

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL IN BELIZE

BETWEEN:

**(1) THE BELIZE ALLIANCE OF CONSERVATION
NON-GOVERNMENTAL ORGANISATIONS
(2) PHYLLIS DART
(3) GODSMAN ELLIS**

Appellants

-and-

**(1) THE DEPARTMENT OF THE ENVIRONMENT
(2) BELIZE ELECTRICITY COMPANY LIMITED**

Respondents

**CASE ON BEHALF OF THE SECOND RESPONDENT
for hearing 3 and 4 December**

Introduction

1. This appeal concerns the decision of the First Respondent, the Department of the Environment (DOE), on 5 April 2002 to grant approval to an Environmental Impact Assessment for the construction by the Second Respondent, the Belize Electricity Company Limited (BECOL), of Chalillo Dam on the Macal River in Belize. This project is known as the Macal River Upstream Storage Facility (MRUSF) and is designed to produce electricity and upstream storage capacity for Mollejon Power Plant, and thereby to increase Belize's electricity generating capacity.
2. On 10 April 2003 the Appellant, the Belize Alliance of Conservation Non-Governmental Organisations (BACONGO), obtained leave to appeal to the Privy Council against the decision of the Court of Appeal of Belize upholding Chief Justice Conteh's refusal in the Supreme Court of Belize of BACONGO's application to quash the DOE's decision.

3. On 14 August 2003, after a contested hearing on 30 July 2003, the Privy Council refused BACONGO's application for an interlocutory injunction to prevent BECOL from carrying out any construction works pending the outcome of its appeal. In refusing BACONGO's application, their Lordships made the following statement in relation to BACONGO's case (paragraph 41):

“As already noted, the Court of Appeal differed on the need for a public hearing under Regulation 24. But (in addition to other public consultation which took place in August 2001) a public hearing has now been held and (as the Board was told without contradiction) the DoE has taken account of the objections and representations made at the hearing. The appeal will turn on BACONGO's claim that the EIA was incomplete and defective, in particular because of the need for further investigations in four important areas: geology (as affecting the design and construction of the dam); hydrology (including the impact on downstream settlements); flora and fauna; and archaeological sites. “

Background

4. The construction of the MRUSF has been under consideration for over a decade. In 1988 a Renewable Energy Study commissioned as part of the long-term energy plan for Belize recommended a staged development of the Macal River that included an upstream storage facility at either Rubber Camp or Challilo (see Affidavit of Lynn Young of 3 June 2003, paragraphs 22-23). Since then at least four feasibility studies examining the MRUSF have been produced for Belize Electricity Ltd (BEL), between 1992 and 1999.
5. On 24 August 2001 BECOL submitted its Environmental Impact Assessment (EIA) to the DOE as it was required to do under the Belize

Environmental Protection Act 2000, Chapter 328 of the Laws of Belize Revised Edition 2000 (EPA) and Regulation 7 of the Belize Environmental Impact Assessment Regulations 1995 (EIA Regulations). BECOL had previously submitted an EIA in December 1999 but the DOE had required more information. Further work had been done and, as mentioned, the EIA was submitted in August 2001. Under Regulation 25 of the EIA Regulations, the National Environmental Appraisal Committee (NEAC), which consists of 12 members drawn from a wide range of government departments and from non-governmental environmental organisations, is given the function of reviewing environmental impact assessments, and of advising the DOE on their adequacy. The non-governmental environmental organizations represented on NEAC included (a) the Association of National Development Agencies (ANDA) and (b) the Appellant BACONGO, whose officer Candy Gonzalez swore the main affidavit supporting the application for judicial review.

6. The project justification section of the EIA (**PJ**) (Part II Volume I - summarised at Part I Chapter 1.3 of the Main Report, page 6) explains the purpose of the MRUSF. The introduction states as follows (at Section 1.0):

“The country of Belize is developing; with this development has come an increased demand for energy to service industries, tourism, fishery and others. The country is still in the process of extending electricity to all of its citizens in order to provide life’s basic necessities. The country needs a greater energy self-sufficiency and currently imports almost half its energy requirements. It prefers to utilise renewable resources. In this regard, the Government of Belize (GOB) has identified hydroelectric power as one of the main sources of electricity to be developed over the long term to meet Belize’s present and growing energy needs. Other sources in the energy equation are diesel driven generators, purchase of energy from Mexico, and potential biomass schemes using agricultural by-products or wood. The objective of this document is to clearly rationalise the basis for proposing this project to the people of Belize.”

7. Section 1.2 of the PJ addresses Current Energy Sources. Paragraph 1.2.2 is entitled Issues Related to the Purchase of Energy from Mexico. It states:

“Currently Belize relies heavily on Mexico for electricity. In 2000, 48% of the annual electricity requirements were met through purchases of electricity from CFE of Mexico. The dependence on Mexico is of considerable concern when considering the security of energy supply in Belize. This concern was highlighted during March 2001 when for many weeks Belize experienced rotating power interruptions due to Mexico’s inability to supply, necessitating BEL to drop service, on a rotating basis to large groups of its customers. This indicates the need for Belize to approach self-sufficiency in electrical generation.....”

While the current contract with Mexico provides favourable off-peak rates the price on peak is over 4.5 times the off-peak rate and every effort must be made by BEL to shelter the people of Belize from these very high prices.....”

During the wet-season, the Mollejon plant can provide some relief during peak periods, when flows are available. However, during the dry season, the lack of storage and low river flows considerably reduce the energy output of the plant, exposing the people of Belize to the high on-peak Mexican prices. ...”

The MRUSF would considerably improve the situation.” (pages 3-4 of the PJ)

8. The PJ reaches the following conclusions:

“In order to meet growing energy needs, Belize will have to increase its power generation capabilities in the short-term and in addition compensate for any energy shortfall that could result from termination or

reduction of supply from Mexico when the current contract expires. Over the years, BEL has been using different methods for power generation and proposes to meet energy needs with different tools one of which being hydropower. The decision of BEL to present through BECOL the MRUSF project to the people of Belize is based on the following key issues:

- 1) The MRUSF is presently the most economical option for generating power within Belize.*
- 2) The MRUSF is both technically and economically viable and will maximise the hydroelectric power generation of the Macal River that the Mollejon dam started to harness in 1995.*
- 3) The MRUSF would help decrease energy reliance on outside sources.*
- 4) The MRUSF offers flexibility to BEL that will translate into better overall service to its customers.*
- 5) The MRUSF offers significant flood control benefits to downstream stakeholders.*

As with any other power generation option, it does entail environmental and social impacts. These are the subject of the full MRUSF EIA of which this Project Justification forms part. It is the objective of the EIA to detail the consequences (positive and negative) and to propose a strong Project Management Plan (PMP) to help offset and reduce negative impacts to acceptable levels, where feasible.”

9. The EIA, which was 1500 pages long, was placed in public libraries throughout Belize from 28 August 2001 in accordance with Regulation 21 of the EIA Regulations and has remained at the public libraries. Following three meetings held on 24 October 2001, 8 November 2001 and 9 November 2001, the members of the NEAC voted 11 to 1 to recommend that the DOE give environmental clearance to the MRUSF, subject to the preparation and completion of an Environmental Compliance Plan (ECP) in which binding conditions for Environmental Clearance of the project

would be set out. The sole dissenting vote was from the Appellant's representative on NEAC.

10. In a letter dated 10 December 2001, Ismael Fabro, the Chief Environmental Officer at the DOE, wrote to BECOL to convey the decision of the NEAC (see exhibit to Lynn Young's Affidavit of 24 July 2002 at 302, Volume 1 of Extracts from the Record (**EFR**)). He stated as follows:

"The Department of the Environment in the Ministry of Natural Resources, Environment, Industry & Commerce, hereby informs you that after several sessions by the National Environmental Appraisal Committee (NEAC) to review the Environmental Impact Assessment for the proposed Macal River Upstream Storage Facility, Environmental Clearance has been recommended. At a meeting on November 9, 2001, the NEAC voted 11 to 1 in favour of granting Environmental Clearance for implementation of this hydroelectric project, upon the signing of an Environmental Clearance Plan (ECP) by the Belize Electric Company Ltd (BECOL).

The ECP is currently under preparation and will include mitigation measures recommended in the EIA, other measures proposed by the NEAC and also items discussed with you. Upon completion, the ECP will be forwarded for your review and if in agreement, for signing. After signing the ECP, the Environmental Clearance letter will be issued by the Department of the Environment to Belize Electric Company Limited (BECOL)."

