

Madame Claire Waysand
Sous-directrice « Europe et Affaires Monétaires Internationales »
Direction du Trésor
139, rue de Bercy
75572 Paris cedex 12

November 24 2004

Dear Madame Waysand,

We the undersigned NGOs to this letter are raising a specific instance against Electricité de France (EdF) for breaching the OECD Guidelines for Multinational Enterprises with respect to the Nam Theun 2 dam (NT2) in Laos. The specific areas of concern are that EdF is not adhering to, Chapter II, para 2, Chapter V, para 1a), Chapter V, para 2a), Chapter V, para 2b), Chapter V, para 3, Chapter IX, para 1b) and Chapter IX, para 2 of the Guidelines for Multinational Enterprises.

There is clear evidence that EdF

- has failed to identify, respond to and consider the impacts which may be problematic and potentially very great
- will not comply with the Lao government's international obligations and commitments
- has been awarded the Head Construction Contract (HCC) without International Competitive Bidding

APPLICABILITY OF THE GUIDELINES FOR MULTINATIONAL ENTERPRISES TO NAM THEUN 2 IN LAOS

As a signatory to the Guidelines, the French government has committed itself to encouraging multinational companies operating on its territory to observe the Guidelines wherever they operate. Since the operations of multinational enterprises extend throughout the world, international cooperation in this field should extend to all countries. Nam Theun 2 is a Build-Own-Operate-Transfer Project being developed by the Nam Theun 2 Power Company (NTPC). NTPC was created in September 2002 and the Concession Agreement with the Lao government was signed in October 2002. Shareholders in the company are Electricité de France¹ (35%), Electricity Generating Public Company of Thailand (25%), Ital-Thai Development Public Company Limited (15%) and Electricité du Laos (25%).

The NT2 project includes the development, construction, and operation of a trans-basin diversion hydropower project that would use water from the Nam Theun River, a tributary of the Mekong River. The proposed project site is located in the Khammouane and Bolikhamxay provinces in central Lao, about 250 kilometers east of Vientiane. Its area of impact would stretch from the Nakai Plateau to the lower Xe Bang Fai river confluence with the Mekong.

The common aim of the French government adhering to the Guidelines is to encourage positive contributions that MNEs can make to economic, environmental and social progress and minimise the difficulties to which the operations may give rise². This specific instance has been filed with the intention of (1) opening dialogue with Electricité de France, (2) preventing serious damages to the environment and the livelihoods of the affected people, and (3) seeking to improve the economic performance of the project.

¹ The EDF Group is an integrated energy company made up of a network of different companies. The EDF Group's head office is in Paris, France.

² Preface, para 10 of the OECD Guidelines for Multinational Enterprises

BREACHES OF THE GUIDELINES

Environmental and social assessments

The Environmental Assessment and Management Plan (EAMP) and the Social Development Plan (SDP) lack baseline data which are needed (1) to address the environmental, health and social-related impacts associated with the project and (2) to anticipate changes before the project commences. There also “remains some uncertainty whether livelihood programmes will be able to deliver the targeted income levels for resettled households.”³

NTPC plans to initiate construction activities in May 2005⁴, although NTPC still needs to collect a lot of information related to the environmental and social impacts associated with the project. According to the OECD Guidelines for Multinational Enterprises, the development of environmental and social management plans should also include (1) adequate and timely communication and consultation with the communities affected⁵ and (2) provision of public information on the impacts of the activities⁶. Civil Society and local people addressed their concerns in a series of international workshops organised by the World Bank Group on the Nam Theun 2 dam project in Paris, but NTPC failed to identify, respond to and consider the impacts which may be problematic and potentially very great. NTPC is clearly in breach of Chapter V, para 1a), Chapter V, para 2a), Chapter V, para 2b) and Chapter V, para 3 of the Guidelines for Multinational Enterprises. The specific concerns are:

Lack of baseline data

A number of construction elements will be developed during "detailed design" of the project⁷. Exact location of construction camps, quarries and disposal sites have not been determined yet⁸. Data are still being collected for the Nam Theun downstream of the dam and for project construction lands⁹. Data is still being collected on populations likely to be affected directly and indirectly along the Xe Bang Fai¹⁰. The Reservoir clearance plan is still under preparation¹¹. A baseline study is still underway to identify all potentially affected land and assets.¹² Data is still being collected to identify potential impacts due to an additional 20,000 people in the area during construction¹³

Baseline information on the current livelihoods of villagers

The Nam Theun 2 EAMP chapter IV¹⁴ promises fair compensation to the more than 50,000 villagers living downstream of the Nam Theun 2 dam site where “a collapse in the aquatic food chain” is predicted. The document indicates that villagers dependent on the Xe Bang Fai will suffer from destruction of riverbank gardens, loss of buildings close to the riverbanks due to erosion, significant declines in fish catch, impacts on domestic water supply and transportation difficulties. However, key baseline information on the current livelihoods of villagers is lacking, and no clear compensation plan has been developed. The current plans are vague, lacking in detail, and provide no clear assurances for affected people.

