

IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
(SPECIAL POWERS AND APPEALS DIVISION)

JUDICIAL REVIEW APPLICATION NO: R2-_____.

In the matter of the decision fo the
Director-General of Environment
under Section 34A(3) of the
Environmental Quality Act 1974

And

In the matter of the Report under
Section 34A(2) Environmental
Quality Act 1974

And

In the matter of Sections 2, 6, 7, 9,
10, 11, 12 and 13 of the Aboriginal
Peoples Act 1954

And

In the matter of Section 11 of the
Forestry Act 1984

And

In the matter of Article 5 of the
Federal Constitution

And

In the matter of an application under
Order 53 of Rules of the High Court
1980 and under Section 25(2) and
paragraph 1 of the Schedule to the
Courts Judicature Act 1964

BETWEEN

1. XX (NRIC: 7306890)

2. XX (NRIC: 451213-06-5063)
3. XX(NRIC: 581108-06-5091)
4. XX (NRIC:740101-06-7399)
5. XX (NRIC:780401-06-6001)
6. XX (NRIC: 831231-06-5731)
7. XX(NRIC: 680322-06-5467)
8. XX (NRIC: 681227-06-5295)
9. XX (NO/K/P: 520815-06-5243)
10. XX (NRIC: 640619-06-6261)
11. XX(NRIC: 700128-06-5215)
12. XX (NRIC: 760101-06-7223)
13. XX (NRIC: 791231-06-5789)
14. XX(NRIC: 781215-06-5499)
15. XX (NRIC: 600322-06-5165)
16. XX (NRIC: 460322-06-5083)
17. XX(NRIC: 730104-06-5621)
18. XX(NRIC: 431013-06-5108)
19. XX (NRIC: 580711-06-5403)
20. XX (NRIC: 721125-06-5327)
21. XX (NRIC: 701113-06-5065)
22. XX (NO. K/P:400125-06-5127)
23. XX (NRIC: 471222-06-5135)
24. XX (NRIC: 601208-06-5203)
25. XX (NRIC:730618-06-5557)
26. XX (NRIC: 471222-06-5127)
27. XX (NRIC:740102-06-6611) ...APPLICANTS

AND

1. DIRECTOR-GENERAL OF ENVIRONMENT

2. STATE GOVERNMENT OF PAHANG
3. GOVERNMENT OF MALAYSIA ... RESPONDENTS

AFIDAVIT PENDOR BIN ANGER

UNDER ORDER 53 RULE 3(2) RULES OF THE HIGH COURT 1980

I, Pendor bin Anger (Identity Card No: 7306890), a citizen of Malaysia of majority age and having a residence on the bank of Pagar River, Krau Wildlife Reserve, Temerloh, Pahang Darul Makmur do depose and state as follows:-

1. I am the 1st Applicant in this action.
2. I am a Senoi of the Chewong group and was born in Kampung Bukit Lanchar, Raub, Pahang, in 1931.
3. I now live in the jungle area within the Krau Wildlife Reserve, Temerloh which is around 2 hours' walk from the Temuan Orang Asli village in Sungai Temir, Raub.
4. I have been authorized to represent all orang asli of the Chewong group within my residential area consisting of 36 people inclusive of children, to make this Affidavit on their behalf including myself together with the Fourth and Fifth Applicants to bring this application to protect the rights of my people and all the statements made in this Affidavit are within my knowledge and/or my belief to be true or from documents to which I have access or from information which have

been shown to me except where it states otherwise.

5. Our ancestors were from the Krau Wildlife Reserve which is within the Orang Asli Reserve territory in Sungai Temir which is gazetted under Gazette No. 10, Plan No. 3144, District of Raub, Mukim of Gali dated 29/11/1976. Once upon a time, our group broke into 2; one moved to the Kuala Gandah area and the other stayed on in the Sentao River area. My group is from the Sungai Sentao division.
6. Our ancestors survived by hunting and collecting jungle produce and were shifting cultivators and they lived full time in the jungle as stated in paragraph 5 above.
7. Our group today consists of 6 families of 36 people including children and our latest residential area is on the bank of the Pagar River.
8. We are comfortable with our present lifestyle where we live by planting banana trees to be eaten and to sell, planting tapioca, sweet potato, tobacco and chilli by clearing areas within our habitat. We also survive by fishing and hunting monkeys or small animals to be eaten.
9. Our lifestyle of living in the jungle by moving from spot to spot within the habitat territory as stated in paragraph 5 above is for farming purposes and most of the people within our group have never been out of the area where we live.

