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**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

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*In the matter of an application for writs of **Certiorari,**  
**Prohibition & Mandamus** under **Article 140** of the  
Constitution of the Republic*

1. **Environmental Foundation Limited,**  
146/34, Havelock road,  
Colombo 05

- **Petitioner**

CA (Writ) App. No: 478/15

Vs

1. **H.D. Rathnayake,**  
Director General,  
Department of Wildlife  
Conservation,  
Battaramulla
2. **Central Environmental Authority,**  
"Parisara Piyasa",  
Rajamalwatta,  
Battaramulla
3. **Hon. Mr. Gamini Jayawickrama  
Perera,**  
Minister of Sustainable Development  
and Wildlife,  
Ministry of Sustainable Development  
and Wildlife,  
No.80/5, Govijanamandiraya,  
Rajamalwatta Lane,  
Battaramulla
4. **Divisional Secretary,**  
Divisional Secretariat,  
Deraniyagala
5. **Ceylon Electricity Board,**  
Sir Chiththampalam A. Gardiner  
Mawatha,  
P.O. Box 540, Colombo 02

- 6.
7. **Hon. Attorney General,**  
Attorney general's Department,  
Colombo 12
8. **Pan Hydro (Pvt) Ltd.,**  
69, Maligawatta Road,  
Colombo 10

- Respondents

**TO: HIS LORDSHIPS THE PRESIDENT AND THEIR LORDSHIPS THE  
OTHER HONOURABLE JUDGES OF THE COURT OF APPEAL OF THE  
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 04<sup>th</sup> day of December 2015

The petition of the Petitioner appearing by its registered Attorney - at - Law states as follows.

### **THE PARTIES**

1. The Petitioner states that
  - a. The Petitioner is a non-profit making limited liability company incorporated under Laws of Sri Lanka and having its registered office at the address given above. The objects of the Petitioner includes *inter alia* Monitoring State Departments and Regulatory Agencies and ensuring that the public interest in protecting the environment is fully considered in their administrative activities and enforcing laws relating to the conservation of nature and protection of the environment through legal means.

*A copy of the certificate of incorporation and its Articles of Association of the Petitioner is annexed hereto respectively marked P1 & P2 and plead part and parcel hereof.*

- b. The Petitioner has been registered with the Central Environment Authority (*hereinafter referred as the CEA*) as a national level non-governmental organization engaged in environmental activities since 1981.

*The Petitioner annexes hereto its letter of the said registration marked P3 and plead part and parcel hereof.*

- c. The Petitioner is genuinely concerned with the implementation and enforcement of the laws relating to the protection of the environment and also in performing the fundamental duty cast on every person under Article **28(f)** of the Constitution of the Republic to protect nature and its riches. The Petitioner in its capacity has invoked the jurisdiction of your Lordships' Court and other courts in several matters relating to the environment and has obtained relief in pursuance of its aims.
- d. In addition to their above objectives stated therein as set out morefully above, the Petitioners also beg the leave of Your Lordships' Court to plead this Petition "in the public interest" under Article 140 of the Constitution, particularly *inter alia* to ensure compliance with environmental protection laws, regulations and procedures and wildlife protection laws and regulations and to ensure performance of the Respondents' entrusted duties and obligations thereto, as contemplated in Article 27(14), 28(d) and 28(f) of the Constitution of this Republic; for and on behalf of the citizenry of this Republic upon whom all such powers of government are absolutely and inalienably vested by virtue of their sovereign entitlement.

2. The Petitioner states that

- a. The 1<sup>st</sup> Respondent above named is the Director-General of the *Department of Wildlife Conservation (hereinafter sometimes referred as the DWC)*, appointed in terms of **Section 68 (1)** of the *Fauna and Flora Protection Ordinance No. 2 of 1937 as amended (hereinafter at times referred to as FFPO)*, who exercises general purview, authority and supervision in respect of the protection of wildlife in Sri Lanka (including that of protected areas including Nature Reserves and National Parks ), whose statutory duties as morefully elaborated hereinafter become a principal subject matter in this application;

In terms of the FFPO as amended the 1<sup>st</sup> Respondent is the sole authority mandated to prevent any illegal activity within the boundaries of all protected areas including Nature Reserve.

- b. The 2<sup>nd</sup> Respondent is the Central Environmental Authority (*hereinafter sometimes referred to as the "CEA"*) which has been statutorily constituted under the *National Environmental Act No. 47 of 1980 (as amended - hereinafter at times referred to as "the NEA")* and its public duties include the implementation and administration of the NEA and Regulations made thereunder, including issuance of environmental clearance for the prescribed projects as the "Project Approving Agency" as morefully elaborated hereinafter become a principal subject matter in this application

- c. The 3<sup>rd</sup> Respondent is the *Hon. Minister of Sustainable Development and Wildlife* and has ministerial purview over all protected areas in Sri Lanka that come under the Fauna and Flora Protection Ordinance as amended which is enforced by the 1<sup>st</sup> Respondent and therefore has ministerial purview over Nature Reserves such as the Peak Wilderness Nature Reserve (*also known as "Samanala Adaviya Nature Reserve"*).
- d. The 4<sup>th</sup> Respondent is Divisional Secretary of Deraniyagala within whose area of authority the matters hereinafter complained has taken place.
- e. The 5<sup>th</sup> Respondent is the Ceylon Electricity Board which is a body corporate established in terms of the Ceylon Electricity Board Act, 17 of 1969 (as amended) which may sue and be sued in its corporate name.
- f. The 6<sup>th</sup> Respondent is Honourable the Attorney General who has been made a party to this application in terms of Article 134 of the Constitution and Rules of Your Lordships' Court & in terms of Article 35 of the 19<sup>th</sup> Amendment to the Constitution of the Republic 1978.
- g. The 7<sup>th</sup> Respondent is Pan Hydro (Pvt) Ltd, a private company incorporated with limited liability under the laws of Sri Lanka which carried out the construction and/ or operation of the mini hydro project in Peak Wilderness Nature Reserve.

