

Zagreb, 8<sup>th</sup> September 2011.

**SUBJECT: Zelena akcija's comments on the proposed Ombla hydro power plant loan**

Zelena akcija / Friend of the Earth Croatia welcomes the opportunity to provide input and contribute to the process of reviewing the environmental documentation, however we have serious and numerous concerns both about the procedure and the content of the Environmental Impact Assessment (EIA) document.

With this letter, **we ask the EBRD to stipulate that the OMBLA project, first of all, has to pass a new official EIA procedure in Croatia before evaluation on whether the project is suitable for funding.** The current EIA procedure, as it was conducted, goes against Croatian law, and is also unacceptable due to its poor quality. Our main objections to the EIA, which we shall argue in detail below, are as follows:

1. The EIA is outdated and no longer valid
2. Failure to include public in the decision making
3. Compromised legitimacy of the EIA due to pressures exerted upon an expert member of the EIA evaluating commission
4. Poor EIA quality
5. Non-compliance with EBRD standards.

### **1. EIA NOT VALID**

Ombla HPP project is based upon an Environmental Impact Assessment (EIA) which dates from 1999. Since this time major changes in legislation and the social, environmental and political situation have occurred.

The EIA procedure is governed by two pieces of legislation: the Environmental Protection Act (EPA) and Governmental Directive on Environmental Impact Assessment (GDEIA). The former provides the rationale and basic requirements for an EIA procedure and the latter provides detailed instructions for the successful execution of the EIA. At the time of conducting the 1999.EIA the Acts applicable were the 1994 EPA (Official Gazette # 82/94 and #128/99) and 1997 GDEIA (Official Gazette # 34/97 and #37/97). In the case of the Ombla HPP project HEP is operating under the assumption that the 1999 EIA is still valid. The reason for this wrong assumption could be the fact that neither the 1994 EPA nor 1997 GDEIA have provisions about the temporal validity of the EIA whereas the new 2007 EPA prescribes that the EIA is valid only if the project commences within two years of the finishing of the EIA process. However, there are at least two legal arguments that old EIAs cannot be used:

1. The Ordinance on Environmental Impact Assessment (Official Gazette # 59/00, # 136/04

and # 85/06) which has superseded the 1997 GDEIA (under which the Ombla HPP EIA was conducted) clearly states in Article 25. paragraph 2. that “An **EIA study conducted in compliance with the GDEIA** (Official Gazette # 34/97 and # 37/97) **rules can be used as an expert document for the Environmental Impact Assessment for three months upon the entry into force of this Ordinance**”. (i.e. until 12<sup>th</sup> September 2000.)

2. The fact that the 1994 EPA has no provisions(!) on the temporal validity of an EIA does not allow for the interpretation that EIAs conducted in compliance with the 1994 EPA are without expiry. This would lead to unacceptable consequences where theoretically a 30 year-old EIA conducted in 1981 would be valid but a 3 year-old EIA conducted in 2008, after the passing of the 2007 EPA, would not. That this should not be interpreted in such a manner follows not only from plain logic but also from the 'final and transitional provisions' of the 2007 EPA. In Article 228. paragraph 3. it is stated that legislation passed in compliance with the old 1994 EPA can be used until new legislation in compliance with the new 2007 EPA is passed only if it does not collide with the provisions of the new 2007 EPA. An interpretation that EIAs are without expiry would be in direct contradiction with the provision of Article 80 of the 2007 EPA which states that EIAs are valid for two years and can only be extended once for another two years.

If HEP proceeds with the Ombla HPP project with the old EIA, we as the public concerned (Article 3, paragraph 1, bullet 60. of the 2007 EPA) will challenge HEP in a Court of Law and ask for injunctive relief until matter is finally resolved. A similar case of the 1986 EIA for the HPP Kosinj - which was overturned by the Ministry of Environmental Protection, Spatial Planning and Construction, noting that such an old EIA is no longer valid and that a new EIA process compliant with current legislation should be prepared - assures us that we shall not experience problems in doing so.

## **2. FAILURE TO SUFFICIENTLY INCLUDE THE PUBLIC IN THE DECISION MAKING**

Once it was decided to proceed with the Ombla HPP project, the Ministry of Environmental Protection, Spatial Planning and Construction required further conditions to be met and thus reconsidered and updated the existing 1999 EIA conditions. An Environmental and Social Action plan has also been agreed between HEP and the EBRD and published at <http://www.ebrd.com/pages/project/eia/42219.shtml>

According to the Aarhus Convention Article 6. paragraph 10. “*when a public authority reconsiders or updates the operating conditions/.../the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.*” Thus public consultations must take place The Aarhus Convention Compliance Committee has found in the case ACCC/C/2009/41 concerning compliance by Slovakia that:

<<although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation. The Committee considers that the clause “where appropriate” introduces an objective criterion to be seen in the context of the goals of the Convention /.../ The Committee finds that when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern /.../ with the changes and increased potential impact on the environment /.../ public participation would have been appropriate.>>

Therefore, even if EIA was valid the fact that the public was excluded from the process of assessing the 2008 study “Bat Fauna in the Vilina Cave above the Ombla Spring” constitutes a breach of Aarhus Convention and all transposed Croatian legislation thereof.

