



*Community members affected by contaminated waters at prayer ceremony on 17 January, 2020.*

## **DARK WATERS & FORBIDDEN PRAYERS**

### **Karen communities' search for Government intervention on water issue leads to unjustified charges brought against environmental activist**

**K**aren communities near Hpa-An town have been facing contaminated water since October 2019, which they believe is a result of a coal-fired cement factory's operations. The villagers first attempted to work with Kayin State Government agencies to find a way to address this situation, but the problem has not been resolved. With no other options, the communities decided to conduct a public prayer ceremony to raise these issues to any other persons or groups that could assist them. Shortly after this event, Myanmar Police moved to detain one of the coordinators of this event, environmental and human rights activist Saw Tha Phoe.

### **About Karen Rivers Watch**

Karen Rivers Watch (KRW) was established in 2003 in response to the need for a stronger network of civil society organizations to emerge in order to monitor several large dams being revived by the governments of Burma and Thailand on the lower stretch of Salween River in the early 2000s. The organization is a coalition of Karen Civil Society grassroots organizations that are working for a range of issues, including the environment, women, youth, human rights and development issues within the ethnic communities in Karen State. The Coalition monitors development processes affecting the environment, especially rivers, in Karen State in particular and Burma in general; and to mobilize grassroots communities, as well as advocate, with other Burma compatriots, for democratic and sustainable development in Burma.

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Photo taken early in the 2019 flood season showing one of the 2 coal piles in the 4000 TPD cement plant soaking in water that has turned totally black.

## Myaing Kalay cement plant

The first Myaing Kalay cement plant run by the military-owned Myanmar Economic Corporation (MEC) was built in the 1980s<sup>1</sup>, with a capacity of 900 tonnes per day. A second much larger plant was completed in 2001 with a capacity of 4,000 tonnes per day.

In 2016, MEC officials reportedly explained to nearby communities that running the plant on gas was not sustainable in the long term due to potential shortfalls in gas supply, so it would transition to coal<sup>2</sup>. The communities opposed this change, but there was no public consultation process. Since October 2018, coal for the plant has been transported from Pho Sho Port on the Salween River to the cement factory<sup>3</sup>. The plant is likely to be burning at least 800 tonnes of coal per day. There has not been an Environmental Impact Assessment (EIA) for the change from a gas-fired to a coal-fired kiln.

In early October 2019, 3 villages near the cement plant saw water sources (surface water and wells) changing colour, the death of fish and experienced health issues such as skin irritation and rashes when they took showers. This had never happened in the past.

Karen villagers requested Kayin State authorities to intervene. The government said that water samples were sent out to Government labs at end of October, but until today, no results from these tests have been made public. On Oct. 11, Kayin State Chief Minister Daw Nan Khin Htwe Myint visited 3 villages and said there was no problem with the local drinking water. Some local residents in the three villages complained about skin problems to the township Health Department, but they were told that these were caused by other factors and not by the water.

By late October 2019, water contamination had spread to other villages, turning the water black in streams, ponds, and dozens of wells. Water testing was carried out by the Environmental Laboratory (EcoLab) unit of the Advancing Life and Regenerating Motherland (ALARM) organization.

1 <https://frontiermyanmar.net/en/kayin-residents-struggle-against-cement-plant-expansion>

2 *ibid*

3 <http://karennews.org/2018/11/villagers-demand-unsafe-coal-transport-used-in-running-myaing-kalay-cement-factory-stop/>

These tests revealed that (a) in three streams and ponds, the water contained some impurities, and certain chemical levels had exceeded standard levels (see details under Water Testing section below); and (b) water from wells was only drinkable if filtered.

It is significant that none of the tests to date have measured, or at least not published results for, toxic heavy metal contaminants like mercury, chromium and radium which are widely known to be associated with the burning and storage of coal. This omission, when the use of coal is the main cause of concern of affected communities, is extremely concerning.

On 17 January 2020, a traditional Karen prayer ceremony was held in which local residents and village monks came together to pray for protection from pollution<sup>4</sup>.

In late January 2020 another fish die-off occurred. Local communities continued to identify the cement factory as the source of the pollution<sup>5</sup>.

On 6 March, Rear Admiral Myint Nwe responded to questions asked by Members of Parliament regarding the cement plant and water pollution, stating that the water was within acceptable limits. Police attempted to arrest Saw Tha Phoe, an environmentalist that had been supporting the affected communities, that same evening.