10. To us, the reserve area where we live is totally capable of offering us food for our daily survival and a life free from disease and heat.

11. I have been informed by a few individuals who had introduced themselves as researchers from universities who had come to research on our people a few years ago (when we live in the end of the Rambai River) that the government wanted to build a dam in the Lakum jungle reserve area and the Kelau area.

12. After meeting with us a few hours, we never received any visit again from the university researches and only heard about the dam project again from the representatives of the Orang Asli Affairs Department long after that where we were informed that we may need to be moved to another place if the dam was going to be built.

13. We had informed the representatives of the Orang Asli Affairs Department that although the dam would be built near to where we live, we will continue to live in this jungle area as our ancestors always reminded us never to leave the area where we traditionally live now.

14. Since we never again received anymore news about the project and have now been informed that the dam will proceed to be built, we have instructed our

lawyers to obtain more information about the approval of the project.

15. We were advised that it is imperative for us to be informed by the 1st Respondent on the environmental impact assessment (“EIA”) prepared before he could approve the project.

16. Our lawyers made an application to the 1st Respondent to obtain information about any approval of the said EIA relating to the said dam project through a correspondence dated 20/08/2007 and 21/08/2007 and was later informed formally by the 1st Respondent on 29/08/2007 that the EIA for the building of the said dam had been approved on 24/02/2001 (“EIA 2001”) and another EIA (which was prepared by the university researchers who had come to visit us before this) for the resettlement of the Orang Asli Sungai Temir had been approved on 24/09/2003 (“EIA 2003”). A copy of our solicitors’ letter dated 20/08/2007 and 21/08/2007 is enclosed as Exhibits “**PA-1**” and “**PA-2**” and a copy of the 1st Respondent’s reply dated 29/08/2007 is enclosed as Exhibit “**PA-3**”.

17. I verily state that EIA 2001 was approved without informing us about it and we had no knowledge on the approval of the said EIA before we were informed by our solicitors about it.

18. Through the 1st Respondent’s letter dated 29/08/2007 which was received by our

solicitors on 30/08/2007, we were informed that a copy of the said EIA report has to be obtained from the 3rd Respondent through the Department of Water, Energy and Communications, Malaysia and can only make references to the said EIA 2001 and 2003 in the library of the Department of Environment.

19. Our solicitors later applied through a letter dated 03/09/2007 to the 3rd Respondent via the Department of Water, Energy And Communications (“JBA”). A copy of our solicitors’ letter is enclosed as Exhibit “**PA-4**”.

20. The 3rd Respondent through the Raw Water Transfer From Pahang to Selangor Project Team later informed our solicitors via a letter dated 10/09/2007 that there were no more extra copies of the said EIA within their safekeeping and that the reports have to be republished to be handed over to our solicitors. A copy of the said letter dated 10/09/2007 is enclosed as Exhibit “**PA-5**”.

21. In the meantime, our solicitors had been analyzed a few parts of the EIA report in the library of the Department of Environment and found that the said EIA 2001 dan 2003 did not cover the impact on our lives and habitat within the nearby area and did not comply to legal requirements.

22. Further, our solicitors managed to obtain photocopies of Book 1 Part 1 of EIA 2001 and EIA 2003 from other non-governmental organizations (“NGOs”) for the purpose of making this application. A copy of Book 1 Part 1 EIA 2001 is enclosed

in the Affidavit of Rosli bin Omar which is filed simultaneously with this application and a copy of the said EIA 2003 is enclosed herewith as Exhibit “**PA-6**”.

23. I have been advised that EIA 2001 had failed to take into consideration the impact of the construction of the said dam to our lives as shifting cultivators within the Krau Wildlife Reserve Area and the Orang Asli Reserve Area although in paragraph 11.5 of the Executive Summary in the said EIA states that, *‘a lost of hunting and scavenging areas would be seen through inundation’*.

24. We have been informed that an impact on the environment where we live or will move to is not stated in the EIA report although it is mentioned in Paragraph 13.4 of the Executive Summary on page 15 Book 1 Part 1 EIA 2001 that when the trees are cut down, they will be burnt and destroyed using incinerators.

25. We were also informed and advised that the EIA 2003 was actually prepared by the university researchers whom had visited us earlier and that this EIA stated that our group will not be affected by the construction of the dam (in paragraph 6.1.2 Chapter 6 EIA 2003) but failed to state why and on what basis of research this summation was made.

26. We are also advised that in the said EIA 2003, it was stated that out of the 6 families in our group, one family had agreed to the dam project. I state that this is

not possible because my people are not capable/accustomed to making individual or separate decisions. To make a decision individually is uncharacteristic and not within our lifestyle or culture. I state again that actually, no one in our group agrees to the construction of the project and what is written in the EIA 2003 is not true.

