

Eppawela Phosphate Agreement — Part II

By Batty Weerakoon

Continued from yesterday

This is not all. The process of Project Approval as given in the Act can very readily be turned into a fraud practiced not only on the unsuspecting but also on the diligent. The EIA when received from the Project proponent, is made available to the public, and the Project Approving Authority devised under the Act, shall hear any objector to the Project, and thereafter decide whether or not to approve it. If approval is withheld there is an appeal to the Secretary to the Ministry of the Project Approving Agency. But where approval is given despite objections the objector has not the benefit of an appeal. It just ends there. This process can work satisfactorily where the Project Approving Agency is independent of the Project Proponent. But in respect of Projects that are actively promoted by the Government, as has been the case with Eppawela Phosphate, the process of environment protection given in this Act is bound to fail.

Exclusion of Central Environment Authority.

The UNP government had seen to it that in regard to the Eppawela project the Central Environment Authority does not come in at all. About the same time that Mr. Ranil Wickremesinghe as Minister of Industries was getting up Regulations to circumvent the law as it should have been applicable to Eppawela, Dr. Wimal Wickremasinghe, as Minister of Environment, was formulating the Regulations that shut out the Central Environment Authority from Eppawela. By Regulations dated 18 June 1993 he made the Geological Survey and Mines Bureau a "Project Approving Agency". What transparency can there be in the Geological Survey and Mines Bureau which promotes the Eppawela project of McMoRan being the very authority that considers McMoRan's EIA furnished for the purpose of having the project approved? That is not all. It is the Secretary to the Ministry of Industries who signs the McMoRan Agreement that is the appellate authority on any matter relating to the McMoRan EIA on Eppawela.

This Appellate Authority, the Secretary to the Ministry, as signatory to the Mineral Investment Agreement has already in terms of the Agreement admitted the possibility of the most grievous damage to the environment. Para 2.9 of the Agreement is aimed not at prevention of environmental damage but at making a realistic assessment of the possible damage to the environment from industrial mining. It says, "The Company shall manage, monitor and progressively control and correct all adverse effects of mining with respect to water pollution, air pollution, soil contamination and all other factors that may tend to degrade and/or endanger the environment in conformity with the applicable law." There in one single sentence is the McMoRan EIA on its activities in Eppawela. The possibility, or rather the

inevitability of severe environmental pollution and degradation is admitted by parties to the Agreement. For remedy and rectification it refers to the "Applicable law". The fact is that there is no such applicable law. All the talk about the EIA and how it will be scrutinized before approval is granted to the project is just plain humbug.

Part III Investment Agreement makes the Law

Section 30(1) of the Mines and Minerals Act, 33 of 1992 imposes limitations to the issue of exploration and mining licenses by the Geological Survey and Mines Bureau which is the license issuing authority under this Act. It gives the instances where licenses should not be issued and one such instance is in its sub section © which specifies —

"any land within such distance of a lake, stream or a tank bund within the meaning of the Crown Lands Ordinance (Chapter 454), as may be prescribed [without the approval of the Minister in charge of the subject of lands];

A large number of small tanks situated in close proximity to the Eppawela Phosphate deposit are fed and augmented by the Yoda Ela which flows almost adjacent to the deposit. To the South of the deposit the Yoda Ela is less than a quarter of a mile away. To the East and the West it almost borders the Yoda Ela for a distance of approximately two to three miles each way. No permissible distance for exploration or mining has been prescribed and therefore no license could in law be issued with or without the consent of the Minister of Lands. Nevertheless it may be asked as to why the distances from lakes, streams, and tank bunds were not prescribed as required by the Act for the purpose of issuing licenses for exploration for and mining of minerals. The Minister in charge of the sector at the relevant time was Mr. Ranil Wickremesinghe, as Minister of Industry. Section 64(1) of the Mines and Minerals Act, 33 of 1992 vests him with the function of making regulations "in respect of all matters which are required by this Act to be prescribed or in respect of which regulations are required or authorized to be made under this Act." The answer to this is inescapable. Had such an exercise been attempted it would have been made clear that the Eppawela apatite deposit was situated in an area in which commercial mining as attempted by McMoRan could never be permitted.