### **Public Interest**

3. The Petitioners reiterate paragraph 1(d) (above) and state that they plead these grievances in the Public Interest, particularly under *Sub Article 28(f)* of the Constitution, for and on behalf of protection of Nature Reserve and National Park and also renewing and/ or issuing of any such environmental clearance and/ or approval as required by law in respect of mini hydro projects without ensuring strict compliance with regulations set out in the NEA and its Regulations and FFPO and the regulations made thereunder;

### **FACTS:**

#### **Peak Wilderness Nature Reserve and its importance**

4. The Petitioner states that
  - a. Peak Wilderness was initially declared as Peak Wilderness Sanctuary (*also known as 'Samanala Adaviya Sanctuary'*) in 1940 by way of an order published in Gazette Notification No. 8675 of 25<sup>th</sup> October 1940 due to its high ecological value and richness in fauna and flora species. In recognition of the importance of the said area was subsequently upgraded to Nature Reserve by Gazette Notification No. 1515/21 of

21<sup>st</sup> September 2007 and declared as 'Peak Wilderness Nature Reserve (also known as "Samanala Adaviya Nature Reserve")'. The said Reserve is consisted of 9 Blocks as morefully set out in the respective Gazette. A waterfall known as the "Eli Hatha" at Naya Ganga is also situated in the Peak Wilderness Nature Reserve, where the alleged unlawful construction of the Mini Hydro Project has commenced causing extensive damage to the environment.

*A copy each of the Government Gazettes bearing No. 8675 dated 25<sup>th</sup> October 1940 and Gazette bearing No. 1515/21 dated on 21<sup>st</sup> of September 2007, declaring Samanala Adaviya Sanctuary a Nature Reserve, is annexed hereto marked as P4 & P5 respectively and pleads the same as part and parcel hereto.*

- b. Since 2007 Peak Wilderness Nature Reserve (also known as "Samanala Adaviya Nature Reserve") is managed and control under the DWC according to the provisions of the Fauna and Flora Protection Ordinance as amended.
- c. Peak Wilderness Nature Reserve (also known as "Samanala Adaviya Nature Reserve") is part of the Central Highlands of Sri Lanka which was declared as a UNESCO World Heritage Site in 2010 gathering international importance in addition to the environmental value as a protected area.
- d. The Peak Wilderness Nature Reserve directly falls under the jurisdiction, control and supervision of the Department of Wildlife Conservation in Sri Lanka in terms of the provisions of Fauna and Flora Protection Ordinance.
- e. The waterfall known as "Eli Hatha", which is a combination of 7 waterfalls cascading in stages and the 7<sup>th</sup> waterfall of Eli Hatha is referred to as "Dothulu Ella", is rich in biodiversity and the waterfall is a vital ecosystem for a large number of fauna and flora species that depend on the waterfall.

### **Subject of instant application**

5. The Petitioners state that this instant application is primarily connected with the illegal construction and/or operation of a 3 MW mini hydro power plant owned and/or managed by the 7<sup>th</sup> Respondent (**Pan Hydro (Pvt) Ltd**) without the required approvals and/or licenses for such activity within a protected area, in contravention of the law, particularly *inter alia* the National Environmental Act (NEA) and Regulations made thereunder and the FFPO and the Regulations made thereunder, as morefully described hereinafter, invoking the grant of prerogative writs in respect of several statutory duties by one and/or more of the Respondents above named and/or those acting

under their direction, supervision or instructions, and matters connected therewith and/or incidental thereto.

6. The Petitioner reasonably aware that the said mini hydro power plant *inter alia* owned and/or managed by the 7<sup>th</sup> Respondent (Pan Hydro (Pvt) Ltd) forming the subject matter of this application has been proceeded to without the required approvals and/ or clearance for such activity purporting to act under the NEA and Regulations made thereunder, and/or that the annual renewal of the purported licenses obtained in respect of them are defective in several aspects and/or are inaccurate; however despite such irregularities / unlawfulness and/or defects, the Mini Hydro Plant is in operation with the express knowledge and/or permission of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents .
7. The Petitioner states that they perturbed with the information received in and around October 2014 that the 7<sup>th</sup> Respondent was in the process of constructing an unauthorized mini hydro project with the capacity of 3 MW without conducting a proper environmental assessment and environmental clearance as required by law as morefully discussed herein after below.
8. Upon further revelation the Petitioner was reasonably informed that the 7<sup>th</sup> Respondent instead of processing with an approval as set out above, for their proposed mini hydro project with the capacity of 3 MW, they had taken initiatives to resort to apply for an extension of approval (which is impugned in this instant application) given to a different project proponent , namely IWS Power Grid Ltd for a 1 MW mini hydro project in or around 2000, which was subsequently abandoned by the said company.
9. Subsequently on or about 11<sup>th</sup> of November 2014, the Petitioner conducted a site visit in order to verify the facts received on the ongoing construction of unauthorized 3 MW mini-hydro power project (without proper approval from 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondent) and to assess and determine the environmental sensitivity of the area and the damage that can consequent by the construction and operation of the said project therein.  
  
*A copy of the site visit report titled "The Report on the Visit Carried Out to Elihatha Mini-Hydro Site on 11<sup>th</sup> of November 2014" is annexed hereto marked as P6 and pleads the same as part and parcel hereto.*
10. The Petitioner states that the geographical coordinates were obtained by officers of the Petitioner to verify and establish the position of the completed weir and powerhouse in accordance with the gazetted boundaries of the Peak Wilderness Nature reserve and the following has been revealed at the aforesaid site visit conducted by the Petitioner *inter alia* that;
  - a. The entire construction of the mini hydro project including the weir of the reservoir, fore-bay tank, channel, penstock lines and powerhouse in

the process of being constructed are located within the boundaries of Peak Wilderness Nature Reserve as evidence by the GPS locations;

- Weir at approximately 5th/6th Water Fall: E 00165299, N 00186544,
- Power House closer to 7th Water Fall: E 00164877, N 00186813, as morefully referred in the map marked P10 below;

*A copy of the map formulated using GPS locations setting the location of the Weir and Powerhouse in relation to the Boundaries of the Nature Reserve is annexed hereto marked as P7 and pleads the same as part and parcel hereto.*

