

**REPUBLIC OF TRINIDAD AND TOBAGO**

**No. EA3 of 2002**

**BEFORE THE ENVIRONMENTAL COMMISSION**

**IN THE MATTER OF THE ENVIRONMENTAL  
MANAGEMENT ACT, 2000 AND THE CERTIFICATE OF  
ENVIRONMENTAL CLEARANCE RULES, 2001**

**BETWEEN**

**TALISMAN (Trinidad) PETROLEUM LTD.**

**Appellant**

**AND**

**THE ENVIRONMENTAL MANAGEMENT AUTHORITY**

**Respondent**

**Appearances:**

**For the Appellant: Mr. Mark Morgan, Dr. Rajendra  
Ramlogan, Mr. Jeffrey Herrera**

**For the Respondent: Mrs. Gayatri Badri-Maharaj,  
Miss Naveeta Sawh**

**CORAM: Justice Zainool Hosein  
Dr. Eugene Laurent,  
Dr. Judith Gobin**

## **J U D G M E N T**

The facts as disclosed from the Appellant's affidavit are that:-

1. Talisman Trinidad Petroleum Limited (the Appellant) is a wholly owned subsidiary of Talisman Energy INC., which is a large diversified oil and gas producer with its head office in Calgary, Alberta, Canada. The Appellant is a limited liability Company and is registered as an external Company under the provisions of the Companies Act., Chapter 81:01. Its principal office is situated at Suite 551/552, Hilton, Trinidad and Conference Centre, Lady Young Road, Port of Spain, Trinidad.
2. By a Deed of Licence dated 22<sup>nd</sup> July 2002, made between the Republic of Trinidad and Tobago represented by His Excellency the President of the Republic of the first part, the Minister of Energy and Energy Industries of the second part, and Petroleum Company of Trinidad and Tobago Limited (Petrotrin) and the Appellant of the third part, the Appellant was granted an exclusive licence and liberty during the continuance of the Licence and subject to the provisions thereof to search and bore for and get petroleum in and under land comprising 43,843 hectares in the wards of Cocal, Charuma, Ortorie, Trinity and Guayaguayare in the Counties of Nariva and Mayaro (the licensed area)
3. Pursuant to a joint operating agreement between Petrotrin and the Appellant, the Appellant has been appointed the operator and has agreed to carry out the work programme under Clause 4 of the Deed of Licence.
4. The acquisition, processing and interpretation of three-dimensional seismic data is a requirement of the work programme. In order to satisfy this obligation it is necessary for the Appellant in its capacity as operator to design and perform a three dimensional seismic survey in relation to the licensed area.

5. The said seismic survey is an activity which falls under Item 24 of the Schedule to the Certificate of Environmental Clearance (Designated Activities) Order, 2001. Accordingly under Section 35 of the Environmental Management Act 2000 (the Act) the Appellant was required to apply for and obtain a Certificate of Environment Clearance (CEC) under the Certificate of Environmental Clearance Rules 2001 (CEC Rules) before proceeding with the same.
6. In order to make an effective assessment of the hydrocarbon potential of the licensed area, the Appellant has identified a 374 square kilometre area (the survey area) for the said seismic survey. A 32 square kilometre portion of the survey area (the Overlap Area) falls within the Nariva Swamp, as the same is defined in the Schedule of the Forests (Prohibited Areas) Order 1993, the Bush Bush Wildlife Sanctuary as defined in the first Schedule to the Conservation of Wildlife Act Chapter 67:01, and the Nariva Wind Belt Reserve as the same is defined in Appendix 7 to the Schedule to the (now lapsed) Forests (Prohibited Areas) Order 1999.
7. Of the Overlap Area, 5 square kilometres lie within the Wet Land proper while the remaining 27 square kilometres lie largely within the said Nariva Wind Belt Reserve.
8. On the 8<sup>th</sup> July, 2002 the Appellant duly applied to the Environmental Management Authority (Respondent) for a CEC in respect of a seismic survey over the Overlap Area (the “Seismic Survey”). This application (“the Application”) was made in association with another application seeking a CEC in respect of a seismic survey within the remainder of the Survey Area. (Appellant’s Exhibit No. 5).
9. Further under cover of a letter of 17<sup>th</sup> July, 2002, the Appellant submitted a detailed map showing the proposed seismic grid and a relevant satellite image. (Appellant’s Exhibit No. 16).
10. The Respondent formally acknowledged receipt of the Application under an Acknowledgement of Application dated 24<sup>th</sup> July, 2002 which, inter alia, requested further information by way of a more detailed demarcation of the area of the Seismic Survey (which information had already been provided under the Appellant’s letter of 17<sup>th</sup> July, 2002 referred to above).

