulation, processing, or implementation of the Project.

VI. Conclusion

28. In conclusion, Management respectfully contends that the Complaint should be excluded on the grounds set out in paragraphs 25 to 27 above. However, notwithstanding ADB’s view that the Complaint is ineligible for compliance review, ADB has been in regular contact with the Borrower and is also communicating with the Complainants. ADB will continue its dialogue and open consultations with the Complainants and the Borrower to resolve the issues raised by the Complainants. Furthermore, three of the four action items previously agreed with the Complainants have already been completed and the fourth and last remaining action item will be completed after the monsoon season in September/October 2022. Management stands ready to provide further clarification and materials to the CRP upon request.
Attachment - 18 February 2022 Meeting Minutes and Action Items

cc. Wan Farisan Bin Wan Sulaiman, Executive Director Representing Nepal
    Philip Rose, Chair, Board Compliance Review Committee
    Bruno Carrasco, Director General concurrently Chief Compliance Officer, Sustainable
    Development and Climate Change Department (SDCC)
    Bruce Dunn, Director, SDSS
    Manmohan Parkash, Deputy Director General, South Asia Department (SARD)
    Colin Gin, Assistant General Counsel, Office of the General Counsel (OGC)
    Kanzo Nakai, Officer-in-Charge, South Asia Transport and Communications Division (SATC),
    SARD
    Shigehiko Muramoto, Unit Head, Project Administration, SATC
    Arnaud Cauchois, Country Director, Nepal Resident Mission
    Aysha Qadir, Principal Counsel, OGC
    Ricardo Carlos V. Barba, Principal Safeguards Specialist, SARD
    Sin Wai Chong, Transport Specialist, SATC
    Suvalaxmi Sen, Environment Specialist, SATC
Figure 1. Location of Project Road in Nepal
SASEC Muglin-Pokhara Highway Improvement Project Package-II

Meeting Minute

Date: 18th February, 2022

Meeting heading: Bio-diversity Conservation Concerns while extending the road

Participants of meeting

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<tr>
<td>1.</td>
<td>Amit Shrestha</td>
<td>Project Manager, SMPHIP (MAP 02)</td>
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<td>2.</td>
<td>Bishnu Om Bade</td>
<td>Procurement Specialist, PD ADB</td>
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<td>3.</td>
<td>Kamal Shakya</td>
<td>Resident Engineer, SMPHIP (MAP 02)</td>
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<td>4.</td>
<td>Yub Raj Shrestha</td>
<td>Environment Safeguard Specialist, PD ADB</td>
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Issues Discussed:

1. Tragedy was happened on 2nd February, 2022 due to clearance of simal tree located at Gachhepani (CH 68+200) resulting the collapse of tree branch having a nest of Slander Billed Vulture residing on the same.
2. Another simal tree located adjacent to the cleared tree could be potential habitat of the vulture, therefore, that tree should be saved to the possible extent.
3. Awareness about wildlife conservation has to be created to the construction workers, focusing breeding season of birds in Falgun-Baisakhi month.
4. There should be proper coordination within the project team (Project Manager, Consultant and contractor) and prompt and efficient mechanism of reporting for biodiversity sensitive issues e.g. breeding birds has to be developed.
5. Conservation awareness needs to be created to the workers/community through the project with the involvement of stakeholders, working on conservation activities.