- b. A crew of around 30 persons was carrying on the ongoing construction of the building, paving the road up to the forest all the way up to about the 3<sup>rd</sup> waterfall from the bottom where the weir is located.
  - c. An area of approximately 1 Hectare was totally cleared without any approval from the relevant authorities to construct a massive powerhouse which was being constructed, on the bank of the Naya Ganga having blasted rock boulders to create flat surface for the same.
  - d. Along the penstock line, fore-bay tank and channel a thick healthy forest area of approximately 12-15m has been cleared.
  - e. The construction of the weir has caused the water flow of the waterfall to be diverted to flow along one side of the original path of the stream even though only the weir, fore-bay tank and channel appeared to be completely built while no other component of the hydro plant was complete or operational. Approximately 80% of the breadth of the stream has shrunk and dried up.
  - f. The pipeline allowed for the environmental flow is merely 4cm in diameter which is inadequate to maintain the ecosystem in the surrounding area as well as providing for the requirement for aquatic flora and fauna associated with the stream.
  - g. It was also observed that a mechanism has not been brought into place for fish and other aquatic fauna upstream which would allow them to move downstream which in turn affects fauna movement and propagation as well as fauna observed further downstream.
11. The Petitioner further states that the pristine environment of this area was a habitat of aquatic flora and fauna, rare and endemic amphibians, butterflies and small mammals among other biota. With the change of environmental condition resultant by such project, it is indisputable that much of these biodiversity would be lost and ecosystems would be disturbed

12. By way of due disclosure the Petitioner sets forth the following facts in relation to the history of the previous 1MW project referred above and its approvals on which the 7<sup>th</sup> Respondent is allegedly relied on for his new 3MW project as below;

**Proposed 1 MW mini hydro project-Naya Ganga by IWS Power Grid Ltd**

13. The Petitioner reliably informed that Initial Environmental clearance has been granted by the 2<sup>nd</sup> Respondent CEA in or around 2000 for a 1 MW mini hydro power plant was to be constructed by a another company namely IWS Power Grid Ltd proposed based on a purported Initial Environmental Examination (IEE) report done for the project. Petitioner further states that such initial clearance had been given for a 1 MW mini hydro wholly or in part inside the Peak Wilderness Sanctuary; harnessing water from Naya Ganga, a sub-tributary of Seethawaka Ganga.

*A copy of the report titled "Environmental Study Report: Naya Ganga Mini Hydro Power Project" prepared by Environmental Resource Management (Lanka) Pvt Ltd is annexed hereto marked as P8 and pleads the same as part and parcel hereto.*

14. The Petitioner states the following facts regarding the said initial clearance granted for 1 MW mini hydro project ;
- a. That there is only a conditional approval issued by the Central Environmental Authority (CEA) on or around 15<sup>th</sup> August 2000 for the above referred proposal submitted by IWS Power Grid Ltd

*A copy of the said conditional approval (File No. 08/P&E/02/2000) issued by 2<sup>nd</sup> Respondent (CEA) dated 15<sup>th</sup> August 2000 is annexed hetero marked as P9 and pleads the same as part and parcel hereto.*

- b. According to the said conditional approval the project was to be commissioned within 2 years from the date of such approval being 15<sup>th</sup> August 2002. Any extension to the conditional approval beyond the stipulated 2 years must be obtained from the said CEA by a written application made to the CEA thirty days in advance as referred in File No. 08/P&E/02/2000) dated 15<sup>th</sup> August 2000 stipulates the above in **Section A (A.5)**
15. The Petitioner state that however, upon receipt of several complaints from the villagers from the vicinity and the concerned environmental groups regarding the destructions done by the project proponent in constructing the said mini hydro project, the Petitioner conducted a field visit to the project area on or about 2<sup>nd</sup> October 2003.
16. The observations made by the Environmental Officers of Petitioner who carried out this field visit has been formulated in to site visit report which is marked below as **P10** and it was observed that there was extensive damage



caused to the forest surrounding the area as more fully testified in the said inspection report ;

*A copy of the report dated 2<sup>nd</sup> October 2003 compiled by Environmental Officers of the Petitioner is annexed hereto marked as P10 and pleads the same as part and parcel hereto.*

17. The Petitioner states that field visit carried out by the Petitioner revealed *inter alia* the following violations of the conditions stipulated in the conditional approval by the project proponent *inter alia* that ;

a. The then project proponent had not obtained the necessary extension to continue the project as required by the conditional approval and therefore lapsed the approval in or around the time the field visit was conducted.

b. The area marked for the construction of the weir was placed in a manner that would cause the natural water flow of the waterfall to be severely reduced. Also an area of approximately 300 m area of the Naya Ganga (including the 6<sup>th</sup> and 7<sup>th</sup> waterfall) would be severely affected due to the limited water flow.

18. The Petitioner states that, pursuant to the said investigation, by its letter dated 6<sup>th</sup> October 2003, immediately brought to the notice of the Director General of the 2<sup>nd</sup> Respondent of the violation of the conditional approval referred above and requested to take necessary steps to prevent further damage being caused to the environment.

*A copy of the said letter dated 6<sup>th</sup> October 2003 is annexed hereto marked as P11 and pleads the same as part and parcel hereto.*

19. The Petitioner states that it is reliably informed and on reasonable apprehension that due to the grave violations of the conditions of the conditional approval and number of complaints received as to the destruction caused to the Naya Ganga and the surrounding wildlife area due to this mini hydro project, the 2<sup>nd</sup> Respondent did not extend the conditional approval for the project since 2002.

20. Hence The Petitioner is reasonably informed and believed that the said construction operations ceased and there was no construction activities on the site since 2003 as the conditional approval had been lapsed in 2002.

## **REQUISITE CLEARANCE/APPROVALS FOR THE PROJECT - APPLICABLE LEGAL REGIME**

### **The relevant Acts/Regulations**

21. The Petitioner sets out the following salient provisions from amongst the above regulatory regime which are set out for ease of reference;

a. **Provisions of the FFPO AND Regulations made thereunder**

Under the FFPO as amended, the 1<sup>st</sup> Respondent, Department of Wildlife Conservation (DWC), is the sole authority with the statutory duty to ensure the protection and conservation of the Peak Wilderness Nature Reserve.