11. By letter dated 6<sup>th</sup> August, 2002 to the Appellant, the Respondents indicated that it was unable to grant the CEC applied for. (Appellant's Exhibit No. 18), and on 27<sup>th</sup> August, 2002 the Respondent issued a Notice of Refusal to Issue a Certificate of Environmental Clearance ("the Refusal") in respect of the Application which was served on the Appellant's representative on 28<sup>th</sup> August., 2002. (Appellant's Exhibit No. 19).

The Refusal is in the following terms:-

“

**THE CERTIFICATE OF ENVIRONMENTAL CLEARANCE  
RULES, 2001 (Rule 7(1)(b))**

**THE ENVIRONMENTAL MANAGEMENT ACT, 2000  
(Section 36(2))**

**NOTICE OF REFUSAL TO ISSUE**

**A CERTIFICATE OF ENVIRONMENTAL CLEARANCE**

The Environmental Management Authority hereby refuses the application of  
:-

**Talisman (Trinidad) Petroleum Limited  
Talisman Suite (Room 551 & 552)  
Hilton Trinidad and Conference Centre Lady Young Road,  
Port of Spain**

To carry on at **Nariva Swamp**

The undermentioned designated activity (**Activity 24 of the CEC  
(Designated Activities) Order, 2001**)

**3-Dimensional Seismic Survey**

for the following reasons:-

- (a) The proposed activity occurs within the Nariva Swamp which is designated for inclusion in the Ramsar List of Wetlands of International importance under the Convention on Wetlands (The Ramsar Convention, Iran, 1971). The Criteria which qualify the Nariva Swamp for this designation include:

it is a particularly good representative example of a natural or near-natural wetland, characteristic of the appropriate biogeographical region;

it supports an appreciable assemblage of rare, vulnerable or endangered species or subspecies of plant or animal, or an appreciable number of individuals of any one or more of these species or threatened ecological communities.

it is of special value as the habitat of plants or animals at a critical stage of their life cycles.

it regularly supports substantial numbers of individuals from particular groups of waterfowl, indicative of wetland values, productivity or diversity.

The clearing and removal of vegetation, noise and other disturbance associated with the proposed activity have the potential to negatively impact the above criteria for designation of the Nariva Swamp as a Wetland of International Importance. In addition they may change the ecological character and functions of the Nariva Swamp.

- (b) Trinidad and Tobago's obligations under this Convention include:

-To formulate and implement planning so as to make 'wise-use' of wetlands, whether or not they

are included in the List of Wetlands of International Importance; the Conference of the Contracting Parties has approved guidelines on how to achieve wise use.

One of the fundamental guidelines for wise use under this Convention is as follows:

“Activities affecting wetlands need to be governed by the ‘precautionary principle’. In other words, if the impact of specific actions is not clearly understood, then these actions should be prohibited even if there is insufficient evidence to prove a direct link between the activities and resulting wetland degradation.”

In this instance, the precautionary approach must be adopted since the proposed activity may lead to the contravention of Trinidad and Tobago’s obligations to make ‘wise use’ of the Nariva Swamp.

The Nariva Swamp is to be designated an Environmentally Sensitive Area based on the fulfillment of the requirements laid out in Schedules I, II and III of the Environmentally Sensitive Areas Rules, 2001. The criteria for this assessment of the Nariva Swamp are as follow;

Under Schedule I – The Nariva Swamp is a protected area under an International Convention, namely the Ramsar Convention;

Under Schedule II – The protection of the Nariva Swamp is important for the conservation of natural resources and protection of the environment; sustainable economic and human development and logistic support such as environmental education and information sharing.

Under Schedule III – The Nariva Swamp and Bush Bush Wildlife Sanctuary are Prohibited areas under the Forests Act and Bush Bush is a Game Sanctuary under the Conservation of Wildlife Act.

- (a) The National Wetland Policy of Trinidad and Tobago states that the “Wetlands of Trinidad and Tobago will be protected, managed and restored in order to sustain and enhance their ecological and socio-economic values and function for current and future generations.
- (b) The Nariva Swamp Ramsar Site and the Bush Bush Wildlife Sanctuary are Prohibited Areas under the Forests Act, Chap. 66:01;
- (c) The Bush Bush Wildlife Sanctuary is declared as a Wildlife Sanctuary under the Conservation of Wildlife Act, Chap. 67:01;

The Nariva Swamp is therefore protected under the aforementioned legislation and policy of Trinidad and Tobago and the proposed activity would be in contravention of the intent and purpose of the said legislation and policy

Date of issue 27 August , 2002

Environmental Management Authority  
**Managing Director.”**

The Appellant filed a Notice of Appeal against such refusal by the Respondent and set out therein some twenty-three (23) grounds. Before us, however, only five (5) matters were pursued.