According to the Nam Theun 2 Social Development Plan chapter IV¹⁵: “there remains some uncertainty whether livelihood programmes will be able to deliver the targeted income levels for affected households.” More than 6,000 farmers will be forced onto land unfit for farming. Project developers admit that the land is unsuitable for rice cultivation, and that other vegetables will only be able to be grown with large inputs of organic and inorganic fertilizer. It is doubtful there will be

³ Para 123 of the Summary Environmental and Social Impact Assessment for NT2

⁴ website Nam Theun 2: Project history. Viewed on November, 2 2004.

<http://www.namtheun2.com/background/backhistory.htm>

⁵ Chapter V, para 2b) of the OECD Guidelines for Multinational Enterprises

⁶ Chapter V, para 2a) of the OECD Guidelines for Multinational Enterprises

⁷ Para 7 of the Summary Environmental and Social Impact Assessment for NT2

⁸ *Ibid*

⁹ Table C.3 footnote 1 of the Summary Environmental and Social Impact Assessment for NT2

¹⁰ *Ibid*, footnote 2

¹¹ Para 57 of the Summary Environmental and Social Impact Assessment for NT2

¹² Para 93 of the Summary Environmental and Social Impact Assessment for NT2

¹³ Para 104 of the Summary Environmental and Social Impact Assessment for NT2

¹⁴ Assessment of Social issues

¹⁵ Assessment of Social issues

enough land for the resettlers' livestock. It is not clear whether the reservoir will actually provide a productive fishery, or when promised income from forestry or irrigated agriculture programs will materialize. Should these programs fail, project developers are not offering resettled villagers any alternative compensation packages.

Impact on endemic species and nationally threatened species

Annex J of the EAMP (Mammal and Bird Species of the NNT Area) lists 67 species classified as endemic and nationally threatened that have been sighted or that could be present on the Nakai Plateau and in the NNT NBCA. Three wildlife species are critically endangered, 26 vulnerable, 9 endangered and 20 near threatened. Investigations into Bats and Rodents are still very limited¹⁶. The project intends to develop management plans for only two species, the 'White wing duck' and 'Asian elephant', yet even these have not yet been developed.

In fact, detailed wildlife surveys were not even carried out. The study was limited to direct sightings, indirect evidence (e.g. tracks) and interviews with the villagers. Generally, the areas were rarely visited and there is no information available about the viability of the populations¹⁷. Any impact on the population of endemic species may jeopardise the survival of the species because they occur within a particular geographical area and nowhere else. The slightest change in the environment can bring the species to the brink of extinction because the conditions under which the species exist are limited and there is no input of new DNA.

Impact on the fish species

Information on fish distribution, biology and ecology in both the Nam Theun and Xe Bang Fai Rivers remains basic, making it difficult or impossible to prepare a proper and detailed assessment of the impacts¹⁸. Data on fish distribution is still insufficient¹⁹. Whether fish will be able to adapt to the new reservoir conditions or the increased water levels along the Xe Bang Fai is unknown. Experience from other hydropower projects in the region indicates that many fish species will be unable to adapt to the changed conditions and will die out.

Increased pressure on timber and wildlife

Creation of the reservoir will "improve access to the NNT NPA"²⁰. This could lead to increased pressure on timber and wildlife resources and will open up access to the protected area which is the single most important factor in increasing logging and hunting in protected areas. The Environmental Assessment and Management Plan (EAMP) lacks monitoring programmes which are needed to prevent, mitigate, and control these risks.

Clearcuts in reservoir area

Despite the fact that the dam may never be built, the forests in the reservoir area have already been clearcut²¹. Since the early 1990s, the Lao military-run Bolisat Phathana Khet Phoudoi (BPKP - Mountainous Region Development Corporation) has benefited from a concession to log the project's 450 square kilometre reservoir area on the Nakai Plateau. From 1973–2003, forest cover in the Nakai Plateau decreased from 71% to 60%, in the inundation zone from 61% to 48% and 43% of all clearings in the period 1996-2003 occurred outside the inundation zone. In addition to logging the reservoir area, BPKP has carried out resettlement related to the project and built houses for resettled villagers. The Environmental Assessment and Management Plan (EAMP) and Social Development Plan (SDP) do not address these impacts in the decision-making, although associated with the processes.