- i. **S.3(a) FFPO** - entering/ disturbing to any Strict Nature Reserve or Nature Reserve and fauna and flora is prohibited
- ii. **S.6 (1) FFPO** - clear or break up any land for cultivation, mining or for any other purpose/ make any fresh clearing in a **Nature Reserve**, *inter alia*; except under the authority of a permit issued in that behalf by the prescribed officer is prohibited.
- iii. **S.7 (1) (c) FFPO** - clear or break up any land for cultivation, mining or for any other purpose/ make any fresh clearing in a **Sanctuary**, *inter alia*; except under the authority of a permit issued in that behalf by the prescribed officer is prohibited
- iv. **S.66 FFPO** - Power of Arrest and Search

b. **National Environmental Act No.47 of 1980 (as amended)**

v. **Part IVC- Approving of Projects**

- **Section 23BB (1) of the NEA (as amended)- submission of environmental impact assessment report**

All projects approving agencies require from any ... (project proponent) ... who submit any prescribed project for its approval to submit within a specified time an initial environmental examination report or an environmental impact assessment report as required by the project approving agency relating to such project and containing such information and particulars as may be prescribed by the Minister for the purpose.(emphasis added)

- **Section 23EE of the NEA- abandonment or alteration of any such project should be liable for a fresh approval for the same**  
Where any alterations are being made to any prescribed project for which approval had been granted or where any prescribed project already approved is being abandoned the ... Company, Firm or individual who obtained such approval, shall inform the appropriate project approving agency of such alterations, or the abandonment as the case may be, and **where necessary obtain fresh approval** in respect of any alterations that are intended to

be made to such prescribed project for which approval had already been granted(emphasis added)

- **Section 24B (1) of the NEA** - The Authority shall have the power to issue directives to any person engaged in or about to engage in any development project or scheme which is causing or is likely to cause, damage, or detriment to the environment, regarding the measures to be taken in order to prevent or abate such damage or detriment, and it shall be the duty of such person to comply with such directive.  
(2) Where a person fails to comply with any directives issued under subsection (1), the Magistrate may, on application made by the Authority, order the temporary suspension of such project or scheme until such person takes the measures specified in such directive.

vi. **National Environmental (Procedure for Approval of Projects) Regulation (Gazette No. 772/22 of 24.06.1993)** - sets out the prescribed activities which approval is necessary under the provisions of Part IVC of the NEA, which is an **Environmental Impact Assessment (EIA)** to be carried out if necessary.

- **Section (4) of the Part 1 of Schedule of the above**
  - Conversion of forest covering an area exceeding 1 hectare into non-forest uses” requires approval as prescribed under the provisions of Part IVC of the NEA (an EIA if necessary).
- **Section (9) of the Part 1 of Schedule of the above**  
“Construction of hydroelectric power stations exceeding 50 Megawatts” and “All renewable energy based electricity generating stations exceeding 50 Megawatts” requires approval as prescribed under the provisions of Part IVC of the NEA
- However any power project if it is in an environmentally sensitive of the area, approval is required as prescribed under the provisions of Part IVC of the NEA (an EIA if necessary) regardless of the capacity of the said power project.
- The Central Environmental Authority also has an **Environmental Questionnaire for Mini Hydro Projects**, which is more detailed than the general IEE questionnaire and is designed to capture environmental issues specific to mini hydro projects. This questionnaire is used by the CEA/PAA to determine whether the potential project results in long term irreversible or complex environmental and social issues.

22. **Project Approving Agencies** which can grant approval for IEE/EIA are set out in the **Gazette Extra Ordinary No. 859/14 of 23.02.95** and **Gazette Extra Ordinary No. 1373/6 of 29.12.04**.

- a. Department of Wildlife is identified as one such project approving agency in terms of section 23 Y of the NEA

**No approval obtained for the 3 MW project by the 7<sup>th</sup> Respondent**

23. The Petitioner states that the project proponent (7<sup>th</sup> Respondent) did not obtain approval for the current 3MW project from the 1<sup>st</sup> Respondent (DWC) in terms of National Environmental (Procedure for Approval of Projects) Regulation (Gazette No. 772/22 of 24.06.1993) read together with National Environmental (Procedure for Approval of Projects) Regulation (Gazette No. 859/14 of 23.02.1995) made under the National Environmental Act.
24. The Petitioner further states that since the project is within the boundaries of the Peak Wilderness Nature Reserve as morefully pleaded in paragraph 10 above and demonstrated in document marked **P7** above whatever the requisite environmental approval should have been obtained from the 1<sup>st</sup> Respondent, which the 7<sup>th</sup> Respondent has failed to complied with.

**The alleged approval obtained for the project in 2010**

25. The Petitioner states that there is no approval has been obtained by the 7<sup>th</sup> Respondent from the project approval agency (1<sup>st</sup> Respondent) prior to commencement of the project as mandated by law, rendering the whole project unlawful.
26. The Petitioner further states that instead of obtained the required approval from the 1<sup>st</sup> Respondent, the 7<sup>th</sup> Respondent (Pan Hydro Pvt Ltd) has allegedly sought approval relying on the conditional approval granted to a previous project proponent in 2000 as morefully discussed above and such extension was granted by the 2<sup>nd</sup> Respondent on or around 10<sup>th</sup> of June 2010 and subsequent extensions on 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013 respectively.

