

A Guide to
**HEARINGS OF MATTERS ARISING UNDER THE ENVIRONMENTAL
MANAGEMENT ACT, 2000 AND SUBSIDIARY LEGISLATION MADE
THEREUNDER**

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WHAT IS THE ENVIRONMENTAL COMMISSION OF TRINIDAD AND TOBAGO?

The Environmental Commission, an impartial and independent body, is a superior court of record established by the Environmental Management Act, 2000.

The Commission comprises a full-time Chairman and Deputy Chairman, as well as three part-time members. The Chairman and Deputy-Chairman are required to be attorneys-at-law of not less than ten (10) years standing while the part-time members are appointed on the basis of their knowledge of, or experience in environmental issues, engineering, the natural sciences or the social sciences. Members of the Environmental Commission are appointed by His Excellency the President of the Republic of Trinidad and Tobago for a term of not less than three (3) years and under such terms and conditions as he may determine.

HOW ARE THE MEMBERS OF THE ENVIRONMENTAL COMMISSION ADDRESSED?

The members are referred to as “His Honour” or “Her Honour” as appropriate. In Court a member is addressed as “Your Honour”.

WHAT ARE THE POWERS OF THE ENVIRONMENTAL COMMISSION?

The Commission has specific powers under the Environmental Management Act, 2000, as well as all the powers inherent in a superior court of record. The Commission therefore has the same powers as the High Court of Justice on the occasion of an action to:

- punish contempts of court;
- enforce its own orders;
- require the attendance and examination of witnesses; and
- permit the entry on and inspection of property.

WHAT IS THE ENVIRONMENTAL MANAGEMENT ACT, 2000?

The Environmental Management Act, 2000 (“EM Act”) is an umbrella piece of legislation the objectives of which include the promotion and encouragement among all persons of a better understanding and appreciation of the environment, the integration of environmental concerns into private and public decisions, the development and effective implementation of laws, policies and other programmes for the conservation and wise use of the environment for meeting the needs of present and future generations and enhancing the legal, regulatory and institutional framework for environmental management. The EM Act, amongst other things, establishes the Environmental Management Authority (EMA) and the Environmental Commission and provides a basic framework for the regulation of certain activities with the potential to cause pollution, as well as certain classes of pollution including:

- Air pollution;
- Water pollution;
- Noise pollution; and
- Hazardous and non-hazardous wastes.

The EM Act also allows for the protection of specifically defined species of living plants and animals and defined areas of Trinidad and Tobago through their designation as “environmentally sensitive species” and “environmentally sensitive areas” respectively. The basic framework of the EM Act is enlarged in subsidiary legislation.

WHAT ARE THE CERTIFICATE OF ENVIRONMENTAL CLEARANCE RULES, 2001?

The EM Act allows for the regulation of certain activities on the basis of the potential environmental impact which might arise therefrom. The EM Act allows the Minister with responsibility for the environment to determine which activities require a Certificate of Environmental Clearance (CEC) before they can be undertaken.

The Certificate of Environmental Clearance Rules, 2001 (CEC Rules), together with:

- The Certificate of Environmental Clearance (Designated Activities) Order, 2001 (“CEC Order”); and
- The Certificate of Environmental Clearance (Fees and Charges) Regulations, 2001 (“CEC Regulations”).

provide a regulatory framework governing CECs. The CEC Order provides that CECs are required for forty-four (44) diverse classes of activities ranging from the establishment, modification, expansion or decommissioning of a poultry farm for in excess of 250 heads of poultry, through land reclamation activities to exploration for crude oil or natural gas.

Applications for CECs must usually be made directly to the EMA. However where the activity is one which requires permission under the Town and Country Planning Act, the application must be made through the Town and Country Planning Division. The application procedure is set out in the CEC Rules and the appropriate fees are set out in the CEC Regulations.