The first ground argued by Mr. Morgan was that relating to the Ramsar Convention and the designation of Nariva Swamp as a Ramsar site, the only one in the Caribbean. The importance and significance of this is not to be minimized, and care must be exercised to avoid imperilling the continuance of its designation as aforesaid.

In “An Overview of the World’s Ramsar Sites” by Scott Frazier the author refers to the Fifth Conference of the Contracting Parties to the Ramsar Convention (1993) held in Japan, and refers to the challenges and commitments of contracting parties in conserving and ensuring the sustainable use of wet lands. Wet lands are known to be important for a host of varied reasons. They are natural storehouses of biological diversity and provide the life-support systems for much of humanity. They play a vital role in sediment and erosion control, flood control, maintenance of water quality and abatement of pollution, maintenance of water supply, including ground water and support for fisheries.

Wetlands contribute to climatic stability through their roles in global water and carbon cycles, grazing and cultivated lands are often wet land-dependent. Educational, scientific and recreational opportunities abound in wet lands. The author also notes that the tide of wetland destruction and degradation flows on in most parts of the world as non-sustainable development and human population pressures continue to escalate.

The author postulates that humanity depends on the sustainable use of wet lands. As wet lands or wet land functions are lost so the opportunities for sustainable development disappear. It is therefore obligatory that contracting parties to this convention fulfill their two obligations, namely:-

1. to designate wet lands of international importance as Ramsar sites in order to assure their conservation in perpetuity, and
2. to make wise use of all wetlands in their territory through a wide range of interactive policies, programmes and activities.

And in “Implementation of the Ramsar Convention in Trinidad and Tobago”, the RSPB (Royal Society for the Protection of Birds Sabbatical

Report by Dave Pritchard, December 1977), Bill Phillips, the Deputy Secretary General of the Ramsar Convention Bureau in his Foreword to the said Report had this to say:-

“In the few years since joining the Ramsar Convention, (April 1993), Trinidad and Tobago has been a lesson in pro-activity which many other countries could learn from and especially the other Small Island States. Dave Prichard uses the words “enthusiasm” and “courageous” several times to describe the actions of the Government of Trinidad and Tobago and this is well justified. He also notes that they have “set a commendable example in a short space of time, by making full use of some of the main measures which Ramsar participation offers:

Regional and International collaboration, a National Wetland Committee, a National Wetland Policy, the Montreux Record, the Management Guidance Procedure and the Small Grants Fund”.

In the summary of conclusions and recommendations of the Report, the author was able to perceive in relation to National Wetland Policies at page 5, among other things, that “even a seemingly comprehensive measure like the Trinidad and Tobago Environmental Act is not a complete rationalization of measures for nature conservation and protected areas, and the draft National Environmental Policy does not show linkages leaving this to other documents. Policy and legislation should visibly and reasonably promptly be followed by “real world” implementation and enforcement.” .....

Mr. Morgan did not say anything which may be construed as a derogation of the status and importance of Nariva Swamp as a Ramsar site and its continued designation as such, but submitted that although the Ramsar Convention was subscribed to by the Government of Trinidad and Tobago, it was not embodied into the laws of Trinidad and Tobago, since there was no Act of Parliament incorporating it into the local laws. There is that unmistakeably serious lapse and it is trite law that while the convention will be binding upon the Government of Trinidad and Tobago as a signatory thereto, its terms cannot be enforced unless they are brought locally into effect by local enactment.

It is to be noted that the Ramsar site is mentioned in Schedule I of the Environmentally Sensitive Areas Rules (ESA Rules) 2001 and it is therefore

to be taken into account as a Ramsar site, however, neither the Ramsar site nor the Nariva Swamp has been designated as an Environmentally Sensitive Area pursuant to the ESA Rules. Until so designated, the Respondent cannot say that there is an absolute prohibition under the ESA Rules to a 3-D seismic survey being conducted therein. Until designation of the Ramsar site as an environmentally sensitive area or one which includes terms prohibiting an activity such as that proposed, the refusal on the basis simpliciter that it is a Ramsar site, is in law untenable.

The second argument is with reference to the prohibitions under the Forests Act Ch. 66:01 and the Conservation of Wildlife Act, Ch. 67:01. Under these Acts a 3-D seismic survey is neither contemplated nor prohibited. The former Act is concerned with the unlawful felling of trees, while the latter is concerned with restrictions as to hunting. Although in the course of a 3-D seismic survey some felling of trees may take place, this, we are told, will be confined to 3<sup>rd</sup> and 4<sup>th</sup> class trees, to be used for making bridges. No killing of animals is contemplated. In any event the Appellant intends to seek the requisite licence from the relevant agencies to enable it to carry out the 3-D seismic survey and the incidental felling of trees. The prohibitions under the Forests Act and Conservation of Wildlife Act may be lifted by a licence granted by the Conservator of Forests. The Respondent therefore cannot usurp the functions of the conservator or assume that a licence will be refused, a fortiori, where there is no prohibition against a seismic survey. (see Section 38(2) of the Act.).