*A copy of the letters dated 10<sup>th</sup> June 2010, 15<sup>th</sup> December 2010, 7<sup>th</sup> June 2013 sent by the Central Environmental Authority annexed hereto marked as **P12a, P12b & P12c** and pleads the same as part and parcel hereto.*

27. The Petitioner further states the alleged approval granted in 2010 and subsequent extensions and / or subsequent extensions granted by the 2<sup>nd</sup> Respondent, marked above as **P12a, P12b & P12c**, are unlawful and cannot be tenable in law on the basis *inter alia* that;

- a. The previous approval had been granted for a different company for a different project and no nexus between them other than working in collusion for their own benefit.
  - b. The said previous approval granted in 2000 was for a project for a 1 Mw capacity mini hydro power station for a different location where the weir should be placed on the 7<sup>th</sup> stage (Dothulu Ella) of the Eli Hatha water fall.
  - c. The current project which is the subject of this application is a mini hydro power station with capacity of 3 Mw as opposed to the 1Mw and the weir is now located at the 5<sup>th</sup> water fall above the original position which was approved. Therefore it is clear that there are substantial alterations to the original proposed plan in terms of the magnitude / location.
  - d. In and around 2009/2010, at the time the 7<sup>th</sup> Respondent, sought the extension of the project approval (granted by CEA in 2000), the said grant renewal period has lapsed in 2002 and not renewed as required by law
  - e. The Peak Wilderness area was declared as a Nature Reserve in 2007, including where the project is now located as evidence by documents marked **P7** above making the 1<sup>st</sup> Respondent as the Project Approving Agency as morefully described in paragraphs 21, 22 & 23 above.
  - f. A mere reference letter from the 1<sup>st</sup> Respondent does not justify the 2<sup>nd</sup> Respondent decision to issue an extension and it is ultra vires the powers vested with the 2<sup>nd</sup> Respondent.
  - g. As per Section (4) of the *Part 1 of Schedule of National Environmental (Procedure for Approval of Projects) Regulation (Gazette No. 772/22 of 24.06.1993)* "Conversion of forest covering an area exceeding 1 hectare into non-forest uses" requires EIA approval as prescribed under the provisions of Part IVC of the NEA. This has not been taken into consideration in issuing renewal/extension by the 2<sup>nd</sup> Respondent.
  - h. Therefore the renewal of the approval dated 10<sup>th</sup> June 2010 granted by the 2<sup>nd</sup> Respondent and all the subsequent extension of the same shall be considered as *void ab initio* due to the reasons morefully setout above in (a)to (g)
28. Further to this the on or about the 3<sup>rd</sup> of November 2015, the Petitioners conducted a site visit in order to ascertain the extensive environmental damage caused to the Peak Wilderness Nature Reserve by the operation of the said project therein.

A copy of the site visit report titled "Eli Hatha Site Visit on 3<sup>rd</sup> of November 2015" is annexed hereto marked as **P13** and pleads the same as part and parcel hereto.

29. Petitioner states the following has been revealed at the aforesaid site visit conducted by the Petitioner *inter alia* that;

- a. The confluence (merging) of the original river flow and the diverted flow happens just beyond the power station with the distance between the confluence point and the weir is approximately 500-600m and the water flow is substantially low despite the month of November 2015 being an exceptionally rainy season.
- b. The weir is located between the 5<sup>th</sup> & 6<sup>th</sup> water fall as opposed to the 7<sup>th</sup> water fall as in the original project plan violating the following conditions;
  - **Condition A.4** of the document marked **P9**
  - **Condition 1** of the document marked **P12b**
- c. The availability of water for downstream users was substantially low as the **Environmental Flow was limited to a 6 inch pipe** and the anicut built for the purpose of releasing the required volume of water has been blocked off, violating the following conditions;
  - **Condition B.4.2.** of document hereinafter marked **P9**
  - **Amended Condition B.4.2.** of document marked **P12a,**
  - **Condition 2** of document marked **P12b &**
  - **Condition B.2.1** of document marked **P12c**
- d. Observations were made of endemic fish struggling to reach the water flow close to the river as there is no fish ladder constructed violating **Condition B.1.3.** of the conditional approval (File No. 08/P&E/02/2000) issued by 2nd Respondent (CEA) dated 15th August 2000, document marked **P9**

**1<sup>st</sup> Respondent's Department Memo dated 25<sup>th</sup> August 2014**

30. The Petitioner further states that the petitioner's above position is further established by perusal of a memo dated 25<sup>th</sup> August 2014 bearing reference no jcs/6/1/1/31 drawn by the 1<sup>st</sup> Respondent in this connection. As per the memo referred to, it is revealed *inter alia* that;

- a. The project proposed in 2000 was abandoned subsequently to the approval granted and the said area was upgraded as a Nature Reserve and a UNESCO World Heritage Site.

- b. The previous Project Proponent (IWS Power Grid Ltd.), and the 7<sup>th</sup> Respondent (Pan Hydro Pvt Ltd) are two different entities and the changed project proponents in 2009 with no approval from the 1<sup>st</sup> Respondent (DWC).
- c. In 2009 7<sup>th</sup> Respondent, sought to renew the approval granted by CEA and significant alteration to the capacity from 1Mw to 3Mw.
- d. In 2011 objections were raised by the Divisional Secretary of Deraniyagala and violations of the conditions of the purported approval was brought to the notice of the 1<sup>st</sup> Respondent.
- e. The 1<sup>st</sup> Respondent in 2012 verified through GPS technology that the project in dispute was being constructed within the boundaries of the Peak Wilderness Nature Reserve.
- f. The 7<sup>th</sup> Respondent has unlawfully constructed a mini hydro project inside a Nature Reserve having submitted fraudulent documents claiming the project site to be at a private land.
- g. The 2<sup>nd</sup> Respondent (CEA) is not the mandated authority and it was the 1<sup>st</sup> Respondent who had the authority in relation to Nature Reserves under the FFPO.
- h. The said project site was substantially different from the project site which was granted approval in 2000
- i. The 7<sup>th</sup> Respondent has violated the Section 7(1) (c) of the FFPO, as referred to in paragraph 21

*A copy of the extract of the Memo dated 25<sup>th</sup> August 2014 – Ref No. jcs/6/1/1/31 drawn by the Department of Wildlife Conservation annexed hereto marked as P14 and pleads the same as part and parcel hereto.*

- 31. Without prejudice to the above, the Petitioners further states that however in terms of the provisions of the Fauna and Flora Protection Ordinance as amended, the 1<sup>st</sup> Respondent and/ or 4<sup>th</sup> Respondent has failed to discharge the mandated statutory duty vested in them under the law to prevent the encroachment and destruction of the fauna and flora of the Peak Wilderness Nature Reserve by the said mini hydro project.