11. On 5 April 2002 the DOE granted Environmental Clearance to the project following the signing of an ECP. The letter from Ismael Fabro dated April 5 2002 (exhibited to the Affidavit of Lynn Young dated 24 July 2002 at 303, Volume 1 EFR) stated:

“Please be informed that Environmental Clearance is hereby granted to Belize Electric Company Limited for a hydroelectric project (Macal River Upstream Storage Facility). This Environmental Clearance is granted subsequent to the signing of the Environmental Compliance Plan (ECP) prepared by the Department of the Environment (DOE) on April 5, 2002.

Kindly be informed that Belize Electric Company Limited is required to comply with all the terms and conditions incorporated in the Environmental Compliance Plan. Disregard of any of the terms and conditions stipulated in the compliance plan will result in the revocation of Environmental Clearance and/or legal actions being taken against Belize Electric Company Limited.

No changes or alterations to what has been agreed to in the ECP will be permitted without the written permission of the Department of the Environment...”

The judicial review proceedings

12. BACONGO’s opposition to the MRUSF is longstanding and predates the submission of the EIA by more than a year. In her affidavit of 8 February 2002 (at 67-73, Volume 1 EFR), Jamillah Vasquez states that BACONGO is comprised of nine member organisations, all mainly concerned with conservation of the environment. She explains that BACONGO has worked *‘diligently for more than two years...to provide a reasoned technical analysis of the [MRUSF] project and to generate an open discussion about energy options for Belize.’* She also states that *“BACONGO engaged a coalition of international environmental organisations from the United States and Canada in order to create an atmosphere for open discussion of the projects, and to support BACONGO’s advocacy for energy alternatives.”* At paragraph 11 of her affidavit, she states:

“Based on the studies we commissioned and analysis provided by the world-renowned experts, the membership of BACONGO has determined that this project will not provide the best energy solution for the country and would destroy an important natural and cultural treasure that is reproduced nowhere else in Belize or in the world.”

13. It is clear therefore that it is BACONGO’s firm belief that the MRUSF should not be constructed at all. Ms Vasquez goes on to explain that BACONGO has gone to great lengths to engage both the government and Belize Electricity Limited to consider other energy options. These lengths include, as the affidavit of Lynn Young dated 30 April 2002 (282-288, Volume 1 EFR) demonstrates at paragraph 5, numerous form letters sent to the President of the Fortis Group, the majority shareholders of BECOL, calling for the cancellation of the MRUSF.

14. In a letter dated 25 January 2001 (exhibited to Jamillah Vasquez’ Affidavit of 8 February 2002 at 253- 257 of the Record) ten organisations from the USA and Canada, including the National Resources Defense Council, wrote to the President of the Fortis Group, H Stanley Marshall, urging him to withdraw from the MRUSF and referring to 20,000 letters, postcards, emails and faxes which had been sent to him from individuals concerned by his investment in the project. That letter listed a number of reasons why Fortis should abandon the MRUSF including the flooding of forests in protected areas, damage to endangered species and the possibility of the dam exacerbating water quality problems for downstream communities. The letter concluded:

“If you decide to press ahead with this high-risk and uncompetitive hydro scheme, we expect Fortis Inc and the Canadian government....to uphold the highest international standards for environmental assessments, including full disclosure, a public scoping process and public review.

The most prudent approach, however, would be for Fortis Inc to abandon the Chalillo hydro-electric dam scheme without further delay.”

15. Ms Vasquez states (paragraphs 34-6 of her Affidavit at 70, Volume 1 EFR) that, following the submission of the EIA to the DOE on 24 August 2001, BACONGO asked the National Resources Defense Council (NRDC) to prepare comments on the EIA, and that NRDC’s extensive comments were contained in a report dated 23 September 2001 delivered to the DOE and each member of the NEAC.
16. On 27 February 2002 BACONGO commenced judicial review proceedings against the decision of NEAC to recommend environmental clearance to MRUSF. That challenge was later expanded to a challenge to the decision of the DOE on 5 April 2002 to approve the MRUSF.
17. The main thrust of the challenge to the DOE’s decision which BACONGO is maintaining before the Privy Council is, as its skeleton argument for its application for an interlocutory injunction states at paragraph 95, that:
 - (i) it was unlawful to approve an EIA where there were significant gaps in the required information and reliance on future assessments,
 - (ii) it was unlawful to approve an EIA when the requirements of Regulation 20 for a public hearing had not been complied with.
18. These arguments equate roughly to Grounds 3 and 4 of the Amended Grounds of Review at 12-23, Volume 1 EFR. On the first of these two arguments, in his judgment of 19 December 2002, Chief Justice Conteh concluded as follows (at paragraphs 60-61, 557-597, Volume 2 EFR):

“I am satisfied on the evidence on this issue, that the applicant’s complaint cannot be sustained. It is to be remembered these are judicial review proceedings, and I am not as the judge entitled to substitute my own judgment in place of the decision taken. The Court’s role is to ensure

that the decision complained against was not taken in breach of the requirement of the law. Here, the weight of the evidence of the members of NEAC, the body charged by law to review and advise on all EIAs is that they reviewed the EIA in question, and after some deliberation decided to recommend it, with the condition stated to the DOE.

The EIA may or may not be the perfect EIA, this is not a matter for this Court to decide. The body charged with that responsibility has come to its own deliberate conclusion on this issue. However, a perusal of the five volumes of the EIA in question here would show that it addressed the requirements of Regulation 19 as well as the pertinent provisions of section 20 of the Act on EIA.

Accordingly therefore, I do not think that the charge by the applicant that NEAC's decision and therefore that of the DOE on the EIA, was unreasonable or irrational, is made out. Certainly it falls a long way short of Wednesbury's sense of unreasonable."

19. Conteh CJ adopted observations made in two judgments, Prineas v Forestry Commission of New South Wales 49 LGRA 402 and Bow Valley Naturalist Society and BANF Environmental Action and Research Society v Minister of Canadian Heritage, John Allard Acting Superintendent for Kootenay, Yoho, and Lake Louise Field Unit of Parks Canada and Canadian Pacific Hotel Incp (2001) FCA 642-99 on the correct approach to be taken by the courts when reviewing the decisions of public authorities to approve environmental statements (paragraph 62).

20. On the second of BACONGO's arguments, Conteh CJ held that the DOE could and should hold a Regulation 24 public hearing despite the fact that it had made a decision on 5 April 2002 (paragraph 76). He refused the application to quash the decision of 5 April and instead made a mandatory order that the DOE hold a public hearing (paragraph 79). He stated that the outcome of the public hearing might or might not affect the decision of the DOE, but that if the project were to proceed the

information presented at such a hearing might assist the developer to comply with its responsibilities (paragraph 80).

21. Conteh CJ concluded (in relation to all BACONGO's grounds of review before the Supreme Court), that neither the Act nor the Regulations were disregarded in such a fashion, if at all, as to render the DOE's decisions so flawed, tainted or unreasonable that the court was warranted to step in and quash the decision of 5 April 2002 (paragraph 81).

The judgments of the Court of Appeal of Belize

22. BACONGO then appealed to the Court of Appeal of Belize. The Court of Appeal was asked to consider ten grounds of appeal against the judgment of Conteh CJ (see amended Notice of Appeal at 785-798, Volume 3, EFR). For the purposes of this appeal to the Privy Council, it appears from the BACONGO's skeleton for the interlocutory hearing that BACONGO is only challenging the Court of Appeal's decision in respect of three of those grounds: Grounds 3, 4 and 8. Grounds 3 and 4 related to the adequacy of the EIA. Ground 8 related to the decision of the DOE not to hold a public hearing.
23. The Court of Appeal reached the following conclusions on those grounds, in three separate judgments (see 672-730, Volume 2 EFR). We set out the grounds and the Court of Appeal's conclusions on each below.

Ground 3

“A complete EIA is an indispensable condition for a project to proceed. Having found that section 20 of the Act and section 26 of the Regulations provide the whole purpose and rationale of the EIA regime, the learned trial judge erred in law in failing to find that on a true construction of the Act and the Regulations, a project or activity could not, as a matter of law, proceed if the EIA required in connection therewith was not complete, was inadequate or failed to comply with the Act and the Regulations”.

