

6.0 Relevancy of Factors

It is illegal for a public decision making body to fail to take relevant factors into account, or to take irrelevant factors into Account in its decision making process.

6.1 This principle is an element of the doctrine of ultra vires.

See Supperstone & Goudie, Judicial Review

Paragraph 5.35 and 5.38

“It is difficult to deal with these aspects of the ambit of judicial review of discretion at a level which extends beyond platitudes. It is almost self evident that the repository of a discretion must, in deciding whether or how to exercise its power, take into account all the considerations which the law categorises as relevant, and not be influenced by those considerations categorized as irrelevant. Equally it must act only for purposes acknowledged as proper for the particular discretion by relevant law, and must not be motivated by improper purposes or act in bad faith.”

6.2 Assessments of relevancy must be within the limits of reason.

R. v. State for Environment, ex parte Hammersmith and Fulham LBC [1991] 1 A.C. 521 597 [1990]3 All E.,R. 589

Lord Bridge: “ if there are matters which, on the true construction of the statute conferring discretion, the person exercising the discretion must take into account, disregard of those legally relevant matters or regard of those legally

irrelevant matters will lay the decision open to review on the ground of illegality.”

6.3 The statutory considerations which NEAC must take into account when reviewing an EIA are set out in regulation 26 of the Regulations.

6.3.1 In respect of regulation 26(1)(a) it is submitted that:

6.3.1.1 NEAC failed to give consideration to the fact that *“The riparian (riverine) floodplain habitat in the Project area (as characterized by: mid-elevation altitude, along fast flowing streams, extreme (flash) flood levels, highly herbaceous vegetation and undisturbed by people) appears to be a unique vegetation type, extremely rare within the Belizean context.”* (It occupies about 0.5 per cent of the area of Belize.)

See EIA, Main Report, Vol. VI page 183; failed to give consideration to the fact that *“The approach to the river at Chalillo site is characterized by steep slopes and dense pine/oak forest. In addition the riparian forests are major migratory routes for fauna and are the preferred habitat for various wildlife species in the dry season. The scenic attractions along this waterway have long been recognized and are now becoming important to the local ecotourism industry.”* See EIA, Main Report Vol. VII, 7.2.3.4

And by these omissions, NEAC failed to give consideration to the effect of the dam on this natural habitat for the various flora and fauna of the region.

6.3.1.2 NEAC did not consider the cumulative effect on the environment of the Chalillo Project along with the development of Caracol as a tourist attraction.

6.3.1.3 Neither did NEAC consider that side by side with the flooding of 9 square kilometers the Chiquibul National Park would be the devastation reeked on the Pine Ridge by the bark beetle.

6.3.2 The Evidence

Candy Gonzalez deposes to the fact that at the NEAC meetings, *“the discussion of potential effects from the dam project was very cursory.”* See **paragraph 104 of affidavit dated 9th February 2002.**

6.3.3 **Paragraph 105:** *“The entire discussion of wildlife impacts lasted for about 5 minutes.”*

Paragraph 106: *“The Chief Environmental officer dismissed the report in the EIA by the Natural History Museum, saying that they (NHM) really overstated their case and that it was likely they were ‘pushing an agenda’.”*

There was no further mention made of the NHM Report.

6.3.4 An examination of NEAC minutes for 24 October, 8 and 9 November 2001 will show that:

6.3.4.1 NEAC deliberated without scientific or practical information about the effects of the dam, what benefits the dam would bring (if any). The minutes show a meandering and highly superficial consideration of the issues involved.

6.3.4.2 No discussion of or reference made to the cumulative effects mentioned in 6.3.1.2 and 6.3.1.3 above.

6.3.5 The Report of the Natural History Museum (NHM) can be found in the EIA under its own heading. It is not the complete report. 54 pages out of 105 pages. See Further affidavit of Ambrose Tillett dated 11 April 2002, at paragraph 11. It is, in our submission, essential reading for the Court.

6.3.6 The “*Executive Summary*” portion of the NHM Report is at pages 272 – 282 hereof.

6.3.6.1 This report is a “Preliminary Report on the Scientific and Biodiversity value of the Macal and Raspaculo Catchment–Belize. It is an assessment of the wildlife impact and was submitted to AMEC on 24 May 2001. The cover letter from Prof, Richard Bateman that “*NHM believes that this report constitutes the*

best body of data currently available on the wildlife in the area.”