### **Standard Power Purchase Agreement (SPPA) with the Ceylon Electricity Board**

- 32. The Petitioner further states that the 6<sup>th</sup> Respondent (Ceylon Electricity Board (CEB)) has also entered into a Standard Power Purchase Agreement (SPPA) with the 7<sup>th</sup> Respondent to purchase electricity. The Petitioner states that the

CEB could not have entered into a SPPA to purchase electricity from a Mini Hydro Power Plant which is being operated illegally.

33. The Petitioner states that such agreement does not gather any legal recognition as the project is illegal and therefore the said SPPA entered into with the 7<sup>th</sup> Respondent is cannot stand in law. In any event the 7<sup>th</sup> Respondent is estopped in claiming any ignorance of the above contentions and/ or denying their knowledge of the same as it was also a part of the Technical Evaluation Committee (TEC) appointed by the 2<sup>nd</sup> Respondent for this project as evidence by document marked *P12c*.

### **UNESCO CONCERNS**

34. The Petitioner states that they were compelled to lobby with the 8<sup>th</sup> Respondent (Secretary General of Sri Lanka Commission for UNESCO) as the Peak Wilderness Nature Reserve is a vital portion of the Central Highlands declared as UNESCO World Heritage Site by the World Heritage Centre.
35. The Petitioners further states that such constructions within a declared Heritage Site would amount to a violation of a UNESCO Paragraph 172 of the Operational Guidelines and it would impact on the Outstanding Universal Value of this World Heritage Property and therefore a proper environmental impact assessment should have been carried out before commencing with such a project.

*A copy of the letter dated 23<sup>rd</sup> March 2015 sent by the World Heritage Centre to the Permanent Delegate of Sri Lanka to UNESCO expressing these concerns annexed hereto marked as P15 and pleads the same as part and parcel hereto.*

### **REPRESENTATIONS MADE TO THE RELEVANT AUTHORITIES TO PREVENT THE UNAUTHORIZED CONSTRUCTION**

36. The Petitioner states that the following representation were made to the relevant authorities in relation to this issue;
- a. On or about 28<sup>th</sup> January 2015, informed the Honorable Mr. Champika Ranawaka, who was then the Minister of Environment and Natural Resources in 2007 under whose auspice that the Peak Wilderness Sanctuary was declared as a Nature Reserve and followed up with a meeting on or about 24<sup>th</sup> of February 2015 with the said Minister in his capacity as then the Minister of Power and Energy.

*A copy of the letter dated 28<sup>th</sup> January 2015 is annexed hereto marked P16 and pleads the same as part and parcel hereto.*

- b. On or about the 10<sup>th</sup> of April 2015, meeting was granted with the then the Hon. Deputy Minister of Tourism, Sports and Wildlife Mr.



Wasantha Senanayake and at the said meeting 1<sup>st</sup> Respondent has expressly admitted that there were in fact discrepancies and lacking on the part of the Department of Wildlife in failing to prevent the said project.

*A copy of the letter dated 19<sup>th</sup> March 2015 annexed hereto marked as P17 and pleads the same as part and parcel hereto.*

### **FALIURE TO CARRY OUT STATUTORY DUTIES**

37. The Petitioners are reliably made to understand and state that the above referred extension to the conditional approval and/ or any other clearance obtained from 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondent are invalid and defective in several aspects as described above in paragraphs 21, 22, 23 & 24 above, *inter alia* and such decisions as contemplated in the said approvals given/ effected by the 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondents above named and/or those acting under their direction, supervision or instructions, contrary to the provisions of Sections 3 (a), 6 (1) & 7(1) (c) of the FFPO and the provisions of NEA (and the Regulations made thereunder), are marked above as P9, P12a, P12b & P12c for the reasons set out above in paragraph 27 and also for the following reasons *inter alia* that;

- The current project which is the subject of this application is a mini hydro power station with capacity of 3 Mw as opposed to the 1Mw and there are substantial alterations to the original proposed plan in terms of the magnitude / location which would amount to a grave violation of the conditions of the original approval, document marked **P9**, in particular the **A.4 conditions** of the said approval.
- The extension of the conditional approval bearing ref. No 08/P&E/02/2000, document marked **P9**, had been purportedly renewed (which is impugned), documents marked **P12a, P12b & P12c**, under the names of the 7<sup>th</sup> Respondent by the 1<sup>st</sup> Respondent and/ or 2<sup>nd</sup> Respondent and/ or their officials in contravention of the law;
- There has been a failure on the part of the 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondent to carry out the statutory duties/obligations contained in the provisions of *FFPO* and the Regulations and NEA (in particular sections 23BB and 23EE ) and its regulations in paragraphs 21 - 23 as regards the issuing of conditional approval by the DWC as follows;
  - a. There is failure to give recognition to the fact that IWS Power Grid Ltd abandoned the project in 2003 and the current project proponent, the 7<sup>th</sup> Respondent must obtain the necessary fresh approval from the 1<sup>st</sup> Respondent as the project approving agency.

- a. There is a failure by the 2<sup>nd</sup> Respondent to follow the due procedure under the NEA and regulations thereunder, when issuing environmental clearance/ renewing the conditional approval for the said mini hydro project.
  - b. The failure of the 1<sup>st</sup> Respondent and/or 2<sup>nd</sup> Respondents and the officers to resort to proper action against the 7<sup>th</sup> Respondent, the project proponent of the said project and/ or its violations of the FFPO as the operations of the purported project may have been motivated by collateral considerations and/or corrupt and non-transparent practices, for gratification beyond duty of the 1<sup>st</sup> and/or the 2<sup>nd</sup> Respondents and/or the officials of the DWC/ CEA.
  - c. No adequate steps have been taken by the 2<sup>nd</sup> Respondent and/ or officers duly authorised by him to make necessary inquiries and investigations to ascertain whether the FFPO provisions for registration are being complied with.
  - d. There is a failure by 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondents/and or officers of the DWC and/ or CEA to prosecute against the 7<sup>th</sup> Respondent in terms of Section 6 (4) & Section 10 of the FFPO by the 1<sup>st</sup> Respondent AND/ OR Section 24B & Section 24D of the NEA by the 2<sup>nd</sup> Respondent.
  - e. There has been a failure of the 4<sup>th</sup> Respondent, Hon. Minister of Sustainable Development and Wildlife to take disciplinary and/ or appropriate legal steps in terms of section 60B of FFPO against the officers who are found guilty of *mala fides* in relation to the discharge of any function under the Act particularly who are responsible for such unlawful action.
- b. The current project proponent, the 7<sup>th</sup> Respondent has not obtained necessary fresh approval in respect of any alterations from the relevant authorities.
- There is a failure from the part of the 6<sup>th</sup> Respondent (CEB) to give recognition to the fact that no proper approval has been obtained from the respective authorities and operating it unlawfully when entering to the power purchase agreement with the 7<sup>th</sup> Respondent.
38. On or about 22<sup>nd</sup> April 2015 the Petitioner sent a letter of demand to 1<sup>st</sup> Respondent to take necessary steps according to law to immediately declare the said project constructed within the boundaries of the Peak Wilderness

