

17 November 2011

To:

Executive Directors of the EBRD

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Dear Executive Directors and staff of the EBRD,

Re: Ombla hydropower plant, Croatia

Further to our previous communication on the Ombla hydropower plant, which is due to be approved on 22 November, we would like to re-iterate our concerns and inform you that the majority of them have not been addressed by the response from the EBRD and the project sponsor HEP. While the EBRD and HEP have attempted to carefully respond to every point raised, it must be emphasised that **defending the project is not the same as addressing our concerns**. We have therefore also filed a complaint with the EBRD's Project Complaint Mechanism.

Here we would like to concentrate on a few key points in order to underline that the Ombla project is nowhere near a stage when the EBRD's Board of Directors ought to be considering approving it.

1) Outdated Environmental Impact Assessment

To recap: The Environmental Impact Assessment for the project dates from 1999 and is thus outdated and **no longer legally valid according to Croatian law**. While the EBRD has clearly made efforts to ensure that additional studies will be carried out, **these cannot be a substitute for a legally valid EIA**.

Such considerations are no mere formality, as the location of the project is part of a proposed **Natura 2000 site**, and according to the definitions from the EBRD's Environmental and Social Policy 2008 fits the descriptions of natural habitat, protected area and critical habitat. The project is expected to have a significant impact due to construction works including explosives and also due to changing water levels.¹

A biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive has not yet been completed. The EBRD appears to accept that the completion of this study and adoption of mitigation measures will resolve outstanding issues. **It is not clear why the bank is considering approving the project before such an assessment has been undertaken.**

In response to this point, the EBRD/HEP has pointed out that:

"HEP recognizes that conditions are different at present than at the time of the original EIA. However, it is important to note that the Ministry of Environment, Spatial Planning, and

¹ Among the issues of concern are five species of protected bats and *Proteus anguinus*, the cave salamander, classed as 'vulnerable' on the IUCN Red List. (IUCN Red List (VU); FFH Directive: Annex II, IV; Bern Convention: Annex II), *Troglocaris anophthalmus*, the cave shrimp, (IUCN Red List (VU)) and *Congerius kusceri*, the cave clam (FFH Directive: Annex II, IV). Among other cave species four taxa are found only in the Vilina Spilja - Ombla spring, and nowhere else in the world: *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, (all three are aquatic cave snails) and *Eukonenia pretneri*, the cave palpigrae. Proof that the cave is far from being fully explored is the fact that a new Genus of terrestrial isopod found in the cave in 2009.

Construction found the EIA met then-current requirements and has stated that the permits issued as a result of the 1999 EIA and further required studies remain valid. This Ministry and the Ministry of Culture have also reported there is no legal basis under Croatian law to require further studies or assessments.” (Response 07 November 2011)

We do not find this sufficient. **There are clear legal grounds for invalidating the EIA (see Annex 1).** It is not beyond the realm of possibility that the Ministries are mistaken in their assessment of the requirements of Croatian EIA legislation, particularly given that a state-owned company is involved, for which it is surely in the government's interest that the procedures run as smoothly as possible. We would expect independent assessments of the legality of the EIA to be carried out by the EBRD, not just asking parties which have a clear interest in the project going ahead.

2) Failure to hold meaningful public consultation

Croatia is a party to the Aarhus Convention, which is reflected in the Croatian Law on Environmental Protection (Official Gazette No. 110/07). However as a result of the EIA process being carried out in 1999 and the piecemeal approach to updating environmental information being undertaken for the project, the public has not been sufficiently included in decision-making. Although the EBRD and HEP have tried to make up for the old age of the EIA by publishing a summary of it for a commenting period and by holding presentations of the project, none of these steps fulfil the definition of 'meaningful consultation' or comply with the Aarhus Convention:

1) Public participation has been not been undertaken *prior to decisions being taken when options are still open*

Project presentations took place in September 2011, but the EIA was already approved on the national level more than a decade ago, and **there is therefore no legal 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.

The EBRD has denied that this is the case:

“a further biodiversity study will be undertaken, in part because the site has now been proposed for protection under Natura 2000. This study will include a comprehensive evaluation of data in order to determine if further mitigation is needed, whether specific mitigation measures can reduce or control impacts to an acceptable level, and/or whether compensation should be provided for unavoidable impacts. This process will allow any number of options to be considered, so it cannot be said that options are no longer open.”