6.3.6.2 Prof. Bateman says, further, that a further document with additional information was gathered by NHM after the report was submitted to AMEC and is available upon request.

“Nonetheless, it is our considered opinion that even this expanded body of data is insufficient on which to base a sound decision regarding the possible construction of the MRUSF.”

6.3.7 The conclusions of the Report of the Natural History Museum (NHM) are as follows:

6.3.7.1 Ecological Status and Importance of the Macal/Raspaculo Watershed

- *“This study confirms that the area contains a rare and discrete floral floodplain habitat, classified as ‘riparian shrubland in hills’ (Meeran 1999) which acts as both a conduit and critical habitat for resident and non-resident fauna and avifauna.”*

... we conclude that:

- *“the remoteness and strongly seasonal hydrodynamics of the Macal and Raspaculo watershed make it one of the most biologically rich and diverse regions remaining in Central America.”*

- *“A seasonal shortage of food in the region for both herbivores and carnivores means the relatively rich flood source for many species during the dry season. It is also a key staging post for many bird species migrating to and from North America.”*
- *“We confirm that the watershed provides an important habitat for many endangered vertebrate species of international value, including: Jaguar, Ocelot, Margay, Otter, Baird’s Tapir, Morelet’s Crocodile.”*

Of which the first-named 5 are rare in Belize with the IUCN status as vulnerable and the last named one is rare in Belize with IUCN status as endangered.

6.3.7.2 The summary continues that the Significant Predicted Impacts are:

- *“The immediate loss of 70-80% of critical habitat (riparian shrubland) for local populations of Baird’s Tapir and the Scarlet Macaw during the dry season.”*
- *“Similarly a loss of 20-22% of critical habitat for Baird’s Tapir, Morelet’s Crocodile and Scarlet Macaw during the wet season.”*
- *“More critically, loss of ca. 80% of the unique riparian shrubland habitat in Belize; also the*

loss of 22.5 km (ca. 75%) of riverine habitat on the Macal and loss of 18 km of riverine habitat on the Raspaculo.”

6.3.7.3 For these reasons the project is likely to cause:

- *“significant and irreversible reduction of biological diversity in Belize, initially at the population level but later potentially at the species level, some of the species affected being of international importance.”*
- *“fragmentation of the proposed Mesoamerican Biological Corridor.”*
- *“rapid reduction in the already endangered population of the Scarlet Macaw subspecies (*Ara Macao cyanoptera*), leading to population inviability and probable eventual extirpation from Belize.”*
- *“reduction in nutrients and essential biological debris materials that facilitate the productivity of downstream ecosystems.”*
- *“negative impacts on biodiversity and ecological interactions extending well beyond the dam and its impoundment.”*
- *“serious negative (and probably long-term) accumulative impacts from illegal hunting and settlers as a result of increased access to the*

area caused by improved roads and more navigable waterways.”

6.3.7.4 The report recommends that there are alternative sites for the dam which should be considered

“Several tributaries in the Mountain Pine Ridge have been identified that, if dammed, could potentially supply the required volume of water to the existing dam at Mollejon, reducing the impact otherwise caused by inundation of the floodplain habitat and associated wildlife.”

6.3.7.5 *“It will not be possible to mitigate against the long-term impacts on the biodiversity of the catchment, particularly those associated with habitat loss, if the dam is constructed as planned. Equally, it will not be possible to mitigate against the impacts at a broader regional level.”*

6.3.8 In respect of regulation 26 (1) (c) the NEAC did not consider comments concerning the effects of the Project on the environment received from the public.

6.3.8.1 The Evidence

Candy Gonzalez deposes **in paragraphs 121 to 123 of her affidavit** that comments from the public were not discussed by NEAC:

“121: I asked the Chief Environmental Officer to see the comments that had been sent in to the Department from the public and why comments had not been considered.”

“122: The Chief Environmental Officer replied with words to the effect that “nobody asked to see the comments” or that “the folder (containing comments) was there if anyone wanted to see it.”