In considering the application, the EMA may require that an environmental impact assessment (EIA) be undertaken and will take into account any public comments received. Where the EMA requires that an EIA be undertaken, no other entity may grant any permit, licence or other documentary authorisation with respect to the activity until the CEC has been issued. The issuance of a CEC does not affect the obligation to obtain any other approval required by law before proceeding with the activity.

Where an applicant for the issuance or transfer of a CEC is dissatisfied with the decision of the EMA he can appeal to the Environmental Commission. A right of appeal exists where the EMA refuses an application to have any information contained in a CEC application treated as a trade secret or confidential business information and be omitted from the National Register of Certificates of Environmental Clearance.

WHAT ARE THE NOISE POLLUTION CONTROL RULES, 2001?

The EM Act specifically addresses the issue of noise pollution and establishes a regulatory regime through the Noise Pollution Control Rules, 2001 (“Noise Pollution Rules”) and the Noise Pollution Control (Fees) Regulations, 2001.

The Noise Pollution Rules establish three categories of noise zones:

- (a) Zone I – Industrial areas;
- (b) Zone II – Environmentally sensitive areas; and
- (c) Zone III – The General Area.

Different standards of permissible sound pressure levels have been set for each noise zone. The Noise Pollution Rules provide that these standards shall not be exceeded without a variation issued by the EMA.

The Noise Pollution Rules sets out the requirements for applying for a variation or transfer of a variation;

The Noise Pollution Rules also provides for the renewal and revocation of variations, as well as special requirements in cases of emergencies that may threaten human health or the environment.

Where an applicant for the issuance or transfer of a variation is dissatisfied with the decision of the EMA the applicant can appeal to the Environmental Commission. There is also a right of appeal where the EMA refuses an application to have any information contained in an application for a variation treated as confidential business information and be omitted from the Noise Variation Register.

WHAT ARE THE ENVIRONMENTALLY SENSITIVE AREAS RULES, 2001 AND THE ENVIRONMENTALLY SENSITIVE SPECIES RULES, 2001?

The regimes governing Environmentally Sensitive Areas (ESAs”) and Environmentally Sensitive Species (“ESSs”) focus on the environmental asset to be protected.

The EM Act allows for the designation of a defined portion of the environment of Trinidad and Tobago as an ESA or any species of living plant or animal as an ESS where such areas or species require special protection to achieve the objectives of the EM Act. The respective regimes (including the guidelines and procedure for designation) are set out in the Environmentally Sensitive Areas Rules, 2001 (“ESA Rules”) and the Environmentally Sensitive Species Rules, 2001 (“ESS Rules”).

An animal or plant can be designated an ESS if:

- it is indigenous to Trinidad and Tobago or, although not indigenous to Trinidad and Tobago, is present in Trinidad and Tobago for a part of its life or reproductive cycle;
- throughout all or a part of its range it is, or is likely to become, in danger of extinction and its survival is unlikely if the factors jeopardizing it continue to operate;
- it is required to be protected for the purpose of meeting the Government's international obligations under certain International Conventions referred to in Schedule I to the ESS Rules;
- it is referred to in a written law set out in Schedule III to the ESS Rules; or
- any of the Guidelines set out in Schedule II to the ESS Rules apply, including the general objectives of:
 - a. conservation of biological diversity and protection of the environment;
 - b. sustainable economic and human development; and
 - c. logistic support, e.g. environmental education, information-sharing etc.

A portion of the environment can be designated as an ESA if:

- it is the actual or prospective habitat of any environmentally sensitive species;
- it is required to be protected for the purpose of meeting the Government's international obligations under any of the International Conventions referred to in Schedule I to the ESA Rules;
- it is an area that is referred to in a written law set in Schedule III to the ESA Rules;
- it is an area to which any of the Guidelines set out in Schedule II to the ESA Rules apply, including the general objectives of:
 - a. conservation of biological diversity and protection of the environment;
 - b. sustainable economic and human development; and
 - c. logistic support, e.g. environmental education, information sharing etc.