24. Rowe P concluded that: *“The appellant has rightly submitted that this Court should adopt a purposive approach in its construction of the Act and the Regulations ..and to hold that neither the NEAC nor the DOE is*

entitled to grant environmental clearance for this project without having first received a complete EIA and evaluating it for adequacy and compliance with the Act and the Regulations. The appellant contends that an EIA is not complete if there are gaps in it which require further information and likens the situation in the present case to that of R v Cornwall County Council ex parte Hardy [22 September 2000 QBD]. In that case one of the conditions on which planning permission was granted required the applicant to undertake further nature conservation surveys and to prepare appropriate mitigation measures. Harrison J held that it was incumbent upon the planning authority to await the surveys before it granted planning permission. It could not mean that every time there is a gap in the knowledge of the developer and those preparing the EIA on his behalf, the EIA could not be considered complete or adequate. Conteh CJ declined to be bound by that decision and I do not dissent from his decision¹.” (paragraph 23)

25. Rowe P held that if an EIA was developed according to approved Terms of Reference and addresses all the minimum requirements of Regulation 5 and section 20(2) and (3) of the EPA, that EIA would be ‘facially complete’ for the purposes of the EPA. He concluded that the EIA was complete at the time it was submitted by BECOL to the DOE.

26. Mottley JA agreed with Rowe P. Carey JA stated that once an EIA complied with section 20 (2) and (3) of the EPA and Regulation 5 of the EIA Regs, it was complete and adequate. He observed that the powers, duties and functions of the DOE were set out in section 4 EPA but there

¹ Conteh CJ in his judgment of 19 December 2002, at paragraphs 22-32 (568-572, Volume 2 EFR), analysed in detail the scheme of the Environmental Protection Act (CAP 328- Revised Edition 2000) (“**EPA**”) and the Environmental Impact Assessment Regulations 1995 (“**EIA Regs**”), compared it with the legislation in the UK, and concluded that “*Instructive as the issues and decisions of these two cases [R v Cornwall CC ex parte Hardy and Berkeley v Secretary of State for the Environment [2001] AC 603] are, I do not think however, that given the scheme for the enforcement and fulfilment of environmental impact assessment provisions available in the UK, they are of direct applicability or assistance to Belize.*” (paragraph 30).

was no power given to the DOE to approve projects, activities or undertakings. He continued (paragraph 23) “*Howsoever that may be, there can be no question but that an EIA is a necessary factor in the scheme of the Act. Environmental approval is necessary (section 20(1)) as otherwise the developer who fails to carry out such assessment, would commit an offence (sec. 22).*” It is important to note that he concluded that, as the Court was not concerned with planning legislation, references to decisions from England based on such legislation were a pointless exercise.

Ground 4

“All necessary information was not before the NEAC. The learned trial judge misdirected himself in that he held as lawful an EIA which left material matters for future assessment, contrary to statutory obligations (Regulations 5(a) & (g) & (h)).”

27. Both Rowe P (with whom Mottley JA agreed) and Carey JA accepted the approach set out in *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402 which was as follows:

“An obvious purpose of the environmental impact statement is to bring matters to the attention of members of the public, the Department of Environment and Planning and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood. In order to secure these objects, the environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. ...in my opinion, provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity it meets the standards imposed by the regulations. The fact that the environmental impact

statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute or the regulations. In matters of scientific assessment, it must be doubtful whether an environmental impact statement as a matter of practical reality would ever address every aspect of the problem. There will always some expert prepared to deny adequacy of treatment to it and to point to its shortcomings or deficiencies.”

28. Rowe P conducted a detailed examination of the six areas in which BACONGO alleged that there were deficiencies in the EIA, geology, hydrology, archaeology, wildlife, plant species and involvement of inter-agency and public non-governmental organisations and concluded that:

- (1) There had not been an absence of complete and accurate geological data when the NEAC met and voted for environmental clearance (paragraph 37).
- (2) In the light of the expert evaluation of the hydrology of the project he saw no basis for characterising the decision of the NEAC to recommend clearance of the project as irrational (paragraph 41).
- (3) The multitude of wildlife issues dealt with in detail in the EIA made clear that this was not a cursory presentation by the developer to the DOE, but a fully considered and conscious effort to meet the requirements of the Act and Regulations. The NEAC and the DOE were in a position to weigh and take a decision on this and he found nothing irrational in their decision (paragraph 45).
- (4) The extent to which the matter of the archaeological and cultural heritage sites was treated in the EIA and considered by the members of NEAC who voted on the project indicates that at all levels there was a seriousness of approach and a desire to preserve the cultural heritage of Belize. He did not find anything

irrational in the decisions of NEAC and DOE in this matter (paragraph 48).

- (5) In the context of the Act and the Regulations the need for further studies identified in the mitigation measures did not render the environmental information incomplete nor did it cause the decisions of the NEAC and the DOE to be irrational (paragraph 57).

29. Carey JA stated that the EIA was not intended to be perfect in every way. It was designed to inform the decision-maker so that the environmental consequences could be properly understood. There could be no such thing as a complete EIA. The EIA with its inadequacies was before the NEAC and concerns were raised in that behalf. In the event the NEAC decided that mitigating and monitoring plans were to be submitted so as to be included in the ECP. Inadequacies could not convert an otherwise unexceptionable EIA into being unlawful. He stated therefore that he could not accept that the Chief Justice had misdirected himself (paragraph 33).

Ground 8

“A public hearing is an element in the democratic process of evaluating an EIA and must be held prior to any decision on the EIA. The learned Chief Justice erred in law in finding that an order for a public hearing can constitute sufficient remedy in the absence of the quashing of the decisions to approve the EIA.”

30. Rowe P held that Conteh CJ had erred in ordering the DOE to hold a public hearing. He held that if the DOE takes the provisions of Regulation 24(2) into consideration, it is at liberty in the exercise of its discretion to order a public hearing or to decline to order one (paragraph 72). He also stated, however, that since a public hearing was to provide assistance to the DOE and through it to the developer to better carry out its responsibilities, when a public hearing is considered necessary it should precede the grant of environmental clearance of an EIA (paragraph 74).

31. Mottley JA held that in deciding not to hold a public hearing as recommended by the NEAC, it did not appear that the DOE had taken into consideration the factors set out in Regulation 24(2) and consequently he held that the DOE acted unreasonably (paragraph 9). Nonetheless he stated that one of the factors which the Court should consider in deciding whether to grant certiorari and quash the decision was the impact on the needs of good administration. Balancing the interest of the appellant against the public interest, having regard to the fact that a public hearing as directed by the Chief Justice had taken place, he considered that this was a proper case where no order of certiorari should be made (paragraph 16).
32. Carey JA concluded that as the corrective public hearing had already been held and taken into consideration by the DOE this ground had been overtaken by events. He stated, however, that the holding of a public hearing was not mandatory and that in the instant case no further hearing had been warranted. (paragraph 49)

Legislative background

33. The law governing environmental impact assessments is set out at sections 20-23 of the Environmental Protection Act 2000.

34. Section 20 provides as follows:

(1) Any person intending to undertake any project, programme or activity which may significantly affect the environment shall cause an environmental impact assessment to be carried out by a suitably qualified person, and shall submit the same to the Department for evaluation and recommendations.

(2) An environmental impact assessment shall identify and evaluate the effects of specified developments on-

- (a) human beings;*
- (b) flora and fauna;*
- (c) soil;*
- (d) water;*

- (e) air and 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) An environmental impact assessment shall include measures which a proposed developer intends to take to mitigate any adverse environmental effects and a statement of reasonable alternative sites (if any) and reasons for their rejection.*
 - (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.*
 - (5) When making an environmental impact assessment, a proposed developer shall consult with the public and other interested bodies or organisations.*
 - (6) The Department may make its own environmental impact assessment and synthesise the views of the public and interested bodies.*
 - (7) A decision by the Department to approve an environmental impact assessment may be subject to conditions which are reasonably required for environmental purposes.*
 - (8) Any exercise of the powers of the Department under subsections (6) and (7) is an exercise of a disaster preparedness related power within the meaning of section 13(1) of the Disaster Preparedness and Response Act.*

35. Section 22 of the EPA provides that a person who fails to carry out an environmental impact assessment as required under the EPA or the EIA Regulations commits an offence.

36. Section 4 of the EPA governs the powers, duties and functions of the Department of the Environment. They include under Section 4(m):

(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.

And under section 4(w):

(to) advise on the effects of any sociological or economic development of the environment.

37. It is important to note the structural differences between the Belize legislation and the planning legislation in England and Wales. The DOE does not have any express power to grant planning permission as the planning authorities do under section 58 of the Town and Country Planning Act 1990 (the “**1990 Act**”), nor consequently does it have any duty to take into account any EIA prior to the granting of such permission.

38. The EIA Regulations are made under section 21 EPA which empowers the Minister to make regulations prescribing the types of projects, programmes or activities for which an environmental impact assessment is required and prescribing the procedures, contents, guidelines and other matters relevant to such assessment. The scope of these Regulations is therefore necessarily governed by section 21 EPA.

39. Regulation 4 of the EIA Regulations provides as follows:

(1) In identifying the environmental impact assessment process under these Regulations, the relevant significant environmental issues shall be identified and examined before commencing and embarking on any such project or activity....