This affidavit of Candy Gonzalez is at pages 198-209 hereto.

6.3.8.2 Ismael Fabro acknowledges that the DOE received and compiled files of the said comments. See paragraph 11 of I.F. dated the 30th of April 2002. However, he does not say that these comments were considered by NEAC as a part of its deliberations on the EIA.

6.3.8.3 It is not being suggested that NEAC was obliged to read 10,000 letters from the local and foreign public on Chalillo. However, NEAC received comments of substance which NEAC ought to have considered in its deliberations.

6.3.8.4 For example, NEAC received substantial presentations from the Natural Resource Defence Council (NRDC), from BACONGO, and from Ambrose Tillett. In the Jamillah Vasquez affidavit of 8 January 2002 she describes at **paragraphs 31 through 58** all the reports and letters sent by BACONGO to NEAC, including those mentioned herein.

6.3.8.5 Substantial in the sense of thorough evaluations of the EIA and helpful to NEAC.

For example, had NEAC considered the presentation of Ambrose Tillett, it would have been in a far better position to evaluate:

- (1) the effect of the dam on water quality and thus to evaluate effective mitigation measures.
- (2) Those alternatives to energy production which were rejected by the EIA.

6.3.8.6 For example, at pages 10 - 14 of Tillett's report he explains the process which creates the ammonia and the mercury in dam waters. Had NEAC members considered this, they would have been in a better position to decide if partial clearance or any clearance of the reservoir area should have been requested.

6.3.8.7 For example, at pages 4 to 6 of Ambrose Tillett's report he analyses the costs of electricity and clarifies about bagasse as a source of energy:

“Bagasse – fired cogeneration was screened out (not considered a viable option) because they claimed that the plant would only be able to produce electricity during the grinding season. Of course, GE was privy to previous reports like the 1990 Renewable Energy Study prepared by the then BEB, which clearly showed that bagasse can be stored to provide year-round capacity to the grid”.

6.3.8.8 For example, in the NRDC report at pages, 11, 14 & 15, the EIA's claim that Chalillo will control flooding in San Ignacio and Benque is discussed and the distinction made between a flood-control dam and an energy generating dam. In the latter water is kept in the reservoir at the optimum level and will not control flooding at the height of the rainy season. Therefore the alleged flood control benefit promoted by the developer is illusory.

The NRDC Report is at pages 283 -330 hereof.

The Tillett Report is at pages 248 -276 hereof.

6.3.8.9 NEAC did not discuss the comments from those members of the public in the geographical area of the Dam which were collected in the EIA. Had NEAC

reviewed the Public Consultation text of the EIA Main Report page 78, they would have readily seen that the public had voiced several concerns. And, as stated in that Report, the public consultation was to inform the public about the dam and “*to identify issues and concerns held by residents and business owners in the region.*”

6.3.9 NEAC did not consider alternative means of supplying Belize’s energy needs as required by regulation 26 (2) (b).

6.3.9.1 The information upon which to base such consideration was absent from NEAC’s meeting. **As minuted in meeting of 24th October 2001 at 3.10:**

“.....It was suggested also that Government should start to look at promoting the other forms of energy instead of determining whether one excludes the other. This activity should demonstrate how these different sources compliment each other.”

6.3.9.2 A proper consideration of alternative means of supplying Belize’s energy required an examination of the developer’s assertion that to meet additional energy needs “*the generation source selected must be the next least cost option.*”

6.3.9.3 BECOL maintains that the “*Least Cost Generation Study*” done in 1998-1999 by GE Power Systems (GE) concluded:

“(a) the most economic plan for BEL is to pursue hydro expansion at Chalillo, with the construction of the Dam and powerhouse upstream of Mollejon, but with an Independent Power Producer (IPP) making most, if not all, of the capital investment. This is assuming that the existing rate structure for energy purchases from the IPP would be the same as the present rate structure with BECOL.”

6.3.9.4 On 25th October 2001 Candy Gonzalez asked Icilda Humes to request from BECOL a copy of: “*The full GE Report, as they keep referring to it.*”

See paragraph 44 of Candy Gonzalez’s affidavit, which exhibits her letter of request as ‘CG9’.