The third matter raised was the applicability of the National Wetland Policy (The NWP). In his summary of conclusions in the RSPB Sabbatical Report (*ibid*) Dave Pitchard states that:

“The benefit of recommendations from international conferences depends on what people choose to do with them. Trinidad and Tobago perceives good sense in treating them seriously, as a distillation of respected wisdom and as support for committed action.”

The author at page 16-17, paragraph 3.54 considers the question of how potentially damaging activities, developments and changes of use affecting Ramsar Sites can be controlled and considered several methods in place or proposed in Trinidad and Tobago by reference to the existing legislation. As already stated, while there is prohibition as mentioned under the Forests Act and Conservation of Wildlife Act, the proposed activity is neither

contemplated nor prohibited. What seems to be contemplated as in the proposed National Parks and Watershed Management Bill, are not only controls in National Parks and protected areas but also positive measures for ‘wise-use’ management.

Thus, even if one considers the Nariva Swamp to be protected, nonetheless it is not a prohibited area and the proposed activity needs to be considered in terms of wise-use which of necessity involves consideration of the various mitigating measures to be implemented by the Appellant.

What Mrs.Badri-Maharaj , for the Respondent, was unable to do was to point to the existence of statutory linkage which would empower the Respondent as the environmental co-ordinating authority or “one-stop shop”, that ensures that all requisite licences and permits are obtained from relevant agencies prior to the issuance or refusal by the Respondent of a CEC.

The main thrust of the Appellant’s argument is on the failure of the Respondent:-

1. to give the Appellant an opportunity to be heard in order to show why the Respondent should not refuse to grant it a CEC , in other words, there has been a breach by the Respondent of the Appellant’s right to a fair hearing in accordance with the rules of natural justice, and
2. to follow the statutory procedure prescribed for the processing of an application for a Certificate of environmental clearance under the Certificate of Environmental Clearance Rules 2001 (the CEC Rules)

I shall first consider how the application was dealt with by the Respondent and the information which it had before it at the relevant time, and the relevant statutory and regulatory provisions.

Section 35 of the Environmental Management Act 2000 (the Act) makes provision for a CEC and states as follows:-

“**35.** (1) For the purpose of determining the environmental impact which might arise out of any new or significantly modified construction, process, works or other activity, the Minister may by order subject to negative resolution of Parliament, designate a list of

activities requiring a certificate of environmental clearance (hereinafter called “Certificate”).

(2) No person shall proceed with any activity which the Minister has designated as requiring a Certificate unless such person applies for and receives a Certificate from the Authority.

(3) An application made under this section shall be made in accordance with the manner prescribed.

(4) The Authority in considering the application may ask for further information including, if required, an environmental impact assessment, in accordance with the procedure prescribed.

(5) Any application which requires the preparation of an environment impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority.”

Section 36 makes provision for the issue or the refusal of a CEC and provides as follows:-

“36. (1) After considering all relevant matters, including the comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures.

(2) Where the Authority refuses to issue a Certificate, it shall provide to the applicant in writing its reasons for such action.”

By Rule 2 of the Certificate of the Environmental Clearance (Designated Activities) Order 2001, certain designated activities require a CEC, the grant of which, signifies approval of the activity solely in terms of the environmental impact, and by Item 24 of the Schedule to this Order, exploration for crude oil or natural gas, meaning the conduct of all works related to this activity (such as a 3-D seismic survey) does require a CEC.

The Appellant is therefore required to apply for and receive a CEC from the Respondent before it proceeds with the contemplated activity (Section 35(2) of the Act). Its application for a CEC is to be made in accordance with the manner prescribed (Section 35(3) of the Act) and the procedure is that set out in the CEC Rules. The application for a CEC is to be made in accordance with Rule 3 of the CEC Rules. That Rule contains 7 sub-rules, but the relevant ones are sub-rules 1, 4, 5 and 6.

The processing of the application is regulated by Rule 4 which provides that:-

1. the authority shall, within ten (10) working days after receipt of an application under Rule 3(1) or 3(3) issue to the applicant, a Notice acknowledging receipt of the application and it shall  
.....  
(b) request further information of the applicant as prescribed in Rule 3(5).

It would appear that the application (form “A”) was received by the Respondent on 8 July 2002, and the acknowledgement dated July 24, 2002 was forwarded to the Appellant. A request for further information was made by the Respondent pursuant to Rule 4(1)(b). Since the request is so made, then it is for “information of the applicant as prescribed in Rule 3(5)” When one turns to Rule 3(5) one sees that the sub-rule provides that the information thereunder “shall be supplied by the applicant in support of his application”. In other words, the information will already have been supplied and so the further information contemplated by 4(1)(b) could only be information further to what had already been supplied under Rule 3(5).

