

As of July 29, 2002

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 of the National
Environmental Appraisal Committee made on
Friday, November 9th , 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 9th
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

THE DEPARTMENT OF THE ENVIRONMENT

BELIZE ELECTRIC COMPANY LIMITED

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Respondents

EX PARTE, BELIZE ALLIANCE OF

CONSERVATION NON GOVERNMENTAL

ORGANIZATIONS (BACONGO)

- Applicant

**Chronology of “Statement in Support of Application
for Leave”**

- (i) Application for Leave to Apply for Judicial Review filed on 8th February 2002.
- (ii) “Statement in Support of Application for Leave” dated 8th February 2002.
- (iii) Leave granted by Conteh C. J. to amend “Statement in Support” on 26th February 2002.
- (iv) Amendment to “Statement in Support” dated 28th February 2002.
- (v) Leave granted by Conteh C.J. to file for Judicial Review on 28th February 2002.
- (vi) Amendment to “Statement in Support” by substitution granted by

Conteh C.J. on 19th April 2002.

- (vii) Amendment to “Statement in Support” granted by Conteh C.J. on 15th July 2002.
- (viii) Amendment to “Statement in Support” granted by Conteh C.J. on 29th July 2002.

Amended by substitution
pursuant to Order of
Conte C. J. on 19th April

Amended Grounds on which relief is sought

A. Legal Frame Work

1.0 Administration under the Environmental Protection Act, Chapter 328 (the Act)

1.1 Section 3(1): For the administration of this Act and the regulations made thereunder, there shall be established under the Ministry for the time being responsible for the Environment, a department to be known as the Department of the Environment.

1.2 Section 3(2): The Department shall be headed by a public officer to be known as the Chief Environmental Officer who shall be appointed by the G.G. in accordance with section 107 of the Belize Constitution.

2.0 Duties of Department of Environment (DOE) under the Act

2.1 Section 3(3): It shall be the responsibility of the DOE to monitor the implementation of this Act and the regulations made thereunder and to take necessary action to enforce its provisions.

2.2 By Section 4 of the Act, the DOE is entrusted with twenty-seven (27) powers, duties and functions which include, inter alia, the following:

2.2.1 to be responsible for the continuous and long-term assessment of natural resources and of pollution; **(a)**

2.2.2 to ensure protection and rational use of natural resources for the benefit of the present and future generations; **(b)**

- 2.2.3 to specify methods to be adopted in taking samples and making tests for the purpose of this Act; **(h)**
- 2.2.4 to undertake investigations and inspections to ensure compliance with this Act or the regulations made thereunder; **(j)**
- 2.2.5 to provide information and education to the public regarding the importance of protection and improve of the environment; **(k)**
- 2.2.6 to conduct studies and make recommendations on standards relating to the improvement of the environment and the maintenance of a sound ecological system; **(u)**
- 2.2.7 to examine and evaluate and if necessary carry out environmental impact assessments and risk analysis and to make suitable recommendations to mitigate against harmful effects of any proposed action on the environment; **(m)**
- 2.2.8 to highlight the value of wetland ecosystems and promote successful management approaches in their utilization; **(s)**
- 2.2.9 to monitor trends in the use of natural resources and their impact on the environment; **(v)**
- 2.2.10 to exercise any other functions relating to the protection of the environment; **(aa)**

3.0 Requirements when undertaking an assessment of the impact a project will have on the environment (EIA):

- 3.1 Section 20(2): an environmental impact assessment shall identify and evaluate the effects of specified developments on:
- (1) human beings;
 - (2) flora & fauna;
 - (c) soil;
 - (d) water;
 - (e) air & climatic factors;
 - (f) material assets, including the cultural heritage and the landscape;
 - (g) natural resources;
 - (h) the ecological balance;
 - (i) any other environmental factor which needs to be taken into account
- 3.2 Section 20(3): an EIA shall include measures to mitigate any adverse environmental effects, and a statement of reasonable alternative sites (if any) and reasons for their rejection.
- 3.3 Section 20(4): every project, programme or activity shall be assessed with a view to the need to protect and improve human health and living conditions and the need to preserve the reproductive capacity of ecosystems as well as the diversity of species.
- 3.4 Section 20(5): when making an EIA, the proposed developer shall consult with public and other interested bodies or organizations.

4.0 Requirements under the Environmental Impact Assessment Regulation S.I. 107 of 1995 (the Regulations)

- 4.1 Schedule 1 lists the categories of projects which shall require an EIA. Schedule 1 includes in (g): major waterworks; dam, impoundments, alteration of river banks and shoreline, alteration of ground water, diversion

of water courses, modification of stream flows.

4.2 Regulation 19: sets out fifteen (15) topics the report of the EIA shall contain (a to o)

4.3 Regulation 20: notice of the EIA must be published and made available for inspection.

4.4 Regulation 21: an EIA report is not complete until all further or additional information is supplied to DOE.

4.5 Regulation 25: National Environmental Appraisal Committee

(NEAC) shall:

- (a) review all EIA=s;
- (b) advise DOE of adequacy or otherwise of EIA;
- (c) advise DOE of circumstances where a public hearing is desirable or necessary; upon which DOE shall take into account the several factors set out in regulations 24(2) (a) to (c).