6.3.9.5 **In paragraph 52** of Candy Gonzalez affidavit she deposes to this:

“52. I requested the full GE Report, a document cited often in the Project Justification, and the basis that the EIA used to claim that the MRUSF would be the least cost electricity option of those considered.”

- 6.3.9.6 Candy Gonzalez also asked for the contract for current power purchase agreement for energy from Mollejon.
- 6.3.9.7 The GE Report was never provided to NEAC members. None of the Agreements requested by Candy Gonzalez (representing BACONGO on NEAC) were supplied to NEAC.
- 6.3.10 NEAC did not consider the complete incapacity of the Maya archaeological sites to regenerate after being flooded. Neither did NEAC consider the annihilation of wildlife species.
- 6.3.10.1** With regard to the archaeological sites to be flooded, the information upon which to make an evaluation was not before the NEAC. One only has to look at the contradictions in the affidavit of George Thompson dated 17 April 2002, representing the Archaeology Department, who states in one breath that, from reviewing the EIA and past studies in the Maya Mountain region, he was able to determine that the sites were not large. While in the next breath he states that the Archaeology Department held the view that it needed to know the extent of the settlements and the size of the mounds in the area to determine population size, levels of activity and period occupation.

6.4 To Summarize:

6.4.1 It is submitted that the minutes of the NEAC meetings and the affidavits of Candy Gonzalez (BACONGO's representative on NEAC), show that when considering the EIA, NEAC members had insufficient information about the vast scientific and technical aspects of a dam project.

6.4.2 NEAC members questioned certain environmental issues, but against a deficient EIA, were not able to, and therefore did not, take into account the considerations required by regulation 26.

6.4.3 NEAC members did not consider the unequivocal conclusions drawn by the Natural History Museum Report that:

(1) there would be significant and irreversible reduction of biological diversity in Belize as a result of the project;

(2) alternative sites are available along tributaries of the Macal River in the Mountain Pine Ridge that would not cause inundation to the flood plain habitat.

7.0 Irrationality

A public authority must act within the confines of what is reasonable.

Associated Provincial Picture Houses Ltd. v.

Wednesbury Corporation (1947) 2 AU ER 680

Lord Greene MR:

“The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them.”

- 7.1 It is submitted that with the deficiencies of the EIA and the flaws in the entire process, no public authority would have approved the EIA.

7.2 **The Evidence**

Had NEAC considered the Public Consultation Text of the EIA, it would have been apparent that when the developer met with members of the public in the geographic area of the dam, including the villagers of Cristo Rey, its purpose was to promote the Project by presenting only those benefits, as perceived by the developer.

7.2.1 The provision of information, as required by Regulation 18 (a), includes, it is submitted, the negative aspects of the Project. As stated in the Consultation Text, the public sanction of the Project is not the objective. The objective is to provide information about the Project, and such information should be full, complete and balanced.

7.2.2 The Public Consultation Text shows that the public were very much concerned about public health issues, that the cost of electricity should go down as a result of the project, and BECOL's monopoly status.

7.2.3 The developer's information programme failed to inform the public of much, if not all, of the information available to NEAC in the NHM, Tillet and NRDC reports, namely:

- (1) The Mollejon Dam is operated to optimal energy productivity during peak time (without a Chalillo)
- (2) With a Chalillo dam in place, Mollejon will continue to be optimized for peak energy production. If Chalillo comes in, the energy benefits at peak time will be marginal. Of the extra production from the combined facilities, only 1 in 14 will be peak energy;
- (3) The excess energy from Chalillo would have to be purchased by BEL because of the priority dispatch clause in the 3rd Master Agreement for use in off-peak times at a price which is substantially higher than the price for Mexican off-peak energy;
- (4) the result is that electricity rates will not decrease;
- (5) the water quality of the Macal River will deteriorate significantly;
- (6) fish will be contaminated;
- (7) ecotourism in that area of the Cayo District will be adversely and irreversibly affected;
- (8) for Chalillo to be operated to generate electricity, the water level in the dam would need to be kept at optimum height throughout the year. For Chalillo to be operated as a flood control dam, water would be released during

the dry season in order to prepare for the extra water anticipated in the rainy season. This is directly opposite to the purpose of Chalillo.

