

**IN THE SUPREME COURT OF BELIZE, A.D. 2002**

**Action No. 61**

IN THE MATTER of an application for leave to apply for Judicial Review

AND

IN THE MATTER of a decision by the National Environmental Appraisal Committee made on Friday, November 9, 2001 to Approve an Environmental Impact Assessment by Belize Electric Company Limited

AND

IN THE MATTER of a decision of the Department of the Environment or of the National Environmental Appraisal Committee made on Friday, November 9<sup>th</sup> 2001 to grant environmental clearance to the Macal River Upstream Storage Facility Project

AND

IN THE MATTER of the Environmental Protection Act Chapter 328 of the Laws of Belize, Revised Edition, 2000, and the Regulations made thereunder

THE QUEEN

AND

DEPARTMENT OF ENVIRONMENT  
BELIZE ELECTRIC COMPANY LIMITED

Respondents

AND

Ex parte BELIZE ALLIANCE OF CONSERVATION  
NON GOVERNMENTAL ORGANIZATIONS  
(BACONGO)

Applicant

Appellant's reply (by Dean O. Barrow) to D.O.E.'s oral presentation (by Denys Barrow) and BECOL'S July 24<sup>th</sup> written Revised Skeleton Arguments (by Michael Young) re the following grounds:

A. **The Relationship between DOE and NEAC and the Environmental Assessment process and approval of a project; the Decision(s) being challenged**

1. The function of NEAC, we submit, is clearly not limited to merely determining the adequacy of the EIA and certifying its fitness (or otherwise) for (another) examination, evaluation and decision (on the merits) by the DOE. This is the proposition contended for by Denys Barrow, but even the most cursory inspection of the scheme of the legislation discloses that it cannot be correct. The language and sequencing of (especially) the Regulations reveal a much larger, more comprehensive role for NEAC; and, we submit, that role is nothing less than deciding whether the EIA, and thus the project, ought to be approved, and advising the DOE accordingly. If NEAC advises 'no', DOE cannot say 'yes'; though possibly if NEAC advises 'yes' DOE may, for larger policy considerations, still say 'no.'
2. Regulation 6 says that the EIA process shall include:
  - (a) a screening of the project;
  - (b) review by NEAC ....
  - (c) the design and implementation of a follow-up programme
3. Regulations 22(3) and 23 make clear that it is NEAC that makes the determination, which then triggers the request from DOE to Developer, that more information is required in an EIA, or that further work or studies is needed.
4. Again, according to Regulation 24, it is the NEAC exercise in evaluating the EIA (report), which gives rise to the decision as to necessity for a post EIA (report) public hearing.
5. Regulation 25 sets out the primary function and composition of NEAC, and Regulation 26 details some of the factors that the NEAC assessment of an EIA (report) and the project to which it relates, must include.
6. Significantly, Regulation 27 immediately follows with the process for communication by the DOE of a 'no' decision, and the process for an appeal. There is no provision in the sequencing for any intervention or intermediate or additional stage of separate consideration by the DOE after the NEAC assessment exercise. We submit this is deliberate because any DOE 'no' decision is in fact the (mandatory) adoption of the NEAC 'no' decision.
7. Looking at the above described Regulations, we see that the scope of NEAC's role has been drawn in large terms and that its remit is far greater than the atrophied version contended for by Denys Barrow. Regulation 26 contains the clinching provisions, describing a far-flung canvass of inputs that must inform a detailed NEAC consideration of an EIA (report). It can hardly be for purposes merely of pronouncing on the adequacy of the EIA for another detailed evaluation by DOE (which is nowhere provided for in the Regulations), which other evaluation would result in the 'yes' or 'no' decision.
8. It is clear then, we submit, that NEAC is the agency through which the DOE acts in considering, weighing and assessing the project, and then deciding on approval or not. NEAC is the fulcrum of a carefully calibrated, precisely described process for proper evaluation of the EIA (report) and the project. It is only on the basis of that weighted, informed, duly deliberated and expert NEAC assessment, that a decision to approve the EIA and project can be made. This is why NEAC is chartered to include a wide-ranging,

technically qualified membership, and is chaired by the Head of the DOE. It is inconceivable, we submit, that the body with requisite expertise to pronounce on the merits of both the EIA and the project, should have been brought into existence and mandated to carefully consider EIA and project, only for it thereafter to kick them upstairs to DOE for the same process to be gone through again; but this time without either the depth, capacity, time or statutory guidelines to inform the DOE evaluation.