40. Regulation 5 states that an environmental impact assessment shall include at least the following minimum requirements-

- (a) a description of the proposed activities;*
- (b) a description of the potentially affected environment, including specific information necessary to identify and assess the environmental effect of the proposed activities;*
- (c) a description of the practical alternatives, as appropriate;*
- (d) an assessment of the likely or potential environmental impacts of the proposed activities and the alternatives, including the direct and indirect, cumulative, short-term and long-term effects;*
- (e) an identification and description of measures available to mitigate the adverse environmental impacts of proposed activity or activities and assessment of those mitigative measures;*

(f) *an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;*

41. Regulation 6 states that, whenever the DOE decides that there is a need for an EIA on a project, the EIA shall include a screening of a project, a review by the NEAC as provided in Regulation 25, and the design and implementation of a follow-up programme.

42. Regulation 7 provides that certain types of projects and undertakings which are specified in Schedule I to the EIA Regulations will require an EIA, the scope and extent of which will be determined by the DOE. The MRUSF project falls within Schedule I.

43. Regulation 15 states that a developer must submit draft terms of reference (“**TOR**”) in writing to the DOE for the purposes of an EIA. Under Regulation 16 the DOE must examine the TOR to determine whether they are adequate and advise on any changes which it deems need to be made. Under Regulation 17 where the TOR have been agreed between the developer and the DOE, the developer must commence the EIA and submit it by the specified date.

44. Regulation 19 governs the content of an EIA Report. It states that a report shall include the following:

...

(g) *Significant Environmental Impacts. The data necessary to identify and assess the main effects which the proposed development is likely to have on the environment;*

(h) *A description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on:*

human beings; flora; fauna; soil; water; air; climate; material assets, including the cultural heritage and landscape; natural resources; the ecological balance; and any other environmental factors which need to be taken into account

(i) A presentation of all reasonable alternatives in comparative form, exploring each alternative, including the no-action alternative, and the reason why certain alternatives were recommended or eliminated. The object is to identify the least environmentally damaging alternative that satisfies the basic purpose and the need for the proposed action;

(j) Environmental consequences of the project as proposed, and the alternatives, identifying any adverse effects that cannot be avoided if the action is implemented, all mitigation measures to be employed to reduce adverse effects, the relationship between short term uses of the environment and the enhancement of long-term productivity, and any irretrievable or irreversible commitments of resources that would occur if the action were implemented as proposed;

(k) a mitigation plan;

(l) a monitoring plan;.....

45. Regulation 21 provides that:

(1) Upon receiving the environmental impact assessment, the Department:

...

(b) shall examine the environmental impact assessment or cause the same to be examined to determine whether it complies with the previously agreed terms of reference.

(c) shall examine the environmental impact assessment or cause it to be examined to determine whether:

(i) further environmental assessment is required; or

(ii) any significant harmful impact is indicated.

46. Under Regulation 22 (1) the DOE must advise the developer of its decision within 60 days after the completed EIA has been received. Regulation 22 (2) states that until the developer has been advised under 22 (1), it must not commence or proceed with the undertaking. Under Regulation 22 (3) where a developer is required to supply further or additional information in respect of the EIA then it shall not be deemed to have been completed until the developer has supplied this information to the satisfaction of the DOE.

47. Under Regulation 23 where the EIA is deficient in any respect, the DOE may on the recommendation of the NEAC require the developer to

conduct further work or studies, supply further information, amend the EIA accordingly and resubmit the EIA by a later date.

48. Regulation 24 provides as follows:

(1) The Department, on the recommendation of the National Environmental Appraisal Committee, may require a public hearing, in respect of any undertaking, project or activity in respect of which an environmental impact assessment is required pursuant to these regulations.

(2) In order to determine whether an undertaking, project or activity requires a public hearing, the Department shall take into account the following factors:

(a) the magnitude and type of the environmental impact, the amount of investment, the nature of the geographical area, and the commitment of the natural resources involved in the proposed undertaking, project or activity;

(b) the degree of interest in the proposed undertaking, project or activity by the public, the Department and other government agencies, as evidenced by the public participation in the proposed undertaking, project or activity;

(c) the complexity of the problem and the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity.

49. Regulation 25 states:

(1) There shall be appointed a National Environmental Appraisal Committee whose function shall be to:

(a) review all environmental impact assessments;

(b) advise the Department of the adequacy or otherwise of environmental impact assessment;

(c) advise the Department of circumstances where a public hearing is desirable or necessary.

...

50. Regulation 26 states:

- (1) *Every screening of a project and every assessment by the National Environmental Appraisal Committee shall include a consideration of the following factors, that is:*
 - (a) *The environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project by taking into consideration other projects or proposed projects that have been or will be carried out;*
 - (b) *The significance or seriousness of those effects;*
 - (c) *Comments concerning those effects received from the public in accordance with the provisions of these regulations;*
 - (d) *Measures that are technically and economically feasible that would mitigate or prevent any significant or serious adverse environmental effects of the project.*

- (2) *In addition to the factors set out in sub-regulation (1) of this Regulation, every environmental impact assessment of a project, program or activity and every assessment by the National Environmental Appraisal Committee shall include a consideration of the following factors:*
 - (a) *the purpose of the project;*
 - (b) *alternative means of carrying out the projects that are technically and economically feasible and the environmental effects of any such alternative means;*
 - (c) *the need for and the requirements of any follow-up program in respect of the project;*
 - (d) *short term or long term capacity for regeneration of renewable resources that are likely to be significantly or seriously affected by the project; and*
 - (e) *any other matter that the Committee at the request of the Department may require.*

51. Regulation 27 provides:

- (1) *Where the department has decided that an undertaking, project, or activity shall not proceed, the developer may, within thirty days after the Department's decision, appeal to the Minister against the decision of the Department.*
- (2) *The Minister may appoint a Tribunal to hear and determine the appeal and to report their findings to the Minister.*
- (3) *The Minister may allow the appeal and permit the project to proceed or may dismiss the appeal.*
- (4) *The Minister's decision shall be final.*

Submissions

Differences between UK and Belize legislation

52. The requirement for environmental impact assessments in UK legislation derives from Council Directive 85/337/EEC amended by Council Directive 97/11/EC (the “**Directive**”). The Directive has been held by the courts to have direct effect (see R v North Yorkshire County Council ex parte Brown [1999] 1 PLR 116). The requirements of the Directive were transposed (in 1988) into the law of England and Wales by regulations made under the European Communities Act 1972 and the Town and Country Planning Act 1971 (the predecessor to the Town and Country Planning Act 1990). The principal regulations transposing the Directive are now the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“**the UK Regulations**”), which apply to development projects for which planning permission is required.

53. Regulation 3(2) of those Regulations states that the relevant authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application for planning permission to which Regulation 3 applies unless they have first taken the environmental information into consideration. Regulation 3 applies to every application for planning permission for EIA development. EIA development is defined in Regulation 2 as development which is either Schedule 1 development or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

54. Regulation 30 of the 1999 Regulations provides that for the purposes of Part XII of the 1990 Act (validity of certain decisions) the reference in section 288 to action of the Secretary of State which is not within the powers of the Act (i.e. action liable to be quashed by the Court on an application under that section) shall be taken to extend to a grant of

planning permission by the Secretary of State in contravention of Regulation 3.

55. Environmental information is defined at Regulation 2 as the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development. An environmental statement is defined as a statement that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, and which includes at least the information referred to in Part II of Schedule 4.

56. Part I of Schedule 4 refers inter alia to:

- (3) *A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.*
- (4) *A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:*
 - (a) the existence of the development;*
 - (b) the use of natural resources;*
 - (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the applicant of the forecasting*

methods used to assess the effects on the environment.

- (5) *A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.*

57. These excerpts from the 1999 Regulations highlight significant differences between the English legislation on environmental impact assessments (the “**English legislation**”) and the legislation in Belize (the “**Belize legislation**”).

58. The most important difference for the purposes of BACONGO’s appeal is made clear by Regulations 3 and 30 of the 1999 Regulations. Regulation 3 imposes a duty on the planning authority to consider the environmental information before granting planning permission. Regulation 30 of the Regulations expressly provides that the grant of planning permission taken in contravention of Regulation 3 shall for the purposes of section 288 of the 1990 Act be taken to be outside the powers of the 1990 Act. This means that the grant of planning permission without consideration of the environmental information will be *ultra vires*.

59. Under the Belize legislation by contrast there is no equivalent provision linking the consideration of the environmental impact assessment to any grant of planning permission, and no provision stating that a failure to consider the environmental impact assessment will render any subsequent decision of the DOE *ultra vires*. Indeed the DOE does not have any express power to decide whether or not a development should go ahead, save while the evaluation of the EIA is underway.