See pages 4, 6, 10 & 14 of Tillett's report

See pages 11, 14, & 15 of NRDC's report

7.2.4 This information was never given by the developer. In its deliberations NEAC should have considered these omissions.

7.3 The EIA comprised 1,500 pages. An examination of the document will show a labyrinth of volumes, sections, graphs, maps – a veritable hotchpotch of sections and volumes, all with different pagination.

7.3.1 Joseph Sukhnandan describes it in his affidavit dated 30th of April 2002, **paragraph 22:**

“22 *“Some of the copies prepared by the Angelus Press had pages missing. The EIA is voluminous comprising some 1,500 pages and BECOL was not aware that pages were missing from some of the copies.”*

7.3.2 Ismael Fabro, Chairman of NEAC, gave members this voluminous document on 29th August 2001, and began deliberations on 24th October 2001, a period of seven weeks later.

7.3.3 Ismael Fabro at paragraph 31 of his affidavit of 30th April 2002 says that all NEAC members were to examine the EIA for collective review and assessment to begin in October 2001.

7.4 Similarly, the DOE prescribed 30 days for public review of this voluminous document.

See paragraph 12 of Candy Gonzalez's affidavit 9th February, 2002.

7.4.1 The EIA was put out for public review with missing pages.

7.4.2 This is acknowledged by Joseph Sukhnandan at paragraph 22 of his affidavit, as aforesaid.

7.5 To Summarize:

7.5.1 The factors which the NEAC should have considered, but which they failed to consider, include:

- (1) the public consultation was conducted by the developer from the perspective of promoting the Project, rather than from the perspective of disseminating information about the Project
- (2) To avoid this bias, the DOE ought to have, as a part of the evaluation process, prescribed the procedure for public contact and involvement between BECOL and the relevant public in the

area of the proposed dam, as required by Regulation 18(4) of the Regulations.

- (3) With the length of the EIA and the complexity of the issues involved, thirty days for public reading was manifestly unreasonable;
- (4) The Report of the Natural History Museum indicated that further studies during the wet season and later in the dry season for at least three target species of wildlife were necessary, and recommended that a *“far more thorough and long-term integrated study of all potential sites for both options is pursued.”*
- (5) the fact that the geological findings of the EIA were challenged by one of NEAC’s own members, and by the report of Brian Holland which was submitted to NEAC.
- (6) The absence of Terms of Reference (approved in writing by the DOE) against which to evaluate the EIA.

7.5.2 The omissions in the EIA, the flaws in the evaluation process, have produced a decision which is irrational and unreasonable in the Wednesbury sense, and therefore illegal.

8.0 Bias

A decision will be quashed if there is a real danger of bias. In R v. Gough (1993) 2 All ER 724, cited in

Supperstone and Goudie at paragraph 9.10, “*the House of Lords held that in cases of apparent bias, whether concerning justices, members of inferior tribunals, jurors or arbitrators, the same test is applicable, namely, on ascertainment of facts pointing toward bias, whether there was a “real danger” of bias concerning the relevant member of the tribunal in question; and that, when bias is alleged on the part of an advisor, there is the further question, whether there was a “real danger” that the advice had influenced his decision.*”

- 8.1 The issue of bias was thoroughly dealt with in the Locabail Case [2000] A.C. p. 451
See pages 109 – 155 hereof. It is submitted that this case is essential reading for the Court on the matter of bias.
- 8.2 Regulation 25 (2) of the Regulations constitutes NEAC, with the Chief Environmental Officer or his nominee, being a member, Regulation 25 (3) places the Chief Environmental Officer as the Chairman of NEAC, “*and in his absence, the members present may elect a Chairman for that meeting.*”