(Response 07 November 2011)

Clearly there are still options open for mitigation measures, however it is very unlikely that the zero option ie. the project not going ahead, will be seriously considered at so late a stage, after some environmental permits have already been obtained, and after the EBRD has approved financing. It is unclear how the Natura 2000 study could impact on the permits that have already been issued. Thus we do not agree that major options are still open.

2) Public participation has not been based on *disclosure of relevant and adequate information* and appraisal cannot have been based on *environmental baseline data at an appropriate level of detail.*

Much of the *relevant information and environmental baseline data at an appropriate level of detail* is simply missing because the Natura 2000 study and other baseline studies have not been undertaken yet. The Environmental and Social Action Plan acknowledges this by stipulating that HEP must undertake studies before construction to establish a robust baseline.²

² Undertake pre-construction ecological surveys to establish a robust baseline (note: EIA includes an equivalent

Such studies should have been prepared **before** public consultations on the EIA, and consultations should have taken place **before** an environmental permit was issued for the project. Trying to correct the situation with piecemeal studies and 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 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 a series of piecemeal studies and consultations that take place after the EIA process is completed. There is no way to correct this situation in a legally acceptable manner except by starting the Environmental Impact Assessment procedure from the start.

3. Incomplete biodiversity assessment

The above also means that the EIA has been approved on the national level and the EBRD may be about to approve the project in the absence of detailed, comprehensive and up-to-date information. This is in breach of the EBRD's Environmental and Social Policy 2008 PR 6.6.³

The EBRD believes that this will be addressed as follows: “*At the same time, the ESAP to which HEP has agreed, and which will be part of the legal financing agreement with EBRD, will not allow construction that will affect the areas proposed for protection as Natura areas until a biodiversity study equivalent to an Appropriate Assessment under the EU Habitats Directive is completed and there is adequate mitigation to the integrity and the conservation objectives of the sites, or compensation to ensure overall coherence of the Nature 2000 network is protected.*” (Response 07 November 2011)

Again the emphasis is on mitigation measures and **does not address the question of what will happen if the study finds that the project is too harmful to the Natura 2000 site to proceed with**. It also does not address the point raised above about **how this study would legally be able to impact on those environmental permits already issued**.

4) Damage to habitat without adequate justification

The EBRD Environmental and Social Policy 2008 distinguishes between *natural habitats, protected areas, and critical habitats*. The Vilina Cave - Ombla Spring, as a planned Natura 2000 area and the only known habitat globally for the aquatic cave snails *Horatia knorri*, *Lanzaia kusceri*, *Plagigeria nitida angelovi*, and *Eukonenia pretneri*, the cave paligrade, fits all of these categories.

The EBRD and HEP argue that “*No activities will be undertaken in Vilina Cave; in addition, Croatian authorities are requiring steps to be taken to ensure that water levels cannot rise to the level of this Cave, and also to ensure that no construction takes place near the cave when bats are active.*” **This will be impossible to independently monitor.**

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.”

3 *Through the environmental and appraisal process, the client will identify and characterise the potential impacts on biodiversity likely to be caused by the project. The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.*

The EBRD and HEP do admit that: *There will be some level of effects on the karst cave system. For example, the water level is expected to rise up to 100 meters upgradient of the grout curtain "dam", and the transition zone that is currently flooded part of the time will move upward. In addition, the portion of the karst downgradient of the grout curtain "dam" will become dry for more of the year than is presently the case.*" They also point to the Natura 2000 study that should be carried out before going ahead with the construction.

As shown in Annex I, the illegality of the EIA means that the EBRD's provisions on protected areas (PR 6.15) are being breached. In addition, we believe that EBRD's provisions on critical habitats (PR 6.14) are also being breached. For further explanations see our complaint to the Project Complaint Mechanism at: <http://bankwatch.org/sites/default/files/complaint-EBRD-Ombla-17Nov2011.pdf>

4. Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local spatial planning documents.