60. There is in fact no express provision requiring the approval of the DOE for any particular EIA or the underlying project. Since, however, section 20(7) permits the DOE to impose conditions which are reasonably required for environmental purposes for its approval of the EIA, the assumption must

be that the DOE has an implied power under section 20 EPA to approve EIAs.

61. Regulation 21 of the Regulations requires the DOE to examine the EIA to determine whether further environmental assessment is required or whether any significant harmful impact is indicated. Regulation 23 of the EIA Regulations, meanwhile, states that the DOE **may** require a developer to conduct further studies, supply further information, amend the EIA and resubmit it if it is deficient in any respect. Regulation 4(1), states that the '*relevant significant environmental issues*' shall be identified and examined before commencing and embarking on '*any such project or activity*'. The combined effect of these three Regulations is that, since relevant significant environmental issues must be identified and examined before embarking on a proposed project or activity, if the DOE takes the view that deficiencies in the EIA mean that relevant significant environmental issues have not been identified and examined then it should normally require the developer to conduct further studies, supply further information, amend and resubmit the EIA.
62. There is, however, as Conteh CJ remarked at paragraph 24 of his judgment, no express provision in the Act or the Regulations that the decision as to whether a project should proceed or not will be determined by the adequacy or otherwise of the EIA, except that while the DOE's evaluation of the EIA is still taking place the developer may not commence or proceed with the undertaking (Regulation 22). If the developer were to do so he would be committing an offence (Regulation 28). Regulation 27 gives the developer a right of appeal against a decision of the DOE that an undertaking, project or activity shall *not* proceed.
63. The principal duty under the EPA and the Regulations, and the consequences of failing to comply with that duty, fall on the developer who is required by section 20(1) EPA to submit an EIA which complies with section 20(2) and (3) and Regulations 5, 6 and 19 of the EIA

Regulations, and whose failure to do so will be an offence under Regulation 28. The DOE's central duties under the Regulations are to examine whether an EIA is required, and if it is, examine the EIA to determine whether it complies with the terms of reference, whether further environmental assessment is required, or whether any significant harmful impact is indicated.

Illegality and Irrationality

64. BACONGO's challenge to the EIA is, as set out at paragraph 95 of its skeleton for the interlocutory hearing, that it was unlawful to approve an EIA where there were significant gaps in the required information and reliance on future assessments. As indicated above, the task of the DOE under the EPA and the EIA Regulations is to 'evaluate' the EIA in order to determine whether any significant harmful impact is indicated. The DOE's assessment of the adequacy or otherwise of the information provided and of whether or not it would be likely to have significant effects on the environment is therefore plainly subject to review on *Wednesbury* grounds only.

65. That this is the correct approach is confirmed by R v Cornwall County Council ex parte Hardy [2001] Env LR 25 at paragraph 56, R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env LR 22 at paragraphs 106-111, R v Rochdale Metropolitan Borough Council ex parte Tew and Others [2000] Env LR 1 at 29, and Berkeley v Secretary of State for the Environment [2001] 2 AC 603 per Lord Hoffmann at 614-615 where the approach the courts should take to decisions taken by local authorities or the Secretary of State under the English legislation was considered.

66. Hardy and Tew also state that under the English legislation, if the Secretary of State or the planning authority attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation they will have failed

to comply with article 4(2) of the EC Directive. As Waller LJ explained in Smith v Secretary of State for the Environment [2003] EWCA Civ 262 at paragraph 27, this is because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation *after* that opportunity has been given. Waller LJ quoted the following passage from Hardy which was itself a passage from Tew:

“The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in paragraph 2(c) of Schedule 3, and the reference to mitigation measures in para 2(d), that it is intended that in accordance with the objectives of the Directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken ‘in full knowledge’ of the project’s likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a ‘full knowledge’ of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Schedule 3, would conflict with the

public's right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive.” (Harrison J at paragraph 41)

67. These statements by the court are of limited relevance in considering this appeal. Whereas, as Harrison J makes clear, under the English legislation, the purpose of the regulations requiring the provision of environmental information is to ensure that a decision to grant planning permission is taken in full knowledge of the project's likely significant effects on the environment **as required by the Directive**, under the Belize legislation the purpose of the Regulations is different. They set out the procedure the DOE must follow and the factors it must consider when evaluating the EIA in order to “*make suitable recommendations to mitigate against harmful effects of any proposed action on the environment*” (section 4(m) EPA) and if necessary to impose appropriate conditions (section 20 (7) EPA).
68. As long as the EIA process leaves the DOE well-informed enough about the “*relevant significant environmental issues*” (Regulation 4(1) so as to be in a position to make those recommendations and impose any conditions as to its approval, then it will have fulfilled its function under the Regulations and the EPA. This is a critical difference between the UK and the Belize legislation. The question of whether the DOE is well-informed enough about those relevant significant environmental issues is a matter for the DOE to decide subject to review only on *Wednesbury* grounds.
69. It is also clear, on a fair reading of the Belize legislation as a whole, that it does not impose “hard-edged” legal requirements; rather, it requires the DOE to be satisfied of a number of matters which are “open-textured”. On well-established public law principles, both in assessing the adequacy of the EIA and in deciding whether or not to approve the EIA, the DOE's decision is therefore subject to review only on *Wednesbury* grounds (see *R v Monopolies Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 per Lord Mustill at 32). It would be inappropriate to

subject the DOE's decision-making process (or the views to which it led) to the approach that might be appropriate if this were an appeal on the merits of the views it reached. Where a decision has been entrusted by the legislature to an expert body, accountable to the public, and especially where that decision requires evaluation of matters of fact, degree and opinion, the court will rightly be slow to interfere with that body's judgment unless its views are irrational.

70. BACONGO argues that the DOE's decision to approve the EIA subject to the conditions set out in the Environmental Compliance Plan (ECP) was unlawful because there were gaps in the required information and reliance on future post-approval assessments (see paragraph 95 of its Skeleton for the interlocutory hearing). BACONGO's arguments amount to an attempt to import the EC Directive and UK planning legislation wholesale into Belize. BACONGO's approach largely ignores the fact that the enabling legislation for the EIA Regulations is the EPA **not** the European Directive. Indeed BACONGO stated in its skeleton argument before the Court of Appeal "*It is immaterial that Belize law does not reproduce, word for word, Regulation 3(2) of the United Kingdom regulations.*" (page 23)

71. BECOL submits that, on the contrary, the differences between the two legislative systems are highly material. It is clear that the EIA Regulations must be examined in their own legislative context, and while there are similarities between parts of the EIA Regulations and the 1999 Regulations, case-law examining the meaning and effect of those 1999 Regulations, and the principles which apply to them, should be treated with considerable caution.

Ground 1: Completeness of the EIA

72. BACONGO indicates in its skeleton for the interlocutory hearing at paragraph 12 that it intends to argue that the EIA was deficient in its assessment of the impact of the MRUSF in three areas: geology, the impact on plants and animals and the impact on archaeology. The nub of BACONGO's case is that the EIA was defective because it left over some matters for future assessment (see Grounds of Appeal 4.1 at 788, Volume 3 EFR). BACONGO's argument rests on Regulations 4, 5 and 19 of the EIA Regulations, and it seeks to rely on Smith and Hardy to show that the DOE's approval of the EIA, when, it claims, those Regulations were not complied with, was unlawful (see paragraphs 12 and 85 of BACONGO's skeleton for the interlocutory hearing). As indicated above, BECOL submits that since the finding of unlawfulness in Hardy concerned a statutory regime where the planning authority is required to consider specified information before granting planning permission to the development, the dicta of the court in relation to the consequences of failing to consider that information are of limited assistance here.

73. In the case of Hardy the planning authority had decided that further surveys should be carried out to ensure *inter alia* that bats would not be adversely affected by the development (paragraph 60). Harrison J held that, as bats were a European protected species, if they were found to be adversely affected by the proposed development it was an inescapable conclusion that such a finding would be a significant or main effect. The court held therefore that the planning authority had granted planning permission unlawfully because it could not rationally conclude that there were no significant nature conservation effects until it had the data from surveys. The court's conclusion was based on the fact that the need in Part II of Schedule 4 to the 1999 Regulations to provide a description of measures envisaged to avoid, reduce and if possible remedy significant adverse effects was necessarily contingent on whether there were significant adverse effects. If there were significant adverse effects and yet the environmental statement did not contain the required information

about mitigation measures then the planning authority would have granted planning permission without considering the information it was required to consider under the Regulations and the Directive before the grant of planning permission. It was on this basis that the court concluded, in a passage cited by the Court of Appeal in Smith, that an assessment of significant effects could not be left to the reserved matters stage.