## Water Testing

The testing carried out in late October 2019 by EcoLab/ALARM concluded<sup>6</sup>:

- Water from one pond and two streams<sup>7</sup> had phosphate and chlorine levels above the U.S. Environmental Protection Agency (EPA) Surface Water Standard for Aquatic Life.
- Water from at least one stream<sup>8</sup> had excessive levels for biological oxygen demand (BOD) and chemical oxygen demand (COD).



Over 100 children as well as infants and adults from villages near the cement plant have suffered skin rashes from washing using well water.

4 <https://www.irrawaddy.com/news/burma/environmental-activist-faces-arrest-myanmars-karen-state-rights-groups-object.html>

5 <https://www.mmmtimes.com/news/kayin-villagers-blame-black-water-factory.html>

6 <https://www.irrawaddy.com/news/burma/water-polluted-myanmar-military-run-cement-plant-causes-health-issues-karen-state.html>

7 Zee Taw pond, Yay Twin Gon Village's Nga Thay stream and Mayan Gon stream.

8 Mayan Gon stream.

High BOD and COD, together with phosphates, reduce oxygen levels and these exceedances along with the high chlorine levels may have caused the death of the fish. High chlorine levels could lead to skin problems for humans, such as inflammation, reddish skin, blisters and itching.

In addition, testing by another laboratory has shown exceedance of acceptable levels for total solids, turbidity and iron, as well as of pH. International experts have surmised that the villagers' itching has been caused by dissolved solids in the water.

Initial consultations with international experts have led to the conclusion that water discoloration results from acid drainage caused by water moving through exposed coal piles, with the cement plant being the likely source. If this is the case, the black particles discolouring the water could have a high content of toxic heavy metals. Further testing is required to confirm this.

Despite the Burmese Military official claiming the water was acceptable, the government's test results have not been published, and the ALARM results show unacceptable pollution levels.

## Breaches of Myanmar Law

An existing project must carry out an Environmental Impact Assessment (EIA) for the expansion or extension of that project will necessitate additional construction, renovation or installation that would of itself require an EIA<sup>9</sup>. The construction of a coal-fired kiln (to replace the gas-fired kiln) that can produce 4,000 tons of cement per day requires an EIA before construction commences.

Testing by EcoLab suggested that once filtered, water was suitable for drinking. If the cement plant is rendering water unfit for drinking before filtration, this is a breach of Myanmar's 2015 Environmental Conservation Law and relevant subsidiary legislation<sup>10</sup>. The exceedances of international standards for surface water are also a breach of Myanmar Law.



*Environmental and human rights activist Saw Tha Phoe.*

## Harassment of Saw Tha Phoe in March 2020

Saw Tha Phoe is a Karen environmentalist working with the Karen Rivers Watch Network and representing the Karen State branch of Myanmar Alliance for Transparency and Accountability (MATA). He has been working to support

<sup>9</sup> See section 9 of the 2015 EIA Procedure.

<sup>10</sup> Including the 2014 Environmental Conservation Rules and National Environmental Quality (Emission) Guidelines.



*Fish trap in a seasonally flooded pond near Ye DwinKon where the water has turned completely black and the fish died in October 2019.*

the communities affected by the water pollution referred to above, through coordination of emergency water supplies and by providing updates and information about the water contamination issue.

Saw Tha Phoe, his family, and the people he works with are now facing what appears to be a strategy of harassment and intimidation.

On Friday 6 March, a group of people in civilian clothes, who appeared to be intoxicated, came to Saw Tha Phoe's home looking for him. Later in the evening a group of 10 policemen came to the house. He was not at home at the time and has not returned home since then.

The police presented what appeared to be a court summons for Saw Tha Phoe (for a hearing on 10 March), but rather than requesting a family member to sign the document and leave it at the house, they took the document away with them and did not allow anyone to take a photograph of it. The police threatened to arrest Saw Tha Phoe, despite not having an arrest warrant<sup>11</sup>. Police also searched the family home without a search warrant.

In the following days, members of Saw Tha Phoe's family, people he works with and their families have been subject to harassment – people in civilian clothes have either followed them or loitered around their houses. They are also being repeatedly telephoned by the police.