The EMA is required to designate ESSs and ESAs on the basis of the best scientific data available and after taking into consideration the economic impact and any other relevant impact of the designation. The designation must specify any limitations on the use or any restricted activities with respect to the ESS or ESA.

There is a right to apply to the Environmental Commission for deferment of designation of an ESS or ESA, and there is a right of appeal to the Environmental Commission with respect to any final designation of an ESS or ESA.

PRACTICE AND PROCEDURE BEFORE THE ENVIRONMENTAL COMMISSION

While the EM Act sets out the general procedural framework for proceedings before the Environmental Commission, the Environmental Commission Rules of Practice and

Procedure, 2001 (“the Rules of Practice and Procedure”) provide the details of these procedural issues. This includes such issues as the form and content of documents to be filed with the Commission, timelines within which procedural steps must be taken and the hearing procedure.

You and/or your Attorney-at-Law should consult the Rules of Practice and Procedure before participating in any proceedings before the Commission. Copies are available for purchase at the Government Printer, Cor. Victoria Avenue and Tragarete Road, Port of Spain.

WHO CAN INSTITUTE CIVIL PROCEEDINGS BEFORE THE ENVIRONMENTAL COMMISSION

Section 69 of the EM Act allows any private party to institute a civil action (“Direct Private Party Action”) before the Commission against any other person for alleged violation of specified environmental requirements identified in section 62. The procedure and prerequisites for such direct private party actions are set out in section 69. Once a complaint is filed and the EMA is duly notified of it, and the EMA has not commenced any enforcement action or elected to assume responsibility for taking enforcement action, the matter is brought before the Commission.

Section 69(2) of the EM Act provides that any individual or group of individuals expressing a general interest in the environment or a specific concern with respect to the claimed violation can bring a Direct Private Party Action.

WHO CAN PARTICIPATE IN PROCEEDINGS BEFORE THE ENVIRONMENTAL COMMISSION?

When proceedings are commenced before the Commission the initial parties to the matter will be named in the Notice of Proceedings filed with the Registry. However, where the issues surrounding the subject matter of the proceedings affect any third party who is not already a party to the proceedings, such third party may make an application to intervene in the proceedings or may be joined as a party on the application of any party.

In determining whether to permit such intervention or joinder, the Commission will consider several factors including:

- whether the third party’s participation will materially assist the Commission in deciding the matter;
- whether the third party has a sufficient interest in the matter;
- whether the third party’s position is or is not supportive of the proceedings, complaint or appeal;
- whether the third party will repeat or duplicate evidence presented by other parties; and
- if the intervention is late, there are satisfactory reasons therefor.

An appellant may claim relief from a decision of the EMA because of alleged acts or omissions of a third party. When the appellant has served the Notice of Allegation on the third party, the third party has twenty-one (21) days to inform the Commission whether he wishes to be heard in the matter.

The EM Act also gives the Attorney General the power to intervene in any proceedings before the Commission on behalf of the Government of Trinidad and Tobago.

PUBLIC PARTICIPATION

The Environmental Commission is an impartial and independent body with an original and appellate jurisdiction over certain matters under the EM Act and other legislation where jurisdiction in the Commission is provided for:

The Commission holds public hearings at which affected parties present evidence and make submissions. The Commission is subject to the rules of evidence, the rules of natural justice, the EM Act and the Rules of Practice and Procedure.

The Commission's primary objective is to make just decisions within the confines of the law and in keeping with a policy for sustainable development, being the balance of economic growth with environmentally sound practices. The Commission encourages all interested parties to participate in proceedings before it so that the Commission can arrive at its decision having regard to all relevant evidence and submissions.

WHAT IS A PRELIMINARY HEARING?

The Commission may decide to hold a preliminary hearing in preparation for the substantive hearing and to address any procedural issues.