74. Even in this statutory context, however, where the requirement is that the planning authority take their decision to grant planning permission in full knowledge of the likely significant effects of the project, the courts have recognised, as Tew and Hardy make clear, that the need for full knowledge does not mean that the environmental statement must contain every conceivable piece of environmental information about a particular project. The courts have also made clear that there is scope for argument about the extent to which details of mitigation measures may be left for subsequent approval (see Tew at 29).

75. It is furthermore significant that in both Tew and Hardy the matters which had been left to be resolved after the grant of planning permission were of considerable magnitude and importance. In Hardy, as explained above, the planning authority had entirely failed to consider the impact of the project on a species that was protected by a European Directive.

76. In Tew, a case which concerned the grant of outline planning permission, there was no description at all of the development proposed to be carried out, nor any description of its design, size or scale. Clearly therefore it was not possible to describe the proposed mitigation measures (at p 29-30). Sullivan J made it clear, however, that he did not want to rule out the adoption of outline plans. He stated: *“If illustrative floor space or hectareage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects.”*(p 30)

77. In Berkeley, another case on which BACONGO relies, the Secretary of State had failed even to consider whether an environmental statement was necessary.

78. By contrast, the matters which BACONGO complains have been left over for future assessment are, even on its own case, of a far lesser order as is made clear below.

79. Furthermore, Belize's EIA Regulations expressly contemplate that a lawful and satisfactory EIA may well leave certain matters for further resolution. Regulation 5 (a) requires that an EIA should include as one of its minimal requirements:-

“(f) An indication of gaps in knowledge and uncertainty which may be encountered in computing the required information.”

80. Equally, Regulation 19 (h) requires:-

A report of the environmental impact assessment shall include the following:-

(b) Summary. A summary of the proposed project, preferably not exceeding 15 pages in length, accurately and adequately describing the contents of the EIA report. The summary should highlight the conclusions, areas of controversy, and issues remaining to be resolved.

81. The question for the court to decide is therefore whether, against the specific legislative background in Belize, the matters which BACONGO complains have been left to future assessment render irrational the decision of the DOE to approve the EIA subject to the conditions set out in the ECP.

82. For the reasons set out below, BECOL submits that they do not.

Rare plants

83. BACONGO states in its skeleton for the interlocutory hearing at paragraph 98 that necessary assessments are unlawfully to be undertaken post-approval because the EIA states at page 186 of the Main Report that:

“Prior to construction, additional survey work will be undertaken to further identify the location and extent of plant species at risk in the reservoir area. Significant residual effects to plant species at risk are likely unless the success of the transplantation programme can be verified and implemented.”

84. The passage identified by BACONGO is taken out of context, and the first and second sentences come from different places in the text. The EIA considers rare plant species at pages 184-186 of the Main Report under the heading “*Plant species at risk*”. It states at 185:

“Plant species at risk known to exist in the Project area are listed in Table 6.8. Several individuals of these species would be lost during construction activities.Due to the rarity of these plant species, significant impacts are likely to occur from habitat alteration (eg clearing, grubbing) related to construction activities. Therefore, measures are identified to mitigate potential effects.”

85. The sentences identified by BACONGO come from a passage which addresses mitigation, not significant effects. That passage states:

“Transplantation of plant species at risk has been shown to have some success, however, the results of transplantation of species identified in Table 6.8 have not been proven. Prior to construction, additional survey work will be undertaken to further identify the location and extent of plant species at risk in the reservoir area. The results of those surveys will be used to develop a transplantation program, the goal of which will be to

propagate individuals of identified species for permanent relocation to suitable habitat in areas outside of the Project footprint. The specific details of the transplantation/ propagation program will be developed and tested by the Proponent in consultation with scientific expert, prior to construction.”

86. The passage concludes under the heading “Significance of residual impact”:

“Significant residual adverse effects to plant species at risk are likely unless the success of a transplantation program can be verified and implemented, prior to construction.”

87. BECOL submits that this passage is unambiguous in its assessment that there will be significant adverse effects on certain plant species from the construction. The surveys that will be carried out are to assess how successful mitigation measures in the form of a transplantation program will be. The EIA is also unambiguous in stating that the success of that program is unverified. The NEAC and the DOE are left in no doubt about the significance of the adverse effects, and the unproven nature of the proposed mitigation measures. There is no sense in which either the DOE or the general public whose comments were elicited under Regulation 20 could be said to have been unaware of the significant effects of the development on plant species, as the court found to be the case in Tew and Hardy. Indeed, as Sullivan J stated in Tew, in certain cases the details of mitigation measures may be left for subsequent approval. Here specific details of the mitigation measures have been left to be developed and tested. The essential elements and the risks involved are, however, clearly delineated in the EIA in full compliance with the EIA Regulations.

Geology

88. The minutes of the meeting of the NEAC held to consider the EIA on 8 November 2001 (256-262, Volume 1 EFR), demonstrate that the issue of geology was raised by the member of the Committee from the Geology and Petroleum Department (GPD) who was not satisfied that the geological information was accurate (Minute 3.04). Minute 3.05 states:

“A lengthy discussion on the geology of the site ensued. The member from GPD stated that although he disagrees with the naming and description of the rock type of the project area, he felt that the competency of the rock type that does exist there could withstand a dam. However, there would have to be changes to the engineering design to include proper grouting as well as other structural modifications to secure the dam.”

89. Minute 3.07 states:

“It was decided that the Chairman and the member from GPD would view the boring samples tomorrow and hold a teleconference with the geologists who conducted the EIA.”

90. The minutes of the meeting of 9 November 2001 (263-267, Volume 1 EFR) at which the NEAC voted to approve the project record as follows at 1.01:

“The Chairman presented a summary of the teleconference on geo-technical aspects of the project held earlier that day. He informed the NEAC that the cores were examined by the member from GPD. According to the member, there was the misidentification of some rocks by the EIA preparers. The member maintains the position that despite the additional information and explanation by BECOL that the rock referred to as ‘granite’ is in fact not granite. The member reiterated that he is not questioning the competency of rocks for the construction of the dam but

rather accuracy of the description of the rocks. The Chairman went on to say that the issue now appears to be a 'judgment call' of the geologist as geology, not being an exact science, allows for a difference of opinion. Other geologists will be brought in to do another assessment of the rock formation. In the event that the member from GPD's opinion proves to be accurate, then the issues with respect to adjustments of the engineering design will be addressed in the ECP. The chairman stated that the NEAC is not questioning the professional integrity of the EIA preparers or that of the member from GPD but the committee must ensure that accurate information is sought. The Chairman recommended that since the question on geology did not really affect the fact that the dam could be constructed that the NEAC should go ahead and make a decision."

91. These minutes make it clear that, while the member of the NEAC from the GPD considered that the rock type had been misdescribed as granite, he was not questioning the competency of the rocks for construction of the dam. Adjustments would need to be made to the engineering design, but the principle of construction would be unaffected. It was for this reason that the Chairman of the NEAC recommended that a decision should be taken and that issues relating to the engineering design should be addressed in the ECP.

92. BACONGO have attempted to paint this dispute over the geology of the rock as a dispute over the significant effects of the development (see BACONGO's skeleton for the interlocutory hearing at paras. 104-5 and BACONGO's Skeleton before the Court of Appeal (CAB skeleton) at page 823-5, Volume 3 EFR). BACONGO states that if the dam breaks because the foundation had fracture or fault lines nearby that would be a main effect. BECOL accepts that if the difference in geology identified by the member from GPD meant that despite alterations in the engineering design to accommodate that difference, there would be a greater risk of dam failure, this would be a significant effect. That was not, however, the evidence before the NEAC and it was not the evidence before the Supreme Court of Belize. The member from GPD who had questioned

the description of site geology expressly stated that he was not questioning the competency of the rocks for construction of the dam.

93. The EIA describes the geology of the area in which the MRUSF will be constructed at pages 72-80 of the Main Report (Chapter 4). Part 2, Volume I of IV, pages 1-18, of the EIA addresses the geology of the site in further detail under the headings “Geology and Geotechnics”, “Geotechnical Investigation Program”, “Regional Geology and Seismicity”, “Site Geology”, “Geotechnical Assessment”, “Construction Materials”, “Geotechnical Design Considerations” and “Future Investigations”. The EIA describes the dam design at page 46 of the Main Report (Chapter 3). In Chapter 6, the chapter of the Main Report which addresses effects of the development on the environment, accidental events and malfunctions and effects of the environment on the project are described at pages 234-239. Paragraph 6.6 states as follows:

“Hydroelectric development projects are subject to the nature of the environment in which they are located. The MRUSF Project will be exposed to a variety of topographical and climatological conditions. The proposed Project has been designed to mitigate effects of the environment on the Project (Chapter 3.0), however three specific concerns have been identified as potential concerns: the potential for sinkhole formation (karst geology); earthquakes/ induced seismicity; and sedimentation of the reservoir itself.”