9. Of course, the best support for our submission is to be found in what actually happened with the instant case. The minutes of the NEAC meetings show without a doubt that NEAC, chaired by the Head of the DOE, appreciated at all times its true decision-making function as surrogate for the DOE (see Minutes of Nov. 9<sup>th</sup> meeting: 1.01; 1.05; 1.10; 1.12; 2.01; 3.01). Exhibit IH1C, attached to the affidavit of Icilda Humes, at item 3.0 reflects the following:

‘Decision on conditional approval of the Project’

“Of the twelve members present, eleven voted in favour of the project being given clearance ....”

10. But in an attempted feat of transmutation not seen since the halcyon days of the middle ages when alchemists practised the art of turning base metal into gold, Mr. Denys Barrow contended that these words meant no more than that NEAC decided it would advise the DOE on the adequacy of the EIA for a DOE decision, which is yet to be taken. Now, though, that hapless proposition has been utterly exploded by the 4<sup>th</sup> affidavit (and exhibits) of Lynn Young. Speaking to the DOE final decision of 5<sup>th</sup> April 2000 to approve the project.
11. We wonder what the court is to make of this particular development and the behaviour of the DOE. All along, it now appears, the DOE was instructing its counsel wrongly. Mr. Denys Barrow’s oral presentation was replete with references to the non-decision in this matter, saying that the process was still in train, that the EIA consideration exercise was still with the NEAC, and that the DOE could not (properly) make a decision given the inadequacies, omissions and gaping holes in the EIA (my words, \*not his) that NEA had identified. We submit that the confirmed decision of the DOE must now be struck down by the court, inter alia in view of its having been impugned by its own counsel in the most categorical terms, when he said that any decision of the DOE to approve in the extant circumstances would be unreasonable.
12. But Mr. Denys Barrow went further. He said that NEAC’s function under the Regulations is limited, and NEAC cannot give even conditional approval to EIA or project. He submitted that the terms of the NEAC decision show a looseness of language and that decision can mean no more than that NEAC was advising DOE that it found the EIA adequate. Then he said: “if NEAC purported to approve the process, that cannot stand.” In the circumstances, since the fourth affidavit of Lynn Young shows that NEAC did give conditional approval, then on Mr. Denys Barrow’s argument NEAC acted in excess of its statutory power. For this additional reason the

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*\* His words are: “NEAC did not decide that the EIA is adequate, and the EIA has not even left NEAC yet and gone to DOE. So there can be no approval”*

*“If DOE with this information from NEAC as to the shortcoming of the EIA chooses to give approval, then we will certainly be back before this Court. Public should then come to court to challenge any such approval”*

*“NEAC merely brought out the shortcomings of the EIA, so as to provide DOE with a basis on which to say ‘no’”*

NEAC decision and the DOE decision that flowed from it, on the very submissions of the DOE, must be quashed.

**B. The lack of approved, settled Terms of Reference and the consequent failure to determine whether EIA complied with such**

13. We submit that the evidence shows that there is either confusion or lack of candour, or both, on the part of Ismael Fabro, Chairman of NEAC and Head of DOE. This is particularly in connection with exactly which document(s) were attached to his letter of March 3, 1999. In addition, we continue to assert that the letter of March 17, 1999 from DOE to BEL was not a written agreement of Terms of Reference. Rather, that letter contained comments and recommendations from DOE as part of what was an incomplete process to fix Terms of Reference. Indeed, the March 17<sup>th</sup> letter confirms that DOE did not consider what had been submitted by the Developer as draft Terms of Reference, to be adequate; and that indeed the DOE was unclear as to which document (or documents) submitted by the Developer was intended to serve as the Terms of Reference.
14. The Respondents attempt to correct the record regarding the Terms of Reference in two stages. At the first stage, as part of Ismael Fabro's second affidavit, the letter of March 3, 1999 is submitted to the court and attached to a set of documents, implying that these documents were attached to the original letter. The second stage of the Respondents' efforts to correct the record came after the Applicant's arguments pointing to the evidence before the court of the discrepancy between the March 3, 1999 letter and the documents purportedly attached to it (some of which were clearly produced after March 3, 1999). The Respondents then asked leave to submit an additional affidavit by Joseph Sukhnandan. This affidavit purports to contain the original attachment which went along with his March 1, 1999 letter. Again we must point out that the document that the Respondents asked leave to attach does not have a date, or any indication that it - or it alone - was attached to the March 1, 1999 letter. The Respondents then attempt to justify the documents exhibited in Mr. Fabro's affidavit as additions to the document attached to the March 1, 1999 letter, which the Respondents claim was the original Terms of Reference.
15. Giving Mr. Fabro the benefit of the doubt, and assuming that he did not intend to mislead the court by attaching a March 3, 1999 letter to a set of documents produced well after this date, then we must conclude that Mr. Fabro was himself confused about which document or documents were, in fact, the agreed Terms of Reference. We submit that this confusion further substantiates the Applicant's submission that neither Department of Environment nor NEAC knew what the Terms of Reference were when they evaluated the EIA. The March 17, 1999 letter from the Department to BEL underscores this confusion. In this letter, the Department states that it is unclear which document is the Terms of Reference. From the letter of October 25, 2001, it is clear that the Department still did not know what document or documents constituted the Terms of Reference against which the EIA should be compared.
16. The Developer provided a number of documents purporting to be Terms of Reference to the Department along with a November 9, 2001 letter. However, there is no evidence that these had been approved by the Department in writing before the environmental assessment had begun. Furthermore, except that the NEAC received these documents, there is no evidence that NEAC examined the EIA and evaluated whether it complied with the purported Terms of Reference. This accounts for the ad hoc way the NEAC reviewed the EIA.
17. The Regulations take pains to describe the process of determining Terms of Reference, and agreeing to them in writing. They then mandate the comparison of these Terms of Reference to the Environmental Impact Assessment. Discretion may govern the comparison of the Terms of Reference to the Environmental Impact Assessment.