¹⁶ Chapter 3 of the Environmental Assessment and Management Plan

¹⁷ Chapter 3, page 88 of the Environmental Assessment and Management Plan

¹⁸ Chapter 3, pag. 73, 78, 82 of the Environmental Assessment and Management Plan

¹⁹ *Ibid*

²⁰ Para 85 of the Summary Environmental and Social Impact Assessment for NT2

²¹ Chapter 3, page 91 of the Environment assessment and management plan

Consultation

People in the reservoir area and living downstream along the Xe Bang Fai were never given the choice of a no-dam option when being consulted about the project.²² Once a decision was made by the Lao government to proceed with the project in the early 1990s, affected people were never given the chance to say no to the project. The questions put to affected communities have been “there will be a dam. What kind of resettlement would you like or what kind of compensation would you like?” but not “do you think a dam would be a good option in your area?” This is not real consultation.

An environmental and social management plan compliant with the OECD Guidelines for Multinational Enterprises requires the project proponents (1) to engage in adequate and timely communication and consultation with the communities affected²³ and (2) to provide the public information on the impacts of the activities²⁴. Several documents are not available for review by civil society and local, affected people (see chapter ‘Environmental and social assessments’). NTPC has failed to identify, respond to and consider the impacts which may be problematic and potentially very great. NTPC is clearly in breach of Chapter V, para 2a) and Chapter V, para 2b) of the Guidelines for Multinational Enterprises.

The specific concerns are:

Posters are inadequate

The Lao language materials used for recent consultations with villagers in relation to NT2 include a set of posters that include mainly illustrations with short subtitles. There are two sets: The first set includes a total of 8 posters, and deals with livelihood alternatives specifically for resettled people. The second set includes a total of 11 posters, and deals with the positive and negative impacts of the project, the process for determining compensation, and possible options for compensating for negative impacts. There appears to be a number of potentially misleading points (e.g. solutions that may not be realistic) and two major problems. The first major problem is to claim that there will be more fish in the tributaries of the Xe Bang Fai after the dam is built. This information is not correct. Secondly, the critical issue of increased rainy season flooding along the Xe Bang Fai is not mentioned or depicted in any of the posters.

No realistic discussion²⁵

Independent observers have noted that at least one village in the middle Xe Bang Fai was not visited by the consultation facilitators. Instead a top-down “consultation” was conducted by district officials who presented the posters about the project's benefits and mitigation measures. Village facilitators were selected based on the government-organized village administration system. While this does not necessarily indicate that the village committee is not interested in assisting the villagers, it does suggest that the district officials have already framed the role of the villager facilitators and committee. The officials told the facilitators to record the villagers’ concerns and proposals. There was no real discussion or consultation about how the villagers felt about the project or what they wanted their river and livelihoods to be like. The villagers proposed to have a community fishpond, crops to compensate for lost income and riverbank gardens.

The villagers in this one community are not happy that they are losing the Xe Bang Fai River as they know it. They are very uncertain if they will still be able to catch fish from the river. They are not satisfied with the aquaculture (fishpond) plans because they will require a lot of investment.

During a field visit to one community on the Nakai Plateau slated for resettlement, villagers had no idea regarding the finer details of what was going to happen to them. The villagers did not know when or where they would be moving as they said the dates kept changing. They said that the

²² Stephen Sparkes, Norplan on the Paris Workshop organised by the World Bank Group on the Nam Theun 2 dam project in Paris, September 31, 2004

²³ Chapter V, para 2b) of the OECD Guidelines for Multinational Enterprises

²⁴ Chapter V, para 2a) of the OECD Guidelines for Multinational Enterprises

²⁵ independent field visits, IRN

company had come to designate the new village land, but that the soil on the proposed site was of such bad quality, and the village location too far from the proposed new road, that the villagers requested the company find them better land. The villagers were also unsure as to who was to pay for pump maintenance and pump electricity fees for irrigating their new plots.

Villagers also did not know what would happen with their 400 buffalo and were mostly under the assumption that they would have to sell all their buffalo as there was nowhere for them to graze. They also claimed that the allocated 0.5ha of allocated farmland was too small to be able to grow feed for livestock as well as cash crops for sale.

Of major concern is the lack of a market for vegetables produced at the resettlement site. Apparently, some villagers have been to the pilot village a number of times and they said that the pilot village was still unable to sell their produce.