It would seem, therefore, that the wording of Rule 4(1)(b) is inappropriate. Be that as it may, the Appellant supplied further information pursuant to the request. That further information appeared to be two (2) Maps which demonstrate with greater particularity the site where the 3-D seismic survey was intended to take place. By letter dated 6<sup>th</sup> August, 2002 the Respondent indicated its inability to grant a CEC to the Appellant, and this was later confirmed by the Notice of Refusal dated 27<sup>th</sup> August 2002. It would appear that that refusal was pursuant to Rule 7(1)(b) of the CEC Rules.

It would follow therefore that upon receipt of the further information required by the Respondent under Rule 4(1)(b), and by the date of the Respondent's letter of the 6 August 2002, and certainly no later than the date of the Notice of Refusal (27 August 2002), the Respondent must have come to a decision that it had had sufficient information from the Appellant on the basis of which it could refuse to issue the CEC sought. At the time of that decision, it is important to examine what information the respondent had from the Appellant. The only information it had was what was contained in the Appellant's application for a CEC in Form A; the further information in response to the request for a demarcation of the proposed area for the 3-D seismic survey within the Nariva Swamp, which would have included the Ramsar site and the Bush Bush Wildlife sanctuary, and the detailed map showing the seismic grid and an aerial photograph provided to the Respondent in response to its request (the Appellant's exhibit No. 17).

From the three documents submitted by the Appellant in the possession of the Respondent, it is necessary therefore to distil the information contained therein to ascertain whether at the relevant time it had sufficient information on the basis of which it could properly have come to its decision to refuse the CEC. The Application form contains 24 paragraphs. The answers to 9,12,13,14,15, 17,18,20,21,23 and 25 indicate to some degree the nature of the proposed activity. The answers to question 10 deal with the nature of the specific site on which the activity is expected to be conducted, and the answers to questions 16 and 24 deal with the mitigation measures proposed by the Appellant and an identification of any negative impacts it foresees.

The nature of the proposed activity: In answer to question 9 the Appellant speaks about seismic grade explosives being used in the activity. The appellant however contends that the use of these explosives will not have negative environmental impact. In support of this, reference is made to an EIA which it had previously done and submitted in relation to its application for a CEC in respect of the Eastern Block. It can hardly be doubted that the use of explosives in the process does give rise to the possibility of negative environmental impact but the Appellant has indicated that it has evidence to show that this impact can be mitigated or rendered innocuous, and sought to rely on the earlier EIA. Clearly the determination of an issue such as this can only be resolved after sufficient technical evidence has been presented

and considered. Irrespective of whether such information was contained in that EIA, there is no evidence that it was before the Respondent at the time of the Refusal or was ever considered by it. What is clear is that the Appellant was denied the opportunity of showing how the possibility of negative environmental impact could be attenuated to an acceptable level or mitigated or made innocuous.

In answer to question 13, the appellant refers to the felling of third and fourth class trees. To the lay mind the felling of trees may have a negative environmental impact as will the removal of vegetation in answer to question 15. Again these activities ought to have been considered in the context of the entire project against the background of the special characteristics of the site together with such mitigation measures as the appellant may utilize.

The drilling of bore holes under question 13 and their being plugged to avoid surface water contaminating natural aquifer recharge zones would to the lay mind raise an issue of pollution of aquifers but the appellant has argued that the way in which the activity will be carried out protects against this danger. If there was doubt, then the Appellant ought to have been given the opportunity to demonstrate how such an activity could be carried out as would avoid any environmental harm.

As to the noise that would be generated by the proposed activity, the answer to question 22 involves two (2) elements:

- (a) will the noise generated exceed 60 dB; and
- (b) will the noise of 60 dB be for a duration of greater than 1 hour per day.

It would seem that if both of these questions are answered in the affirmative then one would assume that there would be a negative environmental impact. The appellant has shown that at least one element is to be answered in the negative.

There is nothing in the answers to questions 12,14,17,18,20,21,23 or 25 which is germane to the nature of the proposed conduct of a 3D seismic activity.

The proposed site of the Activity: Question 10 deals with the location of the site as do the map and aerial photograph provided. The information provided in answer to this question indicates the general topography and an introduction to the ecological characteristics of the site. In relation to the proposed site the Respondent took into account the facts that :-

1. The Nariva Swamp had been declared a Ramsar site;
2. Portions of the swamp were designated as a Wildlife Sanctuary under the Conservation of the Wildlife Act Ch. 67:01 and
3. Portions of the Swamp had been declared a prohibited area under the Forests Act Ch. 66:01.