However, if there is no clear Terms of Reference, agreed in writing before the assessment begins, then the use of discretion by the Department of Environment or NEAC would have no bounds to contain it. The exercise of such discretion would result in the circumstances in an arbitrary, and we submit, irrational decision. For the sake of completeness, we also say that in conducting its assessment exercise NEAC should in any event use the Terms of Reference as a filter and first determine EIA compliance with it, regardless of whether DOE has already purported to do so. It is only NEAC that has the competence to properly do that exercise.

18. But whatever the general position, DOE specifically here caused NEAC to consider the Terms of Reference and EIA compliance in accordance with Regulation 21(b). Hence the attempts by the Respondents to establish that NEAC did have, and did examine, 'previously agreed' Terms of Reference. But we repeat that there is nothing to show that there was ever any final Terms of Reference document, incorporating the comments and recommendations of the DOE letter of March 17, 1999, which was then approved by the DOE.

C. **The failure of NEAC to recommend, and the failure of DOE to require, a public hearing after the submission of the EIA report and before the decisions of 9<sup>th</sup> November 2001 and April 5<sup>th</sup>, 2002**

19. The arguments of the Respondent and Intervener on this point are, we submit, misconceived. Mr. Denys Barrow for the DOE at first contended in his written skeleton submissions, that the legislation only contemplated pre EIA (report) public hearings. In his oral presentation he changed his tune and seemed to concede, as Mr. Michael Young for BECOL did, that there is a duty to consider whether a public hearing should be held after the EIA has been submitted. But Mr. Denys Barrow then went on to say that since the process, post EIA report submission, is not yet at an end, nothing can be made of the failure to require a public hearing so far. It was still open to the authorities to decide on a public hearing before the decision to approve or not approve the project. Thus, he said, the applicant's complaint on this score is premature. Needless to say, that position has now imploded with the confirmation that a final decision to approve the project was made on April 5<sup>th</sup>, 2002 without any (post EIA submission) public hearing having been held. Thus the applicant's contention has not now been answered by Denys Barrow and DOE.
20. Mr. Michael Young's argument is different. He says that the substantial public consultations and meetings that took place prior to submission of the EIA, are sufficient to discharge the duty of the DOE and NEAC to consider the need for a post EIA submission hearing.
21. With respect, that proposition flies squarely in the face of the authority of the Berkeley case. There, as is the argument of the Intervener here, the project had been widely publicized and involved a well-known development of a famous site. Admittedly widespread consultations and indeed a public inquiry had taken place. But all this was in the absence of an Environmental Statement, and this contrary to the U.K. Regulation. The rationale for the requirement in the U.K. that there be public participation post an Environmental Statement, was gone into extensively by Lord Bingham of Cornhill (see P. 7 et seq of the copy of the judgment made available to the court). He found that the failure to have an Environmental Statement and the public's comment on it, could not be overcome by other consultation not on the Environmental Statement, however widespread that consultation was. This was for the reason, inter alia, that public participation in the decision-making process, which participation had to include its response to the Environmental Statement, was fundamental in the context of democracy and the European Directive and domestic law.

22. In Belize, both the requirements of Regulation 24(1) and good sense, mandate that there be due consideration whether a public hearing is necessary after the EIA report is submitted. As was said in Berkeley at p.15 ... “the environmental impact of the project shall be included in the public debate and ... the decision as to whether consent is to be given shall be adopted on an appropriate basis.” (That environmental impact can only be properly judged after the EIA report has been submitted).

or again:

“The directly enforceable right of the citizen .... is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis that requires the inclusive and democratic procedure .... in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.”