94. Paragraph 6.5 states that *“..the Chalillo dam has been designed to satisfy current international dam safety requirements under all conditions of reservoir loading. This includes ensuring it could withstand the probable maximum flood, which has a risk of occurrence of less than 1 in 10,000 years. It has also been designed to resist failure under earthquake conditions in which a seismic coefficient of 0.2 g was adopted.”*
95. There is no indication in the EIA that this assessment of the significant effects on the environment of the project would be altered by a change in

the characterisation of the rock type. Nor indeed is there any indication in the passage from the World Commission on Dams report extracted at page 27 of BACONGO's CAB skeleton that the foundation problems which are the most common cause of failure in concrete dams are exacerbated by one rock type or another. As Rowe P put it in his judgment at paragraph 36: "*The difference of opinion between experts was not as to whether it was safe to build a dam on the site. The dispute was not as to whether a high dam as contemplated in the EIA design would be unsafe if the rock type was that asserted by the NEAC expert.*"

96. It was explicit in the minutes of the NEAC's meeting on 9 November 2001 that its recommendation of approval or "environmental clearance" to the project was conditional on adjustments being made to the engineering design of the project to accommodate any change in description of the rock type. It is implicit in the imposition of those conditions that any changed design would also result in the dam being '*designed to satisfy current international dam safety requirements under all conditions of reservoir loading.*' (paragraph 6.5 of the Main Report) If the adjustments were not made approval of the project would not be forthcoming.

97. As a result, the ECP signed by BECOL on 5 April 2002 (426-460, Volume 1 EFR) contained the following conditions relating to the geology of the dam (449-450, Volume 1 EFR):

"6.50 *Prior to construction, detailed engineering designs for the dam shall be submitted to Ministry of Works for review.*

6.51 *Also prior to commencement of dam construction, all additional geo-technical assessments conducted and associated with the implementation of the project shall be submitted with the detailed engineering designs. An additional copy of the geo-technical information shall be sent to the Inspector of Mines, Geology and Petroleum Department (GPD)*

- 6.51.1 *Additional geological assessment(s) agreed to in the meeting of February 7, 2002, including mapping, will be submitted within three (3) months of signing the ECP and prior to commencement of construction.*
- 6.51.2 *A team sanctioned by the Inspector of Mines, and agreed to by BECOL, shall carry out the geological mapping.*
- 6.51.3 *The geological findings of the Inspector's team shall be compiled as the Inspector's Report within fourteen (14) days of receipt of all findings to the Inspector of Mines. All such findings shall be analysed ref: rock type(s) vis-à-vis performance of such rocks by the competent and concerned agency(ies). Such findings shall be incorporated into the design and construction of the Chalillo Dam.*
- 6.51.4 *A copy of analysis of performance of rock type(s) identified in the area by AMEC and any other analyses relevant to rock in the area, and in the possession of BECOL, shall be lodged with the inspector within fourteen (14) working days of signing of the Environmental Compliance Plan."*

98. The Affidavit of Brian Holland submitted on behalf of the Appellant dated 11 April 2002 at 141-147, Volume 1 EFR, which criticises the EIA's description of the geology of the site, concludes at paragraph 37:

"It is my professional opinion that, as a minimum, two fundamental studies must be done to provide an adequate basis for designing the Chalillo dam, and evaluating its design. First the description of the core samples must be redone. Second the map of the construction site must be redone and a detailed geological map must be made of the full area contained in the footprint of the project."

99. As illustrated by the extracts identified above, the ECP clearly required BECOL to carry out both of these studies. Given that the DOE's approval of the project was conditional on BECOL complying with the terms of the ECP, BECOL submits that insofar as Brian Holland's affidavit contains any valid criticism of the EIA, that criticism is more than met by the terms of the ECP. As Rowe P stated at paragraph 33 of his judgment (685 Volume 2 EFR):

*“Express provision for the approval of an EIA by the DOE subject to conditions which are reasonably required for environmental protection is contained in section 20(7) of the Act. It is the statutory function of the NEAC to advise the DOE on the adequacy or otherwise of an EIA, pursuant to Regulation 25(1)(b) of the Regulations. In my view, this means that the NEAC is empowered to formulate conditions on which clearance for an EIA may be granted. The ECP which contained the conditions on which environmental clearance was granted was not before the trial judge but it was shown to us and I observe that it purports to have been made in pursuance of section 20(7) of the Act and relevant portions of the Regulations (not specified). **When therefore the NEAC was evaluating the EIA it had in mind the plenitude of its powers and could fully take into consideration all the concerns of the geology expert on the NEAC, the views of BECOL and the additional and continuing studies that BECOL would make. This was a case of making “good” better and not one of shutting the eyes of the assessors to patent dangers to the environment.**” (emphasis added)*

100. In the light of these factors, BECOL respectfully submits that the Privy Council should reject BACONGO's assertion that the Court of Appeal was wrong to conclude that the DOE's decision to approve the EIA, notwithstanding that the issue of rock type in the project area was outstanding, was not irrational.

101. BACONGO has also suggested in its skeleton for the interlocutory hearing (paragraph 105) that: *“if the dam will cost twice as much to build because a different, more expensive design must be used to deal with the different geological conditions, that is clearly a main effect.”* There is no foundation for the suggestion that the cost of building the dam is a main effect on the environment. It is furthermore not one of the issues the developer is called upon to include in the EIA under section 20 (2) or under Regulation 19.

Archaeology

102. BACONGO’s submissions in relation to archaeology are ill-founded.

103. The EIA contains at Volume IV of Part 2 an assessment of the archaeological resources in the area, including two reports, one entitled Baseline Data dated February 2000, and the other entitled the Final Report of The Archaeological Survey of the Chalillo-Mollejon Power Line Corridor dated 30 March 2001. The Survey of the Chalillo-Mollejon Power Line Corridor identified eight structures located in the corridor, concluded that they were considered cultural heritage and therefore had to be mitigated, and suggested two alternative types of mitigation measures involving either complete excavation and removal of the threatened cultural material or changing the route of the corridor so that it does not intersect with the cultural remains.

104. The survey dated February 2000, which concerned the main reservoir project area, sets out at page 3 the methods and materials which it used. It states that a selected sampling procedures was utilised to maximise the chances that the number and location of the sites in the survey area were representative of the overall project area. It concludes (page 10): *“The results of the studies in this area indicate that these sites are undocumented and no archaeological information is known about the settlement and historical data of this region. It can only be postulated that*

the Mayas were intensively using the resources of the area as is suggested by the numerous ancient settlements along the riverine flood plains.”

105. At Paragraph 6.2.3.6 of the Main Report, the EIA states:

“Heritage resources have been identified in the Project area in both the proposed reservoir area and along the power transmission line RoW. These resources include Mayan sites and areas of heritage resource potential.

The primary concern relating to heritage resources is the loss of site integrity. Impact to site integrity may result from disturbance of heritage features, the destruction of heritage features or the degradation of the cultural landscape. Construction related interactions with heritage resources may compromise site integrity as a result of one or more of the following Project construction activities: drilling and blasting; clearing and grubbing; and excavation.

Mitigation: The results of the archaeological investigations conducted as part of this EIA were forwarded to the Commissioner of Archaeology at the GOB. The Commissioner has not yet determined what mitigative measures are necessary. The Proponent will continue its consultation with the Commissioner to develop an appropriate mitigation plan for construction.

Significance of Residual Impact: Residual significant adverse effects are unlikely with implementation of an approved mitigation plan.”

106. Paragraph 6.3.3.4 makes the same comment in relation to the flooding of the project area.

107. In his affidavit dated 17 April 2002 (at 268-270, Volume 1 EFR) George Thompson, acting Archaeological Commissioner in the

Department of Archaeology in the Ministry of Tourism and Culture, described at paragraph 5 the discussions that his department had relating to the archaeological data presented in the EIA. He stated that the department found that the archaeological remains in the area were not of the magnitude of Belize's major archaeological sites. He continued at paragraph 6:

"I considered the archaeological information in the EIA a random sampling of mounds existing in the area. It was the view of the Archaeology Department that we would need to know the extent of the settlements in the area to determine population size and we would need an archaeological sampling of the mounds to determine levels of activity and period of occupation. We felt, however, that the compilation of this information could be addressed in the Environmental Compliance Plan (ECP). With this in mind we agreed that money should be set aside in the ECP for a more systematic survey and sampling through Archaeological excavation and documentation of the existing archaeological remains."