Nature Reserve as illegal and take steps to strictly enforce the provisions of the Fauna and Flora Protection Ordinance in this regard.

*A copy of the letter dated 22<sup>nd</sup> April 2015 annexed hereto marked as P18 and pleads the same as part and parcel hereto.*

39. The 1<sup>st</sup> Respondent has failed and/or neglected to take any steps as required by law on or about 29<sup>th</sup> May 2015 the Petitioner demanded again the 1<sup>st</sup> Respondent reiterating that necessary steps be taken, according to law to immediately declare the said project constructed within the boundaries of the Peak Wilderness Nature Reserve as illegal and take steps to strictly enforce the provisions of the Fauna and Flora Protection Ordinance in this regard.

*A copy of the letter dated 29<sup>th</sup> May 2015 annexed hereto marked as P19 and pleads the same as part and parcel hereto.*

40. The Petitioner states that in addition to the statutory duty cast upon on the 1<sup>st</sup> Respondent, there is a fundamental duty cast on every person under the Article 28(f) the Constitution to protect the nature and conserve its riches. Therefore it is the duty of the Respondents to take necessary steps under the law to protect the Peak Wilderness Nature Reserve from illegal activities referred to above. It is respectfully stated that especially the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents are under a public duty to prevent aforesaid unauthorized activities, which are in violation of the provisions of the FFPO within the said Nature Reserve.

41. Article 27(1) of the Constitution states that the Directive Principles of State Policy shall guide the President, Parliament, the Cabinet of ministers in the enactment of laws and the **governance** of Sri Lanka and specially the Article 27(14) which states that the State shall protect, preserve and improve the environment for the benefit of the Community. The Petitioner states that the Respondents being part and parcel of the "State", they shall follow these constitutional guidelines mentioned above. Therefore the Petitioner further states that it is the duty of the Respondents to take necessary steps to protect and preserve the Peak Wilderness Nature reserve for the benefit of the community which the Respondents have failed to do.

42. **The Petitioners are advised and state that in the totality of the aforesaid circumstances** as hereinbefore morefully enumerated, the impugned determination of the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents and the decision to extend the said approval and/ or any authorizations granted by the 2<sup>nd</sup> Respondent based on the said conditional approval marked *P12a, P12b & P12c* are void *ab initio* and of no force or avail in law in as much as *inter alia* they are:

- (a) Illegal and/or *ultra vires* the purport and ambit of the intended statutory authority as much as;

- i) *P12a, P12b & P12c* has been issued without jurisdiction and therefore is null and void;
  - ii) Failure to identify the grave violations of conditions **A.4 & A.5** specified in the approval, document marked **P9**;
  - iii) Failure to comply with **condition A.4** of the document marked **P9** (cannot be considered as merely a procedural lapse, which would cause damage or detriment to the environment and also no steps taken to comply with the requirements set out in section 23EE of the NEA.
  - iv) Failure to comply with **Condition A.4, Condition B.4.2. & Condition B.1.3.** of document marked **P9**
  - v) The 2<sup>nd</sup> Respondent have no power whatsoever to direct the 7<sup>th</sup> Respondents to proceed with the project, until such time a proper approval has been given by the 1<sup>st</sup> Respondent following the due procedure set out in the FFPO.
- (b) Unreasonable and/or Irrational and/or contrary to the principle of Fairness;
  - (c) Arbitrary, Capricious, Unwarranted, manifestly Irregular and Disproportionate to the intended statutory objectives;
  - (d) Appears to be tainted with Malice and/or *mala fide* and/or the result of extraneous and collateral considerations, which vitiates its validity (if any) thereof;

FURTHERMORE:

- (e) Amounts to a failure to uphold the Petitioners' Legitimate Expectations both substantive and procedural;
- (f) In violation of the principles of Natural Justice;
- (g) There is a manifest error (in the process and/or in the decisions) "on the face" of the decision itself;
- (h) tantamount to an abuse of the due process of law guaranteed to citizens of this Republic, which independent of all other grounds and without prejudice thereto, constitute matters fit & proper to be reviewed and set aside by Your Lordships' Court in the exercise of the jurisdiction of this Hon. Court under *Article 140 of the Constitution*;

43. **In the totality of the premises aforesaid** the Petitioner is advised and state that they are entitled to constitutionally as indeed *ex debito justitiae*, to mandate in the nature of *inter alia*:

- a) A mandate in the nature of Writ of Certiorari to quash the decision of the 2<sup>nd</sup> Respondent to renew and/ or extend its conditional approval granted in 2000 dated 15<sup>th</sup> August (as contained in document marked **P9**), renewal granted on 10<sup>th</sup> June 2010 and extensions on 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013, marked as **P12a, P12b & P12c** respectively ;
- b) A mandate in the nature of Writ of Certiorari to quash the decision of the 1<sup>st</sup> Respondent to allow the operation of the said project and or endorse/ authorize the renewal and/ or permission granted by the 2<sup>nd</sup> Respondent and or as evidence by document marked **P14** dated 25<sup>th</sup> August 2014
- c) A mandate in the nature of Writ of Prohibition restraining the 1<sup>st</sup> & 2<sup>nd</sup> Respondents from granting of any new permit/ license/ clearance and/ or extension/ renewal of the same for the project;
- d) A mandate in the nature of Writ of Prohibition preventing the 6<sup>th</sup> Respondent from acting upon the electricity purchasing agreement entered with the 7<sup>th</sup> Respondent and/ or extending any such electricity purchasing agreement affording any validity to the purported renewals marked to as) **P12a, P12b & P12c** above
- e) A mandate in the nature of Writ of Prohibition preventing the 1<sup>st</sup> and / or 2<sup>nd</sup> Respondent from acting upon or affording any validity to the purported renewals marked to as) **P12a, P12b & P12c** above
- f) A mandate in the nature of Writ of Mandamus directing the 1<sup>st</sup> Respondent and/or 4<sup>th</sup> Respondent to prosecute the 7<sup>th</sup> Respondent for illegal construction inside the Peak Wilderness Nature Reserve according to the provisions of the said Fauna & Flora Protection Ordinance and other relevant laws;
- g) A mandate in the nature of Writ of Mandamus directing the 1<sup>st</sup> and/ or 4<sup>th</sup> Respondent to take steps to evict the 7<sup>th</sup> Respondent from the Peak Wilderness Nature Reserve according to the Section 66 (Power of Arrest & Search) of the said Fauna & Flora Protection Ordinance;
- h) A mandate in the nature of Writ of Mandamus directing the 2<sup>nd</sup> and/ or 3<sup>rd</sup> Respondent to take steps against the 7<sup>th</sup> Respondent according to the Section 24(B) (1) & (2) (Authority to Issue directives) of the NEA;

44. The Petitioners respectfully state that, in all of the aforesaid circumstances, grave and irreparable loss, damage and harm has been caused, inter alia, to the Petitioner and especially to the environment and the Peak Wilderness

Nature Reserve and will continue to be caused, and this Application will be rendered nugatory, unless the **Interim Orders** prayed for herein below are granted by Your Lordships' Court;

- a. Suspending the operation of the impugned extension / environmental clearance/ approval granted by the 2<sup>nd</sup> Respondent as evidenced by decision dated 10<sup>th</sup> June 2010, 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013 contained in document marked *P12a, P12b & P12c* above, issued to the Petitioners;

AND/OR

- b. Preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from acting upon the impugned decision dated 10<sup>th</sup> June 2010, 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013 marked *P12a, P12b & P12c* above, allowing / permitting the operation of the said project by the 7<sup>th</sup> respondent and/ or their servants/ agents any further;

45. The Petitioners most respectfully reserve the right to identify and annex further documentation, seek additional reliefs and/or to add further parties as Respondents, if the need for the same arises and/or if so directed by Your Lordships' Court.

46. The Petitioners have not previously invoked the jurisdiction of Your Lordships' Court in respect of this same matter.

**WHEREFORE** the Petitioner prays that your Lordships' Court be pleased to:

- a. Issue notice on the Respondents;
- b. Grant and issue mandate in the nature of Writ of Certiorari to quash the decision of the 2<sup>nd</sup> Respondent to renew and/ or extend its conditional approval granted in 2000 dated 15<sup>th</sup> August (as contained in document marked *P9*), renewal granted on 10<sup>th</sup> June 2010 and extensions on 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013, marked as *P12a, P12b & P12c* respectively.
- c. Grant and issue mandate in the nature of Writ of Certiorari to quash the decision of the 1<sup>st</sup> Respondent to allow the operation of the said project and or endorse/ authorize the renewal and/ or permission granted by the 2<sup>nd</sup> Respondent and or as evidence by document marked *P14* dated 25<sup>th</sup> August 2014
- d. Grant and issue mandate in the nature of Writ of Prohibition restraining the 1<sup>st</sup> & 2<sup>nd</sup> Respondents from granting of any new permit/ license/ clearance and/ or extension/ renewal of the same for the project;

- e. Grant and issue mandate in the nature of Writ of Prohibition preventing the 6<sup>th</sup> Respondent from acting upon the electricity purchasing agreement entered with the 7<sup>th</sup> Respondent and/ or extending any such electricity purchasing agreement affording any validity to the purported renewals marked to as) *P12a, P12b & P12c* above
- f. Grant and issue mandate in the nature of Writ of Prohibition preventing the 1<sup>st</sup> and / or 2<sup>nd</sup> Respondent from acting upon or affording any validity to the purported renewals marked to as) *P12a, P12b & P12c* above
- g. Grant and issue mandate in the nature of Writ of Mandamus directing the 1<sup>st</sup> Respondent and/or 4<sup>th</sup> Respondent to prosecute the 7<sup>th</sup> Respondent for illegal construction inside the Peak Wilderness Nature Reserve according to the provisions of the said Fauna & Flora Protection Ordinance and other relevant laws;
- h. Grant and issue mandate in the nature of Writ of Mandamus directing the 1<sup>st</sup> and/ or 4<sup>th</sup> Respondent to take steps to evict the 7<sup>th</sup> Respondent from the Peak Wilderness Nature Reserve according to the Section 66 (Power of Arrest & Search) of the said Fauna & Flora Protection Ordinance;
- i. Grant and issue mandate in the nature of Writ of Mandamus directing the 2<sup>nd</sup> and/ or 3<sup>rd</sup> Respondent to take steps against the 7<sup>th</sup> Respondent according to the Section 24(B) (1) & (2) (Authority to Issue directives) of the NEA;
- j. Grant and issue interim orders suspending the operation of the impugned extension / environmental clearance/ approval granted by the 2<sup>nd</sup> Respondent as evidenced by decision dated 10<sup>th</sup> June 2010, 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013 contained in document marked *P12a, P12b & P12c* above, issued to the Petitioners;
- k. Grant and issue interim orders preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from acting upon the impugned decision dated 10<sup>th</sup> June 2010, 15<sup>th</sup> December 2010 & 7<sup>th</sup> June 2013 marked *P12a, P12b & P12c* above, allowing / permitting the operation of the said project by the 7<sup>th</sup> respondent and/ or their servants/ agents any further;
- l. grant the Petitioner the costs;
- m. to issue such other orders and directions and
- n. Grant the Petitioner such other and further relief as to your Lordships' Court shall seem meet.

**Attorneys-at-Law for the Petitioner**