27. We are also informed that there had been a meeting between the project developers and a few people from the Temuan group but we state here that we have never been involved or represented or asked opinion of in any meeting with them or made part of any form of discussion between them.

28. I verily state that any notice about the EIA 2003 report had never been mentioned to our group and without our knowledge, this EIA was approved by the 1st Respondent.

29. We have been advised that actually, the 1st Respondent is required to obtain our opinion before approving the EIA 2001 and EIA 2003 because the construction of the dam will be within our area.

30. Since the 1st Respondent had gone on to approve the EIA 2001 dan 2003 without applying legal requirements, we as an Orang Asli people which is already very small will in the highest probability lose our ancestral and traditional land on which we depend on to survive.

31. We have been advised that the 3^d Respondent claimed that the notice about the EIA copies was informed to the public through newspapers. Most of the people in our group are illiterate and matters within the newspapers are beyond our knowledge as we live all the time in the jungle.
32. The 3rd Respondent's action to give such notice in the newspapers although having full knowledge of our lifestyle is an unreasonable and fair act because that action had in fact marginalized us. Our aboriginal rights ought to have been protected but from the actions and decision of the Respondents seemed to have contravened the law.
33. We have also been informed that the gazette for the Sungai Temir Aboriginal People's Reserve (which covers our hunting and scavenging grounds and our residential habitat) had been decided by the 2nd and 3rd Respondents to be withdrawn and degazetted.
34. The decision of the 1st Respondent which was informed to our solicitors on 30/08/2007 was a denial of our civil rights and the failure of the 2nd and 3^d Respondents to make any objections to EIA 2001 and 2003 is a breach of their fiduciary duties towards us.

35. I state that the decision of the 2nd and 3rd Respondents to degazette the Aboriginal Reserve Area is a decision which is in breach of their duties towards us as an aboriginal people.

36. I further state that the decision of the 3rd Respondent in approving the whole construction of the dam project within our area is a breach of the fiduciary duty to protect and preserve our welfare as an aboriginal group in Malaysia.

I have also been advised that:

37. EIA 2001 did not comply with the guidelines made by the 1st Respondent through 2 books called “A Handbook of Environmental Impact Assessment Guidelines” (“Handbook”) and “Environmental Impact Assessment Guidelines for Dams and/or Reservoirs Projects” (“Guidelines for Dams”) where both have legal status which is compulsory to be complied with under Section 34A(2) Environmental Quality Act 1974 (“the Act”).

38. The 3rd Respondent failed to comply with the provisions of Section 34A(2) of the Act by failing to comply with the Handbook and Guidelines for Dams in the capacity as Project Developer when handing over a report under Section 34A(2) of the Act.

39. The 3rd Respondent handed over an EIA report which does not meet/reach the objective of an EIA report under Section 34A(2) of the Act under provision 1.3.2.1 of the Handbook and the EIA 2001 also failed to provide analyses of the necessary project options.

40. The 3rd Respondent failed to comply with the necessary steps under provision

1.3.3 of the Handbook by failing to describe and/or describe reasonably or adequately the project options.

41. The 3rd Respondent failed to comply with the provision 1.4.2 of the Handbook and also under provision 11.8.2 of the Guidelines for Dams by failing to provide in the EIA 2001 any choice of basic design open to the 3rd Respondent and failed to provide any reason for the choice of project from a technical, economic and environmental point in the EIA 2001.
42. The 3rd Respondent failed to comply with provision 1.4.2 of the Handbook and also under provision 11.8.2 of the Guidelines for Dams by failing to provide in the EIA a list of reasonable outcomes of the said project.
43. The 3rd Respondent failed to comply with provision 11.8.1 of the Guidelines for Dams by failing to provide in the EIA all justifications for rejecting other options as per provision 11.8.1 (iii), (iv) and (v).
44. Because the 3rd Respondent failed to provide in the said EIA all reasonable or adequate descriptions of other options, the 3rd Respondent is not capable of providing in the said EIA justifications to reject other options.
45. The 3rd Respondent failed to comply with provision 11.8.3 of the Guidelines for Dams by failing to provide a description for an alternative management system and also failed to prove that the upgrading of existing systems are not able to solve the problems claimed.
46. The 3rd Respondent failed to comply with provision 4.2 Guidelines for Dams by failing to handle a filter system in deciding the appropriate site for its usage through criteria evaluation which is fixed under provision 4.2 Guidelines for

Dams i.e acceptance of social and environmental preservation (refer Schedule 2.8 of the Handbook).