These three (3) matters and the legal considerations in relation thereto have been dealt with earlier and need not be repeated. The final information contained in the application form which the Respondent had before it was that dealing with the mitigation measures proposed.

Mitigation Measures: In answer to questions 16 and 24, the Appellant proposes to deal with the risk of adverse environmental impact by certain mitigation measures. Because of the ecological characteristics of the Nariva Swamp and its flora and fauna it must clearly be recognized that the Respondent is obliged to ensure that there must be no permitted activity in the Swamp that will adversely impact upon it to an unacceptable level and must therefore take preventive steps to avoid damage thereto.

The existence of the obligation of the Respondent is not the issue, the real question is whether in its discharge it has acted unfairly by failing to give the Appellant an opportunity to show how its scientific and technical methodology in relation to its execution of the 3D seismic survey, albeit in the area it is intended to take place, can be so carried out without unacceptable environmental harm. In our judgment, inherent in the Appellant's recognition of the need for mitigation measures is an identification by it of the existence of the risk of foreseeable negative environmental impact. The answers to questions 16 and 24 cannot stand in isolation but must be seen in the context of the entire corpus of evidence contained in Form A. Thus in answer to a given question as to what mitigation measures are proposed, an applicant may state that there are no

mitigation measures proposed but that may be because there is no foreseen adverse environmental impact requiring mitigation, or that the applicant does not have a solution to a foreseeable negative environmental impact.

In the former case, the evidence may reveal an adverse environmental impact which the applicant has not seen or has omitted. In the latter case, the Respondent, in pursuance of a collaborative approach to environmental management, should point the applicant in the direction of mitigation measures which the applicant has not thought about especially as this seems to be contemplated by Section 16(2) of the Act which requires the Respondent to facilitate co-operation among persons and manage the environment in a manner which fosters participation and consensus.

The answers to these two (2) questions 16 and 24 reveal that it may not have been clear that by conducting the 3 D seismic survey there would be no risk of negative environmental impact and it is in this respect that the Appellant complains that it should have been given an opportunity to show to the Respondent that any foreseeable negative environmental impact could be sufficiently mitigated. This is of importance, as in answer to questions 16 and 24, the appellant claims that it can so mitigate negative environmental impact.

I turn now to the procedure stipulated under the CEC Rules for the processing of an application for a CEC to examine the complaint that the Respondent did not follow the correct procedure thereunder.

An application for a CEC is made pursuant to Sections 35 and 36 of the Act which have been set out earlier and in accordance with the procedure set out in Rule 3 and shall be in a prescribed form Form A. When that form has been filled in by an applicant, it is then forwarded to the EMA. The processing of the application is then required under Rule 4. This rule states that:-

4. (1). The Authority shall, within ten (10) days after receipt of an application under Rule 3(1) or 3(3) issue to the applicant a notice acknowledging receipt of the application and it shall -
  - (a) notify the applicant that the application does not relate to a designated activity and accordingly, does not require a Certificate:

- (b) request further information of the applicant as prescribed in Rule 3(5);
- (c) notify the applicant that an application requires a CEC but does not require an EIA;
- (d) notify the applicant that an EIA is required in compliance with a TOR. ....

The processing of an application for a CEC under Rule 4 of the CEC Rules requires examination, if only to keep clearly in focus what each segment of the rule is intended to achieve. In my view the process may logically be set out as follows:-

1. When an application for a CEC is submitted under Rule 3(1), the Respondent is required first to consider whether it has sufficient information to determine whether or not a CEC is required. This is required under Rule 4(1)(a). In considering whether a CEC is required, the Respondent would have regard to the provisions of the Certificate of Environmental Clearance (Designated Activities) Order, 2001. If the Respondent does not have sufficient information to determine whether the activity requires a CEC, it may request further information in accordance with Rule 4(1)(b).
2. Once the Respondent has sufficient information it decides whether or not a CEC is required. If in accordance with Rule 4(1)(a) the Respondent determines that no CEC is required then the applicant is so informed and the matter comes to an end and the applicant may proceed without a CEC.
3. If the Respondent determines that a CEC is required it must then proceed to determine whether it has sufficient information to make a preliminary determination of environmental impact of the proposed activity on the proposed site. If the information contained in the application form and supporting documents is insufficient to answer this question the Respondent must request further information in accordance with Rule 4(1)(b).