In this case however new consultation meetings are foreseen in the Stakeholder Engagement Plan

(p.16-17) for September 2011, on the Environmental and Social Action Plan; Stakeholder Engagement Plan and Non-Technical Summary of the EIA. **Yet all these documents have already been published, and there is therefore no meaningful process in place which would ensure the incorporation of comments received or explanation as to why they have not been included.** To provide for public participation in such circumstances cannot be compatible with the Aarhus Convention because by then public participation is neither early nor effective and major options are no longer open.

Such informal consultations cannot be a substitute for a properly carried out EIA process. An example from a previous hydroelectric project, the Lešće HPP on the River Dobra – also involving HEP - illustrates this point: In spite of a 2007 recommendation from the Bern Convention not to go ahead with the HPP construction, HEP went ahead. The company agreed to undertake a new biodiversity study, however when asked by a representative of Zelena akcija (Green Action) whether it would wait for the results before continuing with the construction, the answer was “No, of course not”. It is insufficient to rely on piecemeal studies and consultations that take place after the EIA process is completed.

Moreover, the Environmental and Social Action Plan stipulates that HEP must, before construction: “Undertake pre-construction ecological surveys to establish a robust baseline (note: EIA includes an equivalent requirement). Include surveys of:

- Terrestrial ecosystems
- Aquatic ecosystems
- Protected bat species
- additional surveys of the locations and extent of species populations in the caves affected by the Ombla HPP - Protected *Proteus anguinus* (Cave salamander).
- Birds

Undertake additional analysis on whether the measures that have already been identified to mitigate impacts on flora and fauna are sufficient to avoid potential effects upon the Natura 2000 site. Based on results, prepare plan required by item 6.2.”

This appears to mean that little is known about the current ecological situation at the site. It is therefore difficult for stakeholders concerned with the ecological impacts to give meaningful input, and there is no guarantee that further consultations will be held that would correct this situation later on. Even if there are further consultations the project may be at too advanced a stage to incorporate properly the recommendations.

**HEP's public information record is poor.** Although the investor claims that it acts as a responsible state owned company, the situation on the field is quite the opposite. In the Stakeholder Engagement Plan it is stated that “HEP is a state owned company, its operations fall under the requirements, specified in the Law on Freedom of Information (Official Gazette # 172/03 and # 144/10). This law regulates citizens’ rights of access to information possessed, used or controlled by public authorities, sets out the principles and exceptions to these rights, as well as the procedures for their achievement and protection.” However on 13<sup>th</sup> February 2006 HEP avoided providing information which Zelena akcija requested under the pretext that it does not fall under the provisions of the above mentioned law. The argumentation provided by HEP was the following: “The mentioned law defines the obligations for providing information for public authorities and not for companies like HEP” (see annex I). Such malpractice has been repeated since then and obtaining official information from HEP is extremely difficult.

On the HEP web page there is no announcement of starting date and deadline until which the

comments on the EIA should be sent (see: <http://www.hep.hr/hep/grupa/razvoj/Ombla.aspx>). By Croatian law and best practices these should also be published.

### **3. COMPROMISED LEGITIMACY OF THE 1999 EIA PROCEDURE**

One member of the EIA evaluating commission, Prof. dr. Bonacci was dismissed from the commission. The official reason was that he did not take an active part in the work of the commission. However, from a letter from Mr. Bonacci to the then Prime Minister we can conclude that he took an active part in the work of the Commission but was replaced because he strongly opposed the project. After his replacement, the evaluation commission gave a green light to the EIA. Such decision-making, is, of course, against best practices of EIA evaluation both in Croatia and the EU.

### **4. POOR EIA QUALITY**

Even a quick glance at the EIA reveals the lack of at least the following:

- Evaluation of the subterranean aquifer size
- “Zero state” study of flora and fauna – this is to be undertaken later but may come too late to make appropriate recommendations for the project
- Taking into account the study of the bat population from 2008 “Bat Fauna in the Vilina Cave above the Ombla Spring” conducted by the University of Zagreb Faculty of Science which strongly opposes the project
- Relevant data on the impact of dam from seismic activities
- Evaluation of the needs for the drinking water for Dubrovnik (projections)
- Evaluation of impact of the dam on the water quality of drinking water for the city of Dubrovnik.

### **5. EBRD NON-COMPLIANCE**

The EBRD in its Country Strategy for Croatia recognizes that “efforts to implement the SEA need to be stepped up” but by financing the energy sector boosts further breaches of the EU and Croatian SEA legislation. The Croatian Energy Strategy – one of the most important state programmes with the most significant environmental impacts still has not been subject to a Strategic Environmental Assessment procedure – and therefore none of the projects, which arise from that strategy, are fully compliant with the EU *acquis communautaire*. Neither has an SEA been prepared for the current spatial planning documents that allow the construction of the HPP in that area.

To conclude, the environmental approval procedures for this project do not meet current standards either in the procedure or in the content. Therefore **we recommend again that EBRD does not approve the loan for the Ombla HPP project!**