47. The 3rd Respondent failed to comply with provision 5.6 of the Guidelines for Dams by failing to provide for factors under provision 5.6 of the Guidelines for Dams which are: main specifications of every option which gives description in the form of size, technology, raw material and comparative advantages/disadvantages from an economic, technical and environmental point.
48. The 3rd Respondent failed to comply with provision 1.4.2 of the Handbook and also provision 11.8.2 of the Guidelines for Dams.
49. According to matters mentioned in paragraphs 40 and 42 above, the 3rd Respondent had replaced the 1st Respondent's discretion with the findings and opinions of the 3rd Respondent's consultants. Therefore the 1st Respondent's decision to approve the said EIA by using the full opinions and findings of the 3rd Respondent's consultants are irrational, unreasonable and beyond its jurisdiction under the said Act.
50. The 1st Respondent's jurisdiction is to weigh the said EIA in situations the detailed comparisons of the other project options and justifications can be made and not otherwise. Therefore, based on the matters mentioned in the whole of paragraphs 39 to 47 above, the decision of the 1st Respondent which was purportedly made under Section 34A(3) of the Act was made ultra vires.
51. The Handbook and the Guidelines for Dams which have legal status under Section 34A(2) of the Act gives a valid expectation to the applicants that the provisions under the Handbook and the Guidelines for Dams must be strictly

complied with. Therefore the decision of the 1st Respondent had been made against this valid expectation of the applicants and the public with regards to the compliance under the Guidelines for Dams and the Handbook due to the reasons stated in paragraphs 39 and 47 above.

52. The 3rd Respondent failed to cause the provision of detailed and reasonable wildlife studies to be weighed by the 1st Respondent in the said EIA.
53. The said EIA 2001 itself declares that the wildlife studies carried out were not adequate and unreasonable and needed further and more detailed studies (Chapter 7, page 11 and Chapter 13 page 2 of the said EIA), therefore the 3rd Respondent has failed to comply with provisions under the Handbook and the Guideline for Dams which provides that detailed description in any particular EIA regarding existing species of fauna must be made in a reasonable manner.
54. In obtaining description for species of fauna, the 3rd Respondent failed to carry out detailed studies on wildlife and had irrationally and unreasonably carried out research for a period of 2 weeks to study the wildlife and fishery (Chapter 7 page 11 and Chapter 7 page 16 of the said EIA).
55. The 3rd Respondent failed to comply with provision 7.2.6 of the Guidelines for Dams by providing data and full description of the species and habitat which are threatened and those which are preserved as required by the Department of Wildlife. Further, the 3rd Respondent failed to comply with provision 7.2.6 of the Guidelines for Dams specifically.
56. The said EIA 2001 failed to give descriptions of habitat and flora and fauna evaluation which will become extinct.

57. The said EIA 2001 failed to provide data and evaluation of indirect environmental impact and failed to predict the indirect environmental impact outside the affected area.
58. The 3rd Respondent had specifically provided an EIA which is against provision 7.2.6 of the Guidelines for Dams i.e. by listing the species of flora and fauna which are extraordinary, threatened or preserved and concluding that these species may be found in other areas and/or could migrate to nearby habitats and therefore would not have any meaningful environmental impact.
59. The 3rd Respondent failed to utilize the criteria provided under provision 7.2 Guidelines for Dams.
60. The 3rd Respondent failed to give any data and assessment pertaining to unique species and habitat.
61. The 3rd Respondent failed to comply with provision 7.1.5 of the Guidelines for Dams which provides that projects which involved the destruction of habitat and species of flora and fauna on a big scale must be given careful consideration, whereas the EIA 2001 failed to provide any consideration of these factors.
62. The 3rd Respondent failed to provide any data and/or evaluation on the environmental impact at a national level and district and territorial level.
63. The 3rd Respondent failed to study and evaluate ecological issues and their impact on a national, district or territorial level.
64. The 3rd Respondent failed to utilize any procedures recommended under provision 7.1 of the Guidelines for Dams i.e analyzing comparatively similar projects at other places based on factors like loss of habitat, changes, exchange or

breaking of habitats, and loss of cumulative habitat in nearby areas and species which are considered sensitive.

65. The 3rd Respondent failed to take into consideration the concerns stated in provision 6.3 by failing to refer to:

- a) latest scientific knowledge regarding the matters stated in Chapter 13 of the said EIA;
- b) narrowing down to the choice of flora and fauna without justification;
- c) not providing sufficient data.