23. In circumstances where, given the complexity of the problem and the magnitude and type of environmental impact that the EIA report had revealed, public hearings post EIA are, to use Mr. Denys Barrow’s words, “central to informing the decision of the DOE whether to approve a project.” We say again that the failure of the DOE to hold a public hearing after the submission of the EIA and prior to the decisions of 9<sup>th</sup> November 2002 and 5<sup>th</sup> April 2002, was bad. It is also instructive to note that NEAC did vote in favour of public hearings to be held after its conditional approval decision and presumably prior to that decision being made final. Clearly, then, the failure of the DOE to act accordingly or even consider the recommendation, is egregious and in violation of its duty under Regulation 24(1).
24. Too much cannot be made of this point. Mr. Michael Young stressed that the Regulations nowhere absolutely require a public hearing, either pre or post submission of the EIA report. But we submit that there are notions of fairplay and the fundamental interest of the public as stakeholder in the environment, that underlie and in fact are the spirit behind the regulations. And it would be contrary to these notions if a public hearing is not provided for on a mandatory basis by the Regulations. We therefore submit that Regulation 18(1) in obliging the developer to provide an opportunity, during the course of preparing his EIA report, for meetings between the developer and interested members of the public, is in fact requiring a public hearing to be arranged. This is borne out by Regulation 19(o), which says that the EIA document is to contain a report of any public hearing that has occurred as a result of that arrangement having been put in place. Thus, in our submission, at least the scheduling of a pre EIA report public hearing, is an absolute requirement of the Regulations.
25. We of course go further and say that there is a duty (as set out earlier and based on Regulation 24(1)) for NEAC (as agent of the DOE) to consider whether a post EIA report public hearing should also be held. And where the factors set out in Regulation 24(2) are present, NEAC, if it is to act properly, must recommend and the DOE must hold a post EIA public hearing. Fairness, as well as the Regulation, demands it. The public’s other right to participation in the process by way of comments on the EIA report copies placed in the libraries had in the instant case already been stunted because of the pages missing from such copies. Those missing pages contained “vital information” (see CG7, letter of Icilda Humes), and without them the EIA to which the public had access was incomplete. In the circumstances the public ought to have been given an opportunity in open forums held by the DOE, to react in Regulation 24(2) circumstances to the completed EIA report; and to have that reaction taken on board by NEAC. This was especially so when the developer had continuing access to NEAC for the propagation of its position, right up to and including during the meeting at which NEAC took its decision of November 9<sup>th</sup>, 2001.

D. **NEAC's failure to consider public comments during its deliberations**

26. The applicant repeats its contention here that the records show clearly that, as a body acting collectively, NEAC did not consider the public comments - either the pre or post EIA comments. It was not sufficient, in the circumstances, for the Chairman of NEAC merely to point out that the post EIA comments were in a folder available to members; and it was not sufficient that pre EIA comments were in the report section of the EIA. The minutes show clearly that NEAC as a body did not consider them. Ex post facto affidavits that are self-serving cannot close this fatal gap.

E. **Delay**

27. We submit that it is not open to the Intervener to raise, at this the substantive hearing stage, the question of delay. In the U.K., delay may be put in issue both at the leave and substantial hearing stages. At the leave stage, this is so because O. 53, r. 4(1) provided:

“(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose ....”

At the substantive hearing stage, delay may again be raised in the U.K. because at Section 31(6) of the Supreme Court Act 1981 it provides:

“where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant -

- (a) leave for the making of the application; or
- (b) any relief other than on the application

28. In Belize the English Supreme Court Act of 1981 does not apply, and thus there is no jurisdiction to refuse any relief sought “on the (substantive) application” for reasons of delay.
29. In any case, as the authority of Ex Parte Burkett makes clear, in calculating delay time does not begin to run until the substantive, final decision has been made. In the instant case the operative date is thus April 5<sup>th</sup>, 2002, rather than November 9<sup>th</sup>, 2001.
30. Further, neither the intervener nor the Respondent can complain of any prejudice. Burkett also makes clear that nothing to do with implementation of the project ought to have taken place before the final decision of April 5<sup>th</sup>, 2002. If the Intervener and Respondent proceeded after November 9<sup>th</sup>, 2001, they did so improperly; and their wrongful actions are no ground for complaint.
31. Finally, the case R v Litchfield District Council makes clear that even where delay can notionally be put in issue at the substantive hearing, it is only on very limited grounds and where either it was not thoroughly canvassed at the leave stage, or new information has come to light. In the instant case the court went fully into delay at the leave stage, and nothing new is being urged by the intervener now.

For all these reasons delay cannot, we submit, act as a barrier to relief here, and the Applicant is entitled to the orders prayed for..

Dated the 31<sup>st</sup> day of July, 2002.