Yoda Ela - gets "sold"

Not only is it that the Yoda Ela runs almost adjacent to the mining area. Related to the Yoda Ela and running directly the risk of pollution are the 3 small tank cascades namely Hammillewa, Eliye Diwulwewa and Kiriolagama, each having 5 to 6 area tanks within them. Also further down along the Yoda Ela course there are several tanks which can be polluted from what it could pick up from the mining area. These tanks are the Konwewa, Mahaganewewa, Siyambalawewa, Ihalawewa, Kaduruwewa, and several tanks of a higher order

such as Palugaswewa. It is not beyond the realm of possibility that the pollution can even reach the Anuradhapura tanks such as Tissawewa that are served by the Yoda Ela.

There is also the prohibition in regard to the issue of licenses, without the approval of the Minister and the Minister of Lands, for exploration or mining, "any land situated within such distance of catchment area within the meaning of the Crown Lands Ordinance as may be prescribed." Kiriwelhinna is the highest point of the Eppawela phosphate ridge. The Moderagam Ari catchment begins there, and it also borders the Kala Oya and Malwatu Oya catchments.

Scientists who have followed the McMoRan saga of the Eppawela people have seriously commented on the possible damage to the ecosystems in the area by large scale phosphate mining. Mr. D. L. O. Mendis, referring to irrigation systems as "ecosystems" because of their multi-faceted functions observes, "The Eppawela phosphate rock deposit is located at the very heart of Kalawewa-Jayaganga ecosystem or cultural landscape. Mining the Eppawela deposit to exhaustion will mean the inevitable degradation of this cultural landscape, and the destruction of the Kalawewa-Jayaganga water and soil conservation ecosystem."

On the Jayaganga or Yoda Ela Mendis cites R. L. Brohier: "The Jayaganga, indeed an ingenious memorial of ancient irrigation which was undoubtedly designed to serve as a combined irrigation and water supply channel, was not entirely dependent on its feeder reservoir the Kalawewa for the water it carried. The length of the bund between Kalawewa and Anuradhapura intercepted all the drainage from the high ground to the east which otherwise would have run to waste. Thus the Jayaganga adapted itself to a wide field of irrigation by feeding little village tanks in each subsidiary valley which lay below its bund. Not infrequently it fed a chain of village tanks down these valleys - the tank lower down receiving the overflow from the tank higher up on each chain.

This literary gem of Brohier with its insights on ancient hydraulic engineering could not have passed unread by students of the vintage of Mr. Ranil Wickremesinghe, grandson of late C. L. Wickremesinghe - a contemporary of Brohier, and very distinguished Land Commissioner under D. S. Senanayake, and also first Ceylonese GA of the Anuradhapura district. The men manning the Geological Survey and Mines Bureau could not have been ignorant of the ecosystems of the Rajarata. It can therefore be submitted that it is precisely because they knew the consequences of what they were embarking on that they desisted from attempting to prescribe distances from the Yoda Ela for purposes of phosphate mining. Any attempt at publicizing such distances by way of Regulations would have set them against other difficulties too, especially in regard to Jayaganga which can claim for itself the rank of an ancient cultural monument protected by sec. 31(a) of the Mines and Minerals Act No. 33 of 1992. From Mr. D. L. O. Mendis we

have it that UNESCO is on its way to include it in its pantheon of World Heritage.

Agreement gives McMoRan extra legal rights.

The Mineral Investment Agreement provides for McMoRan to work on the licenses that had been issued to the State owned Lanka Phosphate Co., for both exploration and mining. The kind of mining, the rate of mining and the nature of the related industrial activity meant to be engaged in by this Company was not such as to deny to it the licenses it needed for its activity. However had the Company's activity, engaged in by virtue of the licenses, caused any adverse impact on the environment it was always open for the Central Environmental Authority to step in to set things right. This was action under the Environment Law. But in that the Agreement has itself recognized the nature of the environmental damage that can be caused by the extensive mining by McMoRan, and purports to provide for relief, there is nothing the Central Environmental Authority can do in the face of such damage. The Agreement protects McMoRan from the Environment Law. The Agreement also obliges the Government to issue to the Company referred to as "Geo Resources" licenses for exploration and mining of 20 sq. km within the "Exploration" area.