4. Where the Respondent has sufficient information to make a preliminary determination, then it must examine the information to see if there is disclosed evidence of any possible negative environmental impact. Where there is no evidence in the application of any negative environmental impact and the Respondent has no reason to believe that there will be negative environmental impact then the CEC must be granted without an EIA being required as is provided in Rule 4(1)(c).
5. Where there is evidence of possible negative environmental impact but the applicant in its application provides the Respondent with sufficient evidence that it can properly mitigate such negative environmental impact, then the CEC must be granted without an EIA being required as is provided in Rule 4(1)(c).
6. Where there is evidence of possible negative environmental impact but the applicant in its application provided the Respondent with **insufficient** evidence that it can properly mitigate the negative environmental impact, then the Respondent must give the Applicant an opportunity to show that it can sufficiently mitigate the negative environmental impact. If this can be demonstrated by the applicant without having recourse to an EIA then he must be allowed to so demonstrate in accordance with the *audi alteram partem* rule. However, where this can only be shown by an EIA, which will often be the case, then the Respondent must, in accordance with Rule 4(1)(d) notify the applicant that an EIA is required and initiate discussions with the applicant in order to prepare the terms of reference (TOR). It is important to note that the applicant cannot of his own volition prepare an EIA, as the TOR of the EIA must be agreed to by the Respondent before the EIA is conducted.

Quite apart from the Rules, there is in conformity with the need for participation under Section 16(2) of the Act, the provision relating to Public comment and the procedure thereunder, (See Section 28 of the Act). The general advantages of public participation are, inter alia, that it:-

1. improves the understanding of issues among all parties;
2. finds common ground and determines whether agreement

can be reached on some of the issues;

3. highlights tradeoffs that must be addressed in reaching decisions; and
4. improves the general understanding of the problems associated with a project, as well as the overall decision-making process.

(See Columbia Journal of Transnational Law Vol. 33, 1995 No. 2 at page 344 by Dr. William A. Tilleman) ..... And among the justifications for allowing public participation into EIA's at page 345 the Author states:-

“1. Environmental assessments are intended to generate higher quality information about potential environmental impacts. In other words, it is a process designed to assist the proponent and the regulators with decisions regarding approvals. Public input therefore enhances a policy of consultation, one designed to improve the quality of development decisions. The public has access to decision-makers to advise them of concerns, issues and values.”

I think it is right that I should indicate a few of the relevant aspects of the principles of natural justice, which are applicable in this matter.

The right to a fair hearing is a principle of natural justice and has been applied as a base on which to build a kind of code of fair administrative procedure.

“The courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and Officials as well as to the acts of collective bodies such as justices and committees. Even where an order or determination is unchallengeable

as regards its substance, the court can at best control the preliminary procedure so as to require fair consideration of both sides of the case. Thus the law makes its contribution to good administration ..... overlooking it is one of the most common legal errors to which human nature is prone. When a Lord Chief Justice, an Archbishop of Canterbury, and a three judge Court of Appeal have strayed from the path of rectitude, it is not surprising that it is one of the more frequent mistakes of ordinary mortals.”

See page 469-470, Administrative Law by Wade & Forsyth, 8<sup>th</sup> Ed.

It is important to note that the significance and universality of the principle “make it applicable to almost the whole range of administrative powers, however silent about it the statute may be.” (See page P. 474 op cit.) The duty to act fairly and to observe the rules of natural justice involves “giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely” per Lord Diplock in Hoffman La Roche (f) & Co. vs. Secretary of State for Trade and Industry (1975) A.C. 295 (368 D-E).

That a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it is fundamental to the principle of law (which governs public administration as much as it does adjudication).....see Sedley J., R. London Borough of Camden ex.p Paddock (1995) COD 130. See also Judicial Review Handbook 3<sup>rd</sup> Ed. By Michael Fordham at Para 60 5.5. Indeed the Appellant complains that he did not see or know of the material or documents upon which the Respondent had based its decision until the hearing of the Appeal. In A.G. vs. Ryan (PC) [1980] ac 718 at page 730, per Lord Diplock at P. 730:

“It has long been settled that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority.”

These principles *mutatis mutandis* may be applied to the method by which the Respondent arrived at its decision to issue the Refusal.

When these principles of fairness are taken into account, it is clear that the Appellant, having been denied the opportunity to persuade or to show how it would be able to carry out the proposed activity without damaging the Swamp (especially in the absence of a prohibition against such activity), the decision to refuse in the circumstances would be fundamentally flawed.

Mrs. Badri-Maharaj in her address referred to *Lloyd v. Mc Mahon* (1987) 1 A.C. 625 per Lord Bridge at page 702 where he said:

“The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expressed the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the right of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.”

As Supperstone and Goudie in their work *Judicial Review* at chapter 8, para. 8.16 under the rubric scope and application of the principles of natural justice, state:

“...since whether those rules apply and the extent of the duty depend upon the particular type of case concerned, it is often difficult to predict with confidence what fairness will be considered to require in any particular context. ....the courts have emphasized that the normal assumption is that the rules will apply”

and at para. 8.17 continues –

“They have been stated indeed to apply ‘to all powers of decision unless the circumstances suffice to exclude them.’ These circumstances may be found in the person or body making the decision, the nature of the decision to be made, the gravity of the matter in issue, the terms of any contract or other provisions governing the powers to decide and so on.”