It appears that the court summons relates to a complaint made directly to the court by an officer of the General Administration Department (GAD)<sup>12</sup> that alleges a breach of sections 505(b) of the Myanmar Penal Code. This means that if Saw Tha Phoe does not respond to the court summons, the court will likely issue one further summons and then an arrest warrant. If he attends court and the judge has commenced (or decides to commence) proceedings<sup>13</sup>, Saw Tha Phoe is likely to be detained until the end of a

<sup>11</sup> According to Schedule II of the Criminal Procedure Code, the police cannot arrest under section 505(b) without a warrant.

<sup>12</sup> This department was changed from military to civilian control by the current government. It is not clear if the complaint was made in an official or personal capacity.

<sup>13</sup> The issuing of a summons indicates that the judge considers that "there is sufficient ground for proceeding" under section 204 of the Criminal Procedure Code. A summons could be issued during the investigation stage under section 202, but this would be unusual.

trial because the offence is non-bailable<sup>14</sup>. The trial could take at least 12 months. Regardless of whether it is even possible to defend charges under this oppressive law, a person accused can therefore expect to spend a substantial time in custody (often the sentence is slightly more than the time already served).

### The alleged offence: Section 505(b)

An offence under sections 505(b) of the Myanmar Penal Code<sup>15</sup> is committed when a person makes, publishes or circulates a statement, rumour or report where the intent or likely outcome is fear or alarm to the public, causing the public to commit an offence against the State or against the public tranquility. To defend against this accusation, it needs to be proven that (a) there was no intent AND (b) that the person had reasonable grounds for believing that the statement, rumour or report was true. The offence carries a 2-year sentence.

Sections 505(b) is notoriously draconian and has been criticized for being extremely broad and vague, breaching international standards on freedom of expression. Human Rights Watch has described it as “among the most abused [of the] provisions” that criminalize free speech under Myanmar law, noting that successive Myanmar governments have used it “against activists and critics, particularly those involved with public protests”<sup>16</sup>. It is a strict liability offence; it can be committed even where there is no intent to cause alarm.

It is not clear to what “statements, rumour or report” the complaint relates to. In a recent English language article, for example, Saw Tha Phoe was interviewed as follows<sup>17</sup>:

*“We will invite international experts to provide an answer for local people,” he said. He said that donating water to the villagers or digging new wells are only temporary solutions, not the long-term and sustainable solutions that are needed. “We hope the government will help us find an answer to our concerns,” he added.*

The complaint appears instead to be a response to his general support of the communities affected by the water contamination around the cement plant. It follows the prayer ceremony and questions being asked in Parliament about the water pollution.

The broad, vague wording of 505(b) breaches international law<sup>18</sup> and means there is a grave risk that any public comment about water pollution could be interpreted as causing “alarm” leading to a breach of “public tranquility”.

<sup>14</sup> See Schedule II of the Criminal Procedure Code.

<sup>15</sup> Penal code 505(b) Whoever makes, publishes or circulates any statement, rumour or report, with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

<sup>16</sup> Human Rights Watch, “They Can Arrest You At Any Time: The Criminalization of Peaceful Expression in Burma,” available at <https://www.hrw.org/report/2016/06/29/they-can-arrest-you-any-time/criminalization-peaceful-expression-burma> (Pg. 48)

<sup>17</sup> <https://www.mmmtimes.com/news/kayin-villagers-blame-black-water-factory.html>

<sup>18</sup> The restrictions under section 505(b) do not meet all of the requirements of being provided by law, pursuing a legitimate purpose and conforming to the strict tests of necessity and proportionality as per Article 19 of the International Convention on Civil and Political Rights (which forms part of the International Bill of Rights and reflects customary international law) and General Comment 27 of the Human Rights Committee.



CSOs have been supplying water to villages since the contamination started.

## Recommendations

- The Kayin State government must immediately and unconditionally drop all charges against Saw Tha Phoe.
- The Myanmar authorities must immediately ensure clean water is supplied to the affected communities.
- The Myanmar authorities must ensure that the MEC’s coal-powered cement factory is taking immediate measures to comply with Myanmar’s environmental safeguards and the international standards in order to avoid potential environmental and social impacts associated with storage and treatment of coal and ash before the next rainy season.
- For long term solution, a joint multi-stakeholder mechanism must be established, consisting of representatives from the government, MEC, KNU, independent experts, affected community, civil society, and media. This mechanism must be officially mandated to facilitate a transparent and accountable process to monitor and test water samples, gather any relevant information related to the water contamination, as well as to provide science-based recommendations to the government.