- 8.3 Section 3 of the Act creates the Department of the Environment to be headed by a public officer to be known as the Chief Environmental Officer.
- 8.4 In the second affidavit of Ambrose Tillett dated 11th April 2002, **he deposes in paragraph 7** to the fact that *“GOB and Fortis Inc., the parent Company of BECOL and BEL agreed to the terms of the 3rd Master Agreement on January 23rd, 2001 and the fact that this Agreement had been reached was posted on the Fortis Inc. website – www.fortisinc.com.”*
- 8.5 In the third affidavit of Ambrose Tillett dated 17th May, 2002, **at paragraph 22**, he exhibits the page from the Fortis Inc. website which proves his statement and that it occurred not on 23rd January 2001, but on 26th January 2001.
- 8.6 **At paragraph 25**, Ambrose Tillett also deposes to the fact that BEL’s Annual Report for 2001 states that on 1st April 2001, BEL borrowed US \$14,896,212 to purchase transmission lines for BECOL. This agreement to purchase is another of the main considerations in the 3rd Master Agreement.
- 8.7 **At paragraph 19**, of Jamillah Vasquez’s affidavit dated 8th February 2002, she exhibits the text of a

television interview by the Prime Minister in which he says in relation to the Chalillo Project that “*We are very much committed to it We are satisfied that based on all the studies so far, that the environmental impact is very limited in terms of whatever so called damage that will be caused to the environment.*” This interview was in early 2001.

8.8 **At paragraph 25** of Candy Gonzalez’s affidavit dated 9th February 2002 she deposes to the State of the Nation Address on 18th September 2001, in which the Prime Minister indicated his Government’s approval of the Chalillo dam project “*as the best alternative for Belize’s energy security.*”

8.9 And then Ismael Fabro, the Chairman of NEAC, swore and filed an affidavit on behalf of the Government on 26th February 2002, in which he advocates that the Court should refuse leave for Judicial Review of NEAC’s decision because to grant leave would prejudice the interest of the Government, in view of the investment it made after the approval of the Environmental Impact Assessment.

8.10 It is submitted that there is/was a real danger of bias on the part of Ismael Fabro as the Chairman of NEAC who presided over the evaluation of the EIA, based on:

8.10.1 the public endorsement of the Chalillo Project by the Government which had appointed Ismael Fabro to his post as a civil servant of the Crown.

8.10.2 Ismael Fabro's stance at NEAC meetings which was, it is submitted, to secure approval as quickly as possible, notwithstanding that the statutory time of 60 days only began after a complete EIA was received, and a complete EIA had not been received on 29 August 2001.

8.10.3 Ismael Fabro's action in swearing an affidavit on behalf of the Government in respect of a matter where the decision of a committee of which he is the Chairman is being challenged.

9.0 To Summarize:

9.1 The Doe exercises its duty "to examine and evaluate" an EIA (as set out in Section 4(m) the Act) through NEAC who reviews the EIA and advises the DOE on the EIA's adequacy and otherwise (as set out in regulation 25).

- 9.2 The duty of the DOE to examine the EIA or cause it to be examined (reg. 21(b) and (c)) is exercised when the DOE brings the EIA to NEAC.
- 9.3 The DOE and NEAC cannot be separated in the evaluation process. In this regard, the failures of the DOE are the failures of NEAC, and vice versa. It is submitted that in the contents of the Act and the Regulations, the DOE could only approve a project if the NEAC gives the given light.
- 9.4 When the DOE acting through NEAC, reviews an EIA to see if it complies with previously agreed TOR's, whether it is complete and in compliance with the law, whether further environmental assessment is required, and whether any significant harmful impacts are indicated, it is required either to approve the EIA or reject the EIA. Without this approval a developer cannot begin or proceed with its project (Section 22 (2) of the Act)
- 9.5 The decision when made, is not a decision to approve the EIA because it includes all the items which it should include according to Section 20 and

regulations 19 and 20; or a decision not to approve the EIA because it does not include all the requirements of the Act and the Regulations.

9.6 It is a decision on whether the project can go forward without doing irreversible uncompensatable damage. This can only come from weighing the environmental impact of the project against its benefits.

9.7 It is submitted that it has to be this way, or else the authority the DOE acting through and in concert with a merely technical exercise – going through an EIA to see if it includes all that it should as far as the law is concerned. Which would mean that a project with devastating environmental effects would have to be approved once it's format and content comply with the law.

9.8 It is submitted that NEAC did not follow procedural requirements nor the scheme of the Act and the regulations. It is also submitted that NEAC acted ultra vires the Act and regulations both in procedure and in substance.

10.0 **Chronology of Events**

10.1 29 Aug. 2001 : NEAC members receive copy of EIA