108. The ECP contains at Section 1.0 (428, Volume 1 EFR) a comprehensive section on archaeology. It provides that further archaeological surveys will be carried out in the impoundment area with an accredited archaeologist as part of the supervision team, and all findings reported directly to the Department of Archaeology (DOA). It states that BECOL must ensure that excavation of sites or structures identified by the Archaeologist as being worthy of being excavated is conducted under the supervision of the DOA.

109. BECOL submits that the identification of the effects on archaeological sites in the EIA was more than adequate to meet the requirements of the EIA Regulations. The NEAC and the DOE were well aware of the risks to ancient heritage sites when they approved the EIA, and imposed strict conditions on BECOL to mitigate the effects of the

project on those sites, which included carrying out further surveys and excavation as appropriate. The surveys and excavation of the area were to be supervised and overseen by the DOA.

110. It is important to note the introduction to the ECP (427, Volume 1 EFR), which states that: *“This compliance plan is a dynamic one and shall be reviewed and revised from time to time as the project develops and if more information becomes available which demonstrates that the original information was materially deficient or erroneous, it being the intent to be fair to all parties including the developer. Any substantive change to this compliance plan must first be approved by the National Environmental Appraisal Committee before coming into effect.”*

111. This passage illustrates the control which the DOE maintains over the development even after the signing of the ECP, and its ability to alter the conditions appropriately. Archaeology is necessarily an area where more information will come to light about archaeological remains in the course of preparation of a site for development, and in the course of construction. The ECP has fully provided for the protection of heritage sites which are revealed before, during and after construction. BECOL submits that the decision of the DOE to approve the EIA subject to conditions as stringent and flexible as those contained in the ECP, can hardly be described as irrational.

112. BECOL submits that the Court of Appeal was right to conclude that: *“The extent to which the matter of the archaeological and cultural heritage sites was treated in the EIA and considered by the member of NEAC who voted on the project indicates that at all levels there was a seriousness of approach and a desire to preserve the cultural heritage of Belize,”* and that there was nothing irrational in the decisions of the NEAC and DOE.

Hydrology; Wildlife; mitigation measures

113. BACONGO's complaints in relation to the consideration of hydrology, wildlife, and mitigation measures are not highlighted in its skeleton for the interlocutory hearing, and it is not clear whether BACONGO will be pursuing them before the Privy Council, and if so on what basis. BECOL submits that the Court of Appeal's reasoning at paragraphs 37-45 (at 687-691, Volume 2 EFR), and paragraphs 50- 57 (at 692- 695, Volume 2 EFR) in relation to each of these areas was incontrovertible. The NEAC and the DOE reached a conclusion that the EIA was adequate in each of these areas. The fact that BACONGO or experts instructed by BACONGO disagree does not render the DOE's decision irrational. BECOL submits that the information provided in the EIA in each of these areas clearly meets the criteria identified in the passage in *Prineas* set out above at paragraph 27, namely:

- (1) *to bring matters to the attention of members of the public, the Department of Environment and Planning and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood.*
- (2) *sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. ...*
- (3) *comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity.*

114. Given that the Regulations themselves require a developer to identify “issues remaining to be resolved”, “gaps in knowledge” and areas of “uncertainty” in the EIA document it is difficult to see how an EIA which recognizes the existence of, and identifies such issues can be regarded as defective in law, still less irrational.

Conclusion on Ground 1

115. BECOL submits, in the light of the above, that the decision of the Court of Appeal that the DOE had not acted unlawfully in approving the EIA subject to the conditions contained in the ECP was correct.

116. In each of the areas claimed by BACONGO to be deficient, the relevant significant environmental issues were identified and examined (Regulation 4), an assessment of the likely or potential environmental impacts of the MRUSF and the alternatives was made (Regulation 5 (e)), the measures available to mitigate the adverse environmental impacts were identified and described (Regulation 5 (e)), and where there were gaps in knowledge these were indicated (Regulation 5 (f)). BECOL submits that there was more than enough information to identify and assess the main effects of the MRUSF (Regulation 19 (g)) and to enable the DOE to impose the stringent conditions contained in the ECP as permitted by section 20(7) of the EPA. Unlike in Hardy and Tew there is no sense in which the DOE made its decision to approve the MRUSF in ignorance of the significant effects of the project on the environment.

Ground 2: Public hearing

117. BACONGO maintains in this appeal its claim that the failure to hold a public hearing before the decision to approve the MRUSF was taken is unlawful.

118. As was highlighted at the hearing before the Privy Council in July 2003, a public hearing was held pursuant to the order of Conteh CJ. That hearing was attended by over 400 people, and the DOE took their views into account (see Draft Affidavit of Eric Fairweather and Affidavit of Elson Kaseke dated 17 November 2003).
119. There was some disagreement between the judges in the Court of Appeal and the Supreme Court in relation to the interpretation of the requirements in the EIA Regulations relating to public hearings. BECOL submits that the proper approach is as follows.
120. The EIA Regulations give the DOE a discretion as to whether to hold a public hearing. Regulation 24(2) sets out the criteria which must be considered in deciding whether to hold a public hearing. It does not, however, oblige the DOE to hold a public hearing if certain criteria are met. The DOE's decision not to hold a public hearing can therefore only be impugned on grounds of irrationality.
121. There is, furthermore, no requirement in the EIA Regulations to hold the public hearing before a particular date or even before a decision to approve the EIA if the DOE does decide to require a public hearing. It is significant that the NEAC's functions include advising the Department on the adequacy of the EIA and on the circumstances where a public hearing is necessary. There is no suggestion that the public hearing must be held as a component in the process of assessing whether the EIA is adequate or not. Indeed Regulation 24 (2) (c) identifies the purpose of the hearing as *"..the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity."*
122. The NEAC, as is made clear from its minutes of 9 November 2001 at 2.01 (265, Volume 1 EFR), recommended that public consultations be held after it had arrived at its decision to recommend approval of the EIA.

123. Given the level of public consultation on the MRUSF project, as highlighted in the Minutes of the NEAC of 9 November 2001 at 1.05 (at 264, Volume 1 EFR), and the Affidavit of Dawn Sampson (at 321-388, Volume 1 EFR) BECOL submits that the decision of the DOE not to hold a public hearing despite the recommendation of the NEAC cannot be characterised as irrational. The DOE was entitled to form the view, having taken into account the factors set out in Regulation 24(2), that a public hearing was not required in this case.

124. In any event, as set out above, a hearing has now been held, and the DOE has taken into account the views of the public expressed at that hearing. Since there is no requirement in the EIA Regulations for a public hearing to be held prior to a decision approving the EIA, BECOL submits that BACONGO's submission that the decision of the DOE to approve the EIA should be declared unlawful and quashed on this basis is unsustainable.

125. Even if the Privy Council accepts both of BACONGO's arguments in relation to the holding of the public hearing, namely that the decision not to hold a public hearing was irrational, **and** that the EIA Regulations intend that a public hearing be held prior to the taking of a decision on approval of the EIA, BECOL submits that, given that the Privy Council has a discretion as to whether to grant the relief sought and to refuse relief where it considers that considerable disadvantages would flow from granting that relief (see Clive Lewis, Judicial Remedies in Public Law (2nd ed., 2000) at 11-003 and 11-035; R v Monopolies and Mergers Commission ex parte Argyll Group PLC [1986] 1 WLR 763 at 774; and R. v Brent LBC Ex p. O'Malley (1998) 30 H.L.R. 328 at 381-2), the following factors militate strongly against the grant of the relief sought by BACONGO:

- (1) A public hearing was in fact held many months before construction on the MRUSF began;

- (2) The DOE has stated that it took the results of that hearing into account;
- (3) The project has already been subject to considerable delay (see paragraphs 4 and 18 of the judgment of the Privy Council on the interlocutory application);
- (4) A decision to quash the DOE's decision in order to hold a public hearing would cause severe disruption and significant loss (see paragraph 40 of the judgment of the Privy Council on the interlocutory application) and would be likely to result in the abandonment of the MRUSF altogether (see Affirmation of Razi Mireskandari of 29 July 2003, paragraph 26);
- (5) The disadvantages to the government and people of Belize from quashing the decision of the DOE for what at this stage would amount to a procedural breach of the EIA Regulations would be out of all proportion to the benefits to be gained from quashing the decision in order to hold the public hearing prior to any decision being taken.

Conclusion

126. For the reasons set out above, BECOL urges the Privy Council to dismiss this appeal.

RABINDER SINGH QC
MICHAEL YOUNG SC
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18 November 2003