Inform the public

Complete analyses of the potential economic and financial risks and benefits of the project for the government and people of Laos have not been released. The Power Purchase Agreement (PPA) and the complete Concession Agreement are not public. A full economic analysis has not been released. NTPC has refused to release hydrological, geomorphological and water quality studies, which makes independent assessment of the assumptions in the EAMP and SDP difficult.

Freedom of association

At the Paris Workshop organised by the World Bank Group on the Nam Theun 2 dam project in Paris, September 31, 2004 NTPC responded that they will respect the contract with the host government which includes respect for the national law. The Lao Labour Law, promulgated in March 1994, is the sole Labour Law in the country. Composed of 62 Articles in 15 Chapters, the Law severely limits Labour Rights in some instances. A key weakness of the Law is its failure to provide real freedom of association for workers. Trade unions must belong to the single national centre Lao Federation of Trade Unions (LFTU). Employers' organisations must be affiliated with the Lao National Chamber of Commerce and Industry (LNCCI). The government refuses to register any workers' organisation that is not affiliated to the LFTU. Clear restrictions on freedom of association are exacerbated by barriers to freedom of assembly and inadequate guarantees of the right to collectively bargain. The Law simply provides the LFTU with the right to negotiate. Recourse to strike is severely restricted by broad prohibitions in Article 59.

NTPC should go further than the framework of the national law²⁶. Lao PDR ratified on December, 7 2000 the International Covenant on Economic, Social and Cultural Rights. Article 8, 1) of the Covenant stipulates: *'the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.'* NTPC should ensure that the Lao government's international obligations and commitments are met in their development of NT²⁷.

Conflicts of Interest and International Competitive Bidding

The construction contracts for the \$1.3 billion project will consist of five principal sub-contracts and one overriding Head Construction Contract (HCC). The HCC has been awarded to Electricité de France without International Competitive Bidding. The five principal sub-contracts are divided into two electromechanical packages (EM1 and EM2) and three civil works contracts (CW1, CW2 and CW3).²⁸

CW1 includes the upstream works including the Nakai Dam, saddle dams, spillway, radial gates, road rehabilitation and new works, bridges, the operator's village and associated infrastructure.²⁹ This is

²⁶ October, 21 2001 'text, commentary and clarifications' of the OECD Guidelines for Multinational Enterprises

²⁷ Chapter II, para 2 of the OECD Guidelines for Multinational Enterprises

²⁸ Nam Theun 2 Power Company, *Environmental Assessment and Management Plan*, 2004 version, available at www.namtheun2.com, p.21.

²⁹ *Ibid.*

the major construction contract for the dam. The contract for CW1 has been given to Ital-Thai Development, again without ICB.³⁰ The Environmental Assessment and Management Plan for Nam Theun 2 states that “EM1, EM2, CW2 and CW3 will be open to International Competitive Bidding”.³¹

The BOOT concession is not subject to International Competitive Bidding and is therefore in breach of Chapter IX, para 2 of the OECD Guidelines for Multinational Enterprises.

Conflict of Interest

Not only have the two most important contracts been awarded without International Competitive Bidding, but they have been awarded to two of the consortium members, presenting a conflict of interest and therefore in breach of Chapter IX, para 1b) and Chapter IX, para 2 of the OECD Guidelines for Multinational Enterprises.

CONCLUSION

There is clear evidence³² of EdF’s violation of the OECD Guidelines for Multinational Enterprises with respect to the Nam Theun 2 dam in Lao PDR. The specific areas of concern are that EdF is not adhering to Chapter II, para 1, Chapter II, para 2, Chapter V, para 1a), Chapter V, para 2a), Chapter V, para 2b), Chapter V, para 3, Chapter IX, para 1b) and Chapter IX, para 2 of the Guidelines for Multinational Enterprises. There is clear evidence that EdF

- has failed to identify, respond to and consider the impacts which may be problematic and potentially very great
- will not comply with the Lao government’s international obligations and commitments
- has been awarded the HCC without International Competitive Bidding

Procedural Guidance on Implementation in Specific Instances requires the National Contact Points to make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them in an efficient and timely manner. Please address this correspondence to Jan Cappelle, Proyecto Gato (Belgium), jan_cappelle@proyectogato.be.

Sincerely,

Jan Cappelle, Proyecto Gato (Belgium)
Sebastien Godinot, Amis de la Terre (France)
Ricardo Carrere, World Rainforest Movement (Uruguay)
Tove Selin, Finnish Asiatic Society (Finland)
Jaroslava Colajacomo, CRBM (Italy)
Aviva Imhof, International Rivers Network (USA)

³⁰ *Ibid*

³¹ *Ibid*

³² see chapter ‘Breaches of the Guidelines’