There is also an additional area of an all round distance of 10 km from the Exploration Area that is designated the Buffer Area. In respect of this area clause 2.4 of the Mineral Investment Agreement makes this reservation: "In the event the Company does obtain Exploration and/or Mining Licenses or rights to an assignment of Exploration and/or Mining Licenses, covering lands within the Buffer Area such lands shall be added to the Exploration Area and treated in all respects as part of the Exploration Area (and Mining Area, if a Developmental Plan is approved) and (sic) as licenses which are subject to the provisions of this Agreement." The clause treats these assignments as "Land leases and other Required Surface Use Agreements".

This devise of a Buffer Area of such extensive extent would bind the Government to grant to McMoRan Exploration and/or Mining Licenses to a total of 136 sq. km. If to this is added the 20 sq. km assigned to Geo Resources, as provided for, the total land area would mount to 156 sq. km. Here McMoRan neatly gets over the prohibition in section 48(1) of the Mines and Minerals Act which says, "No license to explore for minerals shall be issued in respect of any area exceeding one hundred square kilometers." It also frees McMoRan from furnishing EIAs etc. for work in this additional area despite the horrendous reality that the northern boundary of the Buffer Area extends to a point just below the Anuradhapura Sacred City. It also frees McMoRan from the prohibitions to the issue of Exploration and Mining Licenses in respect of land situated in close proximity to the major tanks which include the Tissawewa and Nuwarawewa, and the

many sites of archeological interest (and sites of religious veneration). This is not just an extra legal right McMoRan gets but a clear and serious infringement of several laws as relate to the issue of Licenses under the relevant Act.

The appetite grows with the eating even to the point of recklessness. The clause 2.4 of the Agreement goes on to demand: "Promptly following the date of this Agreement the Government shall use its best efforts to facilitate the entering into of the following in order to secure for the Company all of the rights for surface use of land which are necessary for the conduct of the Company's operations contemplated by this Agreement: (a) a preferential lease between the Company and the appropriate Government authority with respect to State Land within the Exploration Area; and (b) a lease between the Company and the Urban Development Authority with respect to the processing area." Item (b) refers to the processing area in Trincomalee, and this will be considered in a different part of this document. Item (a) relates to land vested in the Mahaweli Authority.

A very salient position in the investment Agreement is that it does not recognize that the occupants of the land in the Exploration and Mining areas have any personal soil rights. It therefore takes away from the land owner or occupier in this area his rights as against the License holder as provided for in the Mines and Minerals Act No. 33 of 1992. Section 61 of the Mines and Minerals Act allows the holder of a license issued under the Act, "to carry out the activities authorized by such license in compliance with such standards and procedures as are prescribed for the carrying out of such activities by the National Environment Act, No. 47 of 1980...". The occupant of the land has therefore the right to refuse the holder of the license to enter his land and carry out any activity which is likely to have an adverse impact on the environment as recognized by the law on environment. The Mines Bureau can require the occupant of land to allow access to such land only to the licensee and not to a transferee of a license. This means that under the Mines and Minerals Act the soil owner or the occupier can resist McMoRan on very valid and legal grounds. The owner or occupier can also resist a licensee under the same provision of the Act if he is not satisfied that the licensee can, after exploration or mining, restore and rehabilitate the land in the manner prescribed by the National Environment Act or the Mines and Minerals Act. The Investment Agreement adopts the simple devise of the preferential lease to McMoRan from the Mahaweli Authority in order to counter this possibility. It proceeds on the assumption that the land here belongs to the Mahaweli Authority and that the occupant's rights are extinguished by the "preferential lease". The devise is meant to ensure that the rights of the Eppawela landowner as against McMoRan are wiped out.

Part IV will appear tomorrow