The 2008 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. In our opinion this is in breach of the EBRD PR 6.15 (see explanation in the PCM complaint at <http://bankwatch.org/sites/default/files/complaint-EBRD-Ombla-17Nov2011.pdf>).

The EBRD and HEP responded to the lack of SEA as follows:

"EBRD acknowledges the importance and benefits of Strategic Environmental Assessment (SEA) as a key tool for sustainable development and for assessing the cumulative impacts of plans and programmes on the environment, including SEAs prepared according to EU SEA Directive or the Protocol on Strategic Environmental Assessment (Kiev, 2003) to the Convention on Environmental Impact Assessment (EIA) in a Transboundary Context. Whereas the Bank does not have ownership of such plans and programmes, it will liaise with governments, regional bodies and those multilateral institutions most appropriately placed to use SEAs as a government decision making tool and will structure its projects in accordance with the conclusions of relevant SEAs, where available.

Considering the Ombla HPP project itself is not subject to an SEA and that it has valid permits based on the 1999 EIA approval, the completion of the SEA on the Croatian Energy Strategy is not deemed to be a legal requirement for the implementation of the project."

We would not agree with this conclusion. As the Croatian National Energy Strategy was approved in October 2009, well after the relevant legislation on SEA was adopted, it was a legal requirement to carry out this process on the Strategy. Thus any projects which stem from it cannot be regarded as having been subjected to proper legal assessment if the whole strategy was not subject to SEA.

5. Lack of integrity of the technical due diligence process

One of the aspects of the responses from the EBRD and HEP which does not relate to the EBRD Environmental and Social Policy but raises several questions is the issue of the technical due diligence report. The version we have seen, which was labelled as being the final version, outlined the technical riskiness and economic and financial problems of the project. However HEP and the EBRD are now claiming that there is no problem:

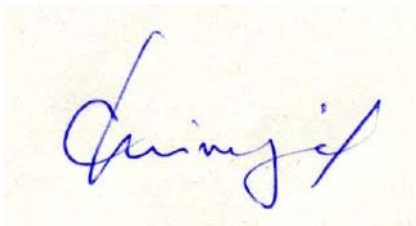
"The initial draft report on which comments were made at the public consultation meetings was very preliminary and reflected an imperfect understanding of the project by EBRD's consultant. It was mistaken in its understanding of many project details and in making many of the engineering assumptions; thus its conclusions were similarly incorrect. The later draft on which comments were made was inadvertently labelled "final", even though it was simply a revision based on partial

comments from HEP and EBRD. The updated report has since been released, and it is based on a more thorough understanding of project planning and site conditions. The updated report concludes that the project is economically viable and, based on the feasibility study proposed by HEP, did not highlight any technical fatal flaws.”

Either there was an issue with the choice of consultants and the timeframe for the assignment here, or the conclusions were simply changed in order to fit what HEP and the EBRD wanted to hear. Neither of these scenarios speaks highly of the way in which the due diligence process was carried out, nor of its results. This severely diminishes trust in the way that the EBRD assesses its projects for financing. We would expect a response from the EBRD on what exactly went wrong here and how it intends to address these issues in the future, as well as publicly disclosing the final version of the report in order to set the record straight.

As a result of these outstanding issues, we expect the EBRD to refrain from financing the project, at the very least until a new Environmental Impact Assessment has been carried out.

Yours faithfully,



Enes Ćerimagić

Annex 1

Illegality of the Ombla EIA under Croatian law

The EIA procedure in Croatia 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 12th 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.

In 2008 a similar case of the 1986 EIA for the HPP Kosinj 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. We intend to challenge the EIA process for Ombla in court if HEP proceeds with the project.

This also means that the EIA contravenes several clauses of the EBRD's 2008 Environmental and Social Policy:

- *PR 1.5. The appraisal process will be based on recent information [...].*
- *PR 1.9 The Environmental Impact Assessment (EIA)/Social Impact Assessment (SIA) shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws.*
- *PR 6.15. Areas may be designated by government agencies as protected for a variety of purposes, including to meet country obligations under international conventions. Within defined criteria, legislation may permit development in or adjacent to protected areas. In addition to the applicable requirements of paragraph 14, the client will: [...]*
 - *demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; [...]*