4.6 Regulation 26: sets out nine (9) factors which NEAC shall consider when evaluating an EIA.

4.7 Relation of DOE to NEAC:

The DOE exercises its duty to examine and evaluate an EIA (as set out in section 4(m) of the Act) through NEAC who reviews the EIA and advises the DOE on the EIA=s adequacy or otherwise. (as set out in regulation 25).

B. Material Facts

1.0 The claimant BACONGO is an umbrella environmental organization, made up of nine separate entities across the entirety of Belize. It is a company incorporated under the Laws of Belize, and has been operating since 1994. It is well- recognized locally and internationally as an activist for environmental protection, and has a large network or international associates on contacts, on whose resources and expertise it draws. A number of its members live in the district in which the Macal River Upstream Facility is to be built.

- 2.0 The Applicant complains of the procedural impropriety of the DOE through NEAC in coming to the decision to approve the Becol-EIA and of the ultra vires nature of the said decision made on the 9th November 2001.
- 3.0 The Applicant complains that the decision of the NEAC on the 9th November 2001, to approve (conditionally) an Environmental Impact Assessment submitted to the DOE by Belize Electric Company, and which related to the Becol project known as the Macal River Upstream Facility, was unreasonable and failed to take into account relevant considerations while taking into account irrelevant considerations.
- 4.0 The Applicant complains that the said decision was unreasonable in the Wednesbury sense.
- 5.0 According to a Press Release issued by the Government of Belize on 13th November, the NEAC decision of 9th November 2001 was also described as a decision to grant environmental clearance to the MRUSF. Since under the Act and the Regulations only the DOE can grant such clearance, the Applicants are unsure whether the Press Release confused NEAC with the DOE or whether NEAC actually purported to exercise the functions of the DOE. In any case, the decision to grant clearance was made. The decision was stated to be subject to an Environmental Compliance Plan, and such a plan was subsequently produced by the DOE. The Applicants also complain of this decision.

C. Submissions on grounds for Judicial Review

- 1.0 The failure of the DOE to enforce regulation 20(2) of the Regulations in relation to the requirement that Becol include in the EIA submitted to the DOE a copy of the newspaper notice in accordance with the requirement of 20(1), thus depriving NEAC of a requirement in the procedure for proper consideration of the EIA, is contrary to the statutory duty imposed on the DOE by section 3(3) of the Act, and unlawful.

2.0 The failure of the DOE, upon receiving the EIA, to examine the EIA or cause the same to be examined, to determine whether it complied with the previously agreed terms of reference, (if any), is contrary to the duties imposed on the DOE by regulations 21 (b) and (c) of the Regulations, and unlawful.

Amended pursuant to Order of Conte C. J. on 15th July 2002

3.0 The failure of the NEAC to recommend a public hearing and the failure of the DOE to require a public hearing to be held in respect of the Chalillo dam before the decision of 9th November 2001 was:

3.1 ultra vires regulation 24(2) of the Regulations in that in these failures, NEAC and the DOE deciding the DOE acted for an improper purpose and failed to take relevant factors into account;

3.2 contrary to the principles of fairness;

3.3 unreasonable in the Wednesbury sense.

Amended pursuant to Order of Conte C. J. on 15th July 2002

4.0 The decision of the NEAC on 9 November 2001, and/or the decision of the DOE premised on the decisions of the NEAC and/or acting through the NEAC, to approve the Becol-EIA, was illegal and unlawful in that it was:

4.1 Ultra vires section 3(3) of the Act because:

Amended pursuant to Order of Conte C. J. on 15th July 2002

4.1.1 the EIA upon which this decision was premised:

4.1.1.1 failed to include mitigation measures and failed to include a statement of reasons for the rejection of reasonable alternative sites, as required by section 20(3);

4.1.1.2 failed to address the needs specified in section 20(4);

4.1.1.3 failed to genuinely consult as required by section 20(5).

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4.1.2 Contrary to the Regulations, the EIA also:

- 4.1.2.1 included faulty and misleading geology reports and in light of this failed to include a description of the possible impact of the project on human beings, and failed to include a description of the effect of the project on material assets, all as required by regulation 19(h)
- 4.1.2.2 failed to present all reasonable alternatives in comparative form and as required by regulation 19(i);
- 4.1.2.3 failed to identify all mitigation measures to be employed to reduce adverse effects of the project, and as required by regulation 19(j);
- 4.1.2.4 failed to include a mitigation plan as required by regulation 19(k);
- 4.1.2.5 failed to include a monitoring plan as required by regulation 19(l);
- 4.1.2.6 failed to indicate the involvement of inter-agency and public/non governmental organisations as required by regulation 19(m).