A preliminary hearing may be held to deal with any of the following:

- (a) identifying parties and other interested persons and the scope of their participation in the hearing;
- (b) determining the length, schedule and the location of the hearing;
- (c) determining whether the hearing will be conducted orally, electronically or in writing;
- (d) hearing preliminary interlocutory applications, including interlocutory applications to dismiss for non-compliance;
- (e) addressing procedural issues;
- (f) identifying, defining and simplifying issues;

- (g) arranging for the exchange among parties of all documents relevant to the proceedings;
- (h) identifying witnesses;
- (i) establishing facts or evidence that may be agreed on;
- (j) parties agreeing on a joint expert;
- (k) scheduling an alternative dispute resolution process (most likely mediation) prior to the date set for the hearing; and
- (l) any other matter that may assist in the just and expeditious disposition of the proceedings.

IS MEDIATION AVAILABLE?

The Commission has identified mediation as the preferred process of alternative dispute resolution. The practice and procedure for mediation is set out in Rule 10 of the Rules of Practice and Procedure, 2001.

The Commission on its own initiative or at the request of the parties may at any time before or during the proceedings schedule a mediation session. The purpose of a mediation session is to attempt to resolve as many issues, whether substantive or procedural, as possible. The mediator will either be a member of the Commission, Commission staff or a person appointed by the Commission.

HOW IS THE JURISDICTION OF THE ENVIRONMENTAL COMMISSION EXERCISED?

The jurisdiction and powers of the Commission may be exercised by the Chairman or the Deputy-Chairman and two other members selected by the Chairman or Deputy-Chairman, for the purpose of any case or proceedings brought before the Commission.

A matter can also be heard by the Chairman or Deputy-Chairman sitting alone or with one other Commissioner if the parties consent thereto. The Chairman presides or in her absence the Deputy-Chairman.

Hearings are usually conducted orally, however it is within the discretion of the Commission to order that written arguments and a citation of authorities be submitted to the Commission in addition to or with the consent of the parties, in place of an oral hearing.

All hearings are governed by the procedures set out in the EM Act, the Rules of Practice and Procedure, the rules of evidence and the rules of natural justice. At the hearing each

party will be treated fairly and be given an opportunity to present their case through evidence and submissions and to cross-examine witnesses.

WHAT IS THE PROCEDURE FOR A HEARING?

The EM Act and the Rules of Practice and Procedure set out the procedure for hearings before the Commission. Each party to the proceedings must file with the Registry of the Commission five (5) copies of their written submissions and must serve a copy on every other party at least seven (7) days before the date of the hearing. Generally at the beginning of the hearing each party gives a brief opening statement which:

1. describes the issues the party will address at the hearing;
2. outlines the evidence the party intends to introduce;
3. lists the witnesses to be called;
4. outlines the topics to be covered; and
5. indicates the amount of time required.

WHAT IS THE ORDER OF PRESENTATION AT A HEARING?

Evidence in the proceedings is usually given in the following order:

1. the party bringing the action;
2. other parties whose interests or position is similar to that of the party bringing the action;
3. the Respondent to the action;
4. other parties whose interest or position is similar to that of the Respondent;
5. the Attorney General;
6. witnesses of the Commission if any; and
7. the party bringing the action in reply.

HOW DO YOU PREPARE FOR A HEARING?

The key to effective participation in a hearing is to be well informed and prepared. To be effective, it is best to be fully prepared to provide your expert opinion and evidence at the hearing. The evidence you intend to rely on should be relevant to the issues at hand.

SUMMONS TO WITNESS

The Environmental Commission has the same power as the High Court to summon a witness to attend a hearing to give evidence or to compel the production of documents. A summons can be issued because the Commission wants to hear from the witness or because a party has requested that the Commission require the person to act as a witness.

WHAT IS A WITNESS STATEMENT?

The Commission may in its discretion accept a sworn written statement made by a witness rather than oral testimony at the hearing. Such witness shall be available for cross-examination, if required.

A witness statement is a concise, complete, written statement of the evidence a witness intends to present. The statement should be concise but should also be complete in the sense that the witness should not have to add anything new if instead oral testimony was given.