- Per Megarry J. in *Gaiman vs. National Association for Mental Health* (1971) Ch. 317 at 333.

In *Lloyd vs. Mc Mahon*, the Councillors had misconducted themselves in failing to make a rate thereby incurring a loss of some £106,103. The District Auditor had already pointed out possible consequences for

individual Councillors. When the Auditor issued an “unless” notice, in which he indicated that he would commence action to recover any losses incurred by the failure to make a rate from the Councillors responsible for incurring them, the Councillors were notified that they might make representations in writing to the Auditor before he reached a decision, and the Auditor enclosed a note of the various matters to which he had had regard in issuing the notice. The note identified specific losses resulting from the delay totalling £106,103 including the loss of interest on sums that would, but for the delay, have been paid earlier than had been the case. The Appellant Councillors were identified as persons who by their voting or absence might have failed to discharge their duty as members of the Council and might, therefore, be guilty of wilful misconduct resulting in the losses in question. The note also showed that there was no lawful justification for the delay in making the rate.

Of great importance was the fact there that the Appellant Councillors made a collective written and fully documented response to the Auditor’s notice with the assistance of the Council’s Chief Executive. And at page 708 Lord Bridge noted that the Auditor had “asserted his sincere belief in what had been said in the collective written response” and therefore to give an individual oral hearing “ would have been a departure from the collective stance which the Appellants were given and had deliberately adopted.”

So it is clear that the Councillors had an opportunity to make their freely documented and collective representations in writing, after having been given a note of the various matters to which the Auditor had had regard in issuing the notice. That is a far cry from being asked to supply further information as was the case in the instant matter. As Lord Bridge indicated at page 702-703 “It is well established that where a Statute has conferred on any body, the power to make decisions affecting individuals, the Courts will not only require the procedure prescribed by the Statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will assure the attainment of fairness.”

While the procedure under Rule 4 does not specifically provide for an oral hearing by the Respondent, it is required by Section 16(2) of the Act in the discharge of its obligation to facilitate cooperation among persons and manage the environment in a manner which fosters participation and promotes consensus. And under Rule 4 1 (c) and (d) there is provision for the issue of a CEC without an EIA or requiring an EIA. The requirement for

an EIA involves a full assessment of the likely impact of the proposed activity and how, by proposed or other mitigating measures any risks of harm to the environment may be eliminated or reduced to a level that is acceptable. Further, Rule 5 provides an opportunity for consultation with the Appellant in respect of a TOR as well as, where appropriate, with relevant agencies (which would include the Forestry Division) and NGOs and having exhausted the available procedures as may be applicable, by Rule 7 it is empowered to either issue or refuse a CEC. So Rules 4 and 5 do involve in accordance with Section 16(2) the application of rules of fairness, before the decision to issue or refuse the CEC under Rule 7 is ultimately made.

The Government of Trinidad and Tobago has stipulated in the preamble to the Environmental Management Act 2000, its commitment to developing a strategy for sustainable development, being the balance of economic growth with environmentally sound practices, in order to enhance the quality of life and meeting the needs of present and future generations. That commitment must not be lost sight of especially as it has been given effect in the objects of the Act (See Section 4(d)(i)(ii)(iii) and has been provided for under Section 16(1)(b) as one of the functions of the Respondent.

I am indebted to Mr. Morgan and Mrs. Badri-Maharaj for their painstaking erudition and researches but I mean no disrespect to Counsel if I did not refer to all of their various citations but only to some in this judgement. I accept the general propositions of law which they establish in relation to the facts of each respective case. As I see it, the instant matter requires an answer to two questions:-

First, whether the Respondent's reliance on the Ramsar convention, the prohibitions in the Forests Act, the Conservation of Wildlife Act, and the Wetland Policy was right in law as a basis to support its decision to refuse to issue a CEC to the Appellant and secondly whether at the time of its refusal to issue a CEC and having regard to the information before it, there was a breach of the Appellant's right to a fair hearing and/or a procedural irregularity under Rule 4 of the CEC Rules.

For the reasons given and in the light of the foregoing, I have come to the conclusion that the first question must be answered in the negative and the second question must be answered in the affirmative.

At the end of the day, therefore, the order which we make is that the Appeal be and is hereby allowed, the refusal is set aside , and the application is referred back to the Respondent for reconsideration in accordance with the principles of natural justice set out herein and also with particular reference to Rule 4 (1) (c) and/or (d) of the CEC Rules.

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Justice Zainool Hosein

I agree.

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Dr. Eugene Laurent

I also agree.

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Dr. Judith Gobin