4.2 Unreasonable and irrational because:

- 4.2.1 NEAC failed to take into account, or to give any consideration to, the factors set out in regulation 26(1) (a), (b), (c) and (d), and 26(2) (b) (c) & (d) of the Regulations;
- 4.2.2 NEAC failed to take into account, or to give proper consideration to other relevant and proper factors, such as:
 - 4.2.2.1 the failure of the developer to engage in genuine public contact and involvement, especially with the people of Cristo Rey Village;
 - 4.2.2.2 the manifest unreasonableness of the period of about 30 days prescribed by

the DOE, namely, from on or about 28th August 2001 to 28th September 2001 for public inspection and comments on the EIA.;

4.2.2.3 the fact that the EIA which was put out for public inspection was incomplete and that several pages were missing;

4.2.2.4 the fact that the report from the Natural History Museum of London (NHM) was the only wild life study in the whole EIA and yet the EIA omitted fifty (50) pages of the original report prepared by NHM;

4.2.2.5 the fact that the report of the Natural History Museum stated, inter alia, that Chalillo would result in *A negative impacts on bio-diversity and ecological interactions extending well beyond the dam and its impoundments.*@

4.2.2.6 failure of DOE to prescribe any procedure, or any proper procedure for public contact and involvement between Becol and the relevant public in the area of the proposed dam;

4.2.2.7 the fact that the EIA discloses that the Chalillo reservoir will destroy a large Mayan site and that the power line corridor will pass through an area containing eight (8) prehistoric Maya structures and directly over two (2) of these;

4.2.2.8 the fact that under section 33 of the Ancient Monuments & Antiquities Act of the laws of Belize, it is an offence for anyone to wilfully damage, destroy, or disturb any ancient monument or in any way

mark or deface any ancient monument.;

4.2.2.9 the fact the geological studies of the EIA were factually incorrect and were proven to be wrong by an examination of Becol=s core samples in the presence of Becol=s representative;

4.2.2.10 the fact that no Terms of Reference shown to be approved by the DOE were available to NEAC during its decision making process.

4.2.3 NEAC acted without the kind of complete information that would enable it to come to a proper decision, and in particular:

4.2.3.1 lack of correct or unchallenged geological studies;

4.2.3.2 lack of previously agreed Terms of Reference against which to determine compliance by the proposed developer;

4.2.3.3 lack of a monitoring plan;

4.2.3.4 lack of mitigation measures against which any compliance plan could be formulated.

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4.2.4 The DOE failed to take into account the flaws in the NEAC evaluation process that produced the advice on or approval of the EIA in that:

4.2.4.1 no public consultation was held despite the fact that the circumstances of the Chalillo project fall squarely within regulations 24 (2) (a) to (c);

4.2.4.2 NEAC was presented with an incomplete EIA for consideration;

4.2.4.3 the DOE failed to comply with the agreement reached with NEAC on

24th October 2001 that the request to Becol for further information would be sent on the morning of 26th October 2001, thus excluding further requests for information from at least one NEAC member;

4.2.4.4 setting of unreasonably short time limits by the DOE on 5th November 2001 requiring NEAC members to review the Avital information@ contained on Becol=s CD - Rom before 9th November 2001.

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- 4.2.5 There was and is implied bias on the part of the Chairman of NEAC and all governmental representatives on NEAC in, but not limited to the following respects:
- (i) prior to the decision complained of, the Prime Minister of Belize publicly announced his Government’s support for the project;
 - (ii) on 26 January 2001 the Government of Belize, BECOL and BEL agreed to the terms of a Third Master Agreement wherein the Government of Belize committed itself to construct the access road to the Chalillo dam site,
 - (iii) the Government of Belize also agreed to waive on behalf of BECOL and its Contractor all licenses, permits, consents and regulatory approvals in connection with the Chalillo project (the New Project) and to waive or cause to be waived all environmental laws, rules or regulations except those to which the Producer agreed to be bound.”

5.0 The decision was irrational and was unreasonable in the Wednesbury sense, and was therefore illegal and void.

Amended
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29th July 2002

6.0 The decision of the Department of the Environment (DOE) evidenced by the letter from the DOE dated April 5, 2002 granting ‘environmental clearance’ to BECOL was

unlawful in that in so doing, the DOE acted on a decision of the National Environmental Appraisal Committee which was itself unlawful.

7.0 The application for Judicial Review was filed on 8th February 2002. Previous to doing so, the Applicant BACONGO had sought recourse to the Minister, BACONGO asked for his intervention to correct the miscarriage resulting from the NEAC/DOE decisions. Candy Gonzalez, the BACONGO representative on NEAC tried, by way of letter writing and lobbying, to get the NEAC and the DOE to reconsider the decisions and reopen the process. The Application was filed after it became clear the decisions were maintained, and after building of a road to the MRUSF was commenced, signaling implementation of the decisions.

D. Relief Sought

- (a) An Order of Certiorari to remove into this honourable court and quash the decisions of 9th November 2001.
- (b) A Declaration that said decisions were unlawful.
- (c) An Order of Certiorari to quash the decision of the Department of Environment (DOE) evidenced by the letter from the DOE dated 5th April 2002 granting 'environmental clearance' to Belize Electric Company Limited for a hydroelectric project (MRUSF).
- (d) A Declaration that said decision evidenced by the letter from the DOE dated 5th April 2002 was unlawful.

Amended
pursuant to Order
of Conte C. J. on
29th July 2002

Dated the 8th day of February 2002

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