WHAT IS THE DIFFERENCE BETWEEN A TECHNICAL WITNESS AND AN EXPERT WITNESS?

A technical witness is a person who is competent to collect and present scientific and technical data. An expert witness is a person whose education, training and experience qualify him to reliably interpret such scientific or technical information and to draw reliable conclusions.

CAN A HEARING BE POSTPONED OR ADJOURNED?

Once the Commission has fixed a date for a hearing, the hearing will proceed on that date except in exceptional circumstances, such as sudden illness of a party. The dates for hearings are fixed taking into account the procedural timelines set out in the EM Act and the Rules of Practice and Procedure, or any other timeline set by the court in a preliminary. If a party has been notified of the time, date and place of a hearing and fails to attend, the Commission may proceed with the hearing and make its decision in the absence of that party.

WHAT PRINCIPLES GOVERN THE HEARING?

The Commission's objective is to conduct a fair, efficient and impartial hearing at which all relevant evidence and principles are considered. The Commission makes its decisions on the basis of the oral, written and other evidence that is admissible in the proceedings, as well as on the basis of all relevant provisions of the law. Evidence may include that of technical and expert witnesses.

WHAT TYPES OF DECISIONS CAN BE MADE BY THE ENVIRONMENTAL COMMISSION?

The decision of the Commission in any proceedings is by the majority of the members present, but the opinion of the presiding Member prevails on any question of law.

The decision of the Commission will also depend on the nature of the matter being filed, and the Commission may dispose of an appeal by:

- dismissing it;
- allowing it and modifying the decision or action of the EMA; or
- allowing it and referring the decision or action back to the EMA for reconsideration.

The Commission may dispose of an application for deferment of decisions made by the EMA under section 25 or designations under section 41 of the EM Act by:

- dismissing it; or
- allowing it and making an Order for deferment of the decision or designation.

The Commission may dispose of a Direct Private Party Action by:

- dismissing it; or
- allowing it and issuing an order as would have been appropriate had the EMA taken action pursuant to sections 64 to 67 inclusive of the EM Act; or
- allowing it and referring the decision or action back to the EMA for reconsideration.

The Commission may dispose of an application by the EMA for enforcement of a Consent Order or Final Administrative Order by:

- dismissing it;
- allowing it; or
- making such other order as the Commission finds appropriate in the circumstances.

WHEN WILL I BE INFORMED OF THE COMMISSION'S DECISION?

The Commission announces its decision within a reasonable time after the conclusion of the hearing. The Commission may either announce its decision orally or give a written judgement. The decision of the Commission is delivered by the presiding Member and any Member may provide a concurring or dissenting opinion. Copies of the decision are made available to the parties and any Order of the court arising out of the proceedings will also be served on the parties.

ARE WRITTEN COPIES OF THE COMMISSION'S JUDGMENTS AVAILABLE?

Yes. Written copies of the Commission's judgments are available through the Registry.

CAN THE COMMISSION AWARD COSTS?

Yes. The Commission has the power to award costs in a matter before it.

CAN I APPEAL THE COMMISSION'S DECISION?

Yes. If a party to the proceedings is dissatisfied with the decision of the Commission as being wrong in law, such party has the right to appeal to the Court of Appeal. However, the decisions of the Commission on questions of fact are final.

GET MORE INFORMATION

For further information on this topic you should refer to:

- The Environmental Management Act, 2000;
- The Noise Pollution Control Rules, 2001;
- The Noise Pollution Control (Fees) Regulations, 2001;
- The Certificate of Environmental Clearance Rules, 2001;
- The Certificate of Environmental Clearance (Designated Activities) Order, 2001;
- The Certificate of Environmental Clearance (Fees and Charges) Regulations, 2001;
- The Environmentally Sensitive Areas Rules, 2001;
- The Environmentally Sensitive Species Rules, 2001; and
- The Environmental Commission Rules of Practice and Procedure, 2001.

Parties may also wish to consult with an attorney-at-law before proceeding with any litigation before the Commission.