66. Through the paragraph 13.4.2 of the said EIA 2001, the 3rd Respondent failed to provide data of all species of fauna stated in the Preservation of Wildlife Act 1972 through schedules 7.1 to 7.2 of EIA 2001.

67. The 3rd Respondent failed to provide adequate and reasonable data on the existence of species of fauna found in the area by failing to provide detailed data regarding the accurate total descriptions of habitat area. Paragraph 13.4.2 of the said EIA is unsure of such total number of species.

68. In paragraph 13.4.3 of the said EIA, the 3rd Respondent gave contradicting conclusions with provision 7.2.6 of the Guidelines for Dams by concluding that species of fauna may migrate to other habitats and that species of flora can be found in other areas.

69. The 3rd Respondent in the whole of paragraph 13.4.3 of the said EIA stated too generally that there will be a serious extinction of fauna without stating or analyzing the real impact under Section 34A(2) of the Act.

70. The whole of paragraph 13.4.4 of the EIA contains general statements which are

not based on any reason, analyses, data or studies and contains general conclusions contradicting section 34A(2) of the Act regarding movement/migration of fauna to other habitat.

71. The 3rd Respondent through the whole of paragraph 13.4.5 of EIA 2001 repeats its general statements and general conclusions which are not based on any data/study/analyses on the said impact on the fauna during the construction process, the whole of paragraph 13.4.5 EIA 2001 only focuses on the logical impact which can be concluded and not based on any research.
72. The 3rd Respondent failed in the whole of Chapter 13 of EIA 2001 regarding Flora and Fauna to give any analyses/data/specific studies on the impact on species of flora and fauna and their habitats as made imperative under Section 34A(2) of the Act.
73. The decision made by the 1st Respondent based on EIA 2001 under Section 34A(2) of the Act that the EIA 2001 complied with provisions under Section 34A(2) of the Act, based on all factors stated in subparagraphs 52 to 72, is irrational and unreasonable by taking into consideration factors which are irrelevant and failed to take into consideration relevant factors which are necessary under the provisions under the Guidelines for Dams and the Handbook as required by the 1st Respondent under Section 34A(2) of the Act.
74. The 1st Respondent's jurisdiction in approving EIA 2001 under Section 34A(3) of the Act is only when the EIA 2001 complies with Section 34A(2) of the Act, therefore all the factors stated in paragraphs 52 to 72 are ultra vires and invalid.
75. The Handbook and Guidelines for Dams which have legal status under Section

34A(2) of the Act gives a valid expectation to the Applicants that the provisions of the Handbook and the Guidelines for Dams will be strictly complied with. Therefore the 1st Respondent's decision was made against the Applicants' and the public's valid expectations regarding the compliance of the provisions of the Handbook and the Guidelines for Dams, and therefore, all factors stated in subparagraphs 52 to 72 on the decision of the 1st Respondent approving the EIA 2001 which did not comply with Section 34A(2) are invalid and against the valid expectation of the Applicants.

76. Due to the factors stated in sub paragraphs 52 to 72 above, the 1st Respondent, in concluding that the steps that will be taken to obstruct, reduce or control negative impact on the environment are sufficient, made a decision which was irrational, unreasonable, invalid and against the valid expectation of the Applicants.

77. I have also been advised and informed and verily believe that the EIA Report 2001 stated that the Orang Asli Sungai Temir Reserve will be flooded whereas another part of the report states that it will be 6 metres above water level. Therefore, my group and I will lose the traditional land of our ancestors and scavenging and migrating areas and will lose our culture and the traditional way of life as orang Asli people.

78. I am legally advised and verily believe that the 1st Respondent's approval under Section 34A of the Environmental Quality Act is invalid, irrational, unreasonable, against the valid expectation of the Applicants and beyond the jurisdiction of the 1st Respondent.

79. I humbly pray that this Honourable Court will grant the application of the

Applicants.

Affirmed by PENDOR BIN ANGER]

On 7th October 2007 in Raub,] Right thumb print

Pahang Darul Makmur through]

The interpretation of BEDU BIN AN]

Before me,

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Commissioner of Oaths

JURAT

Affirmed on 7/10/2007 through the interpretation of BEDU BIN AN, an individual of Temuan race who is fluent in Chewong language and Malay language where BEDU BIN AN had earlier taken oath stating that he has truly, clearly and accurately interpreted the contents of this affidavit to the deponent, PENDOR BIN ANGER, and that he will truthfully interpret the affirmation given to PENDOR BIN ANGER.

Before me,

Commissioner of Oaths.