

Filed on behalf of:	Interested Party
Deponent:	I. Fabro
Affidavit No.	1
Exhibits:	IF 1 – IF 18
Date sworn:	18.11. 2010
Date filed:	18.11. 2010

IN THE SUPREME COURT OF BELIZE AD 2010

CLAIM NO. 550 OF 2010

BETWEEN

**PENINSULA CITIZENS FOR SUSTAINABLE
DEVELOPMENT LIMITED**

Claimant

AND

DEPARTMENT OF THE ENVIRONMENT

Defendant

PLACENCIA MARINA LIMITED

Interested Party

**FIRST AFFIDAVIT OF
ISMAEL FABRO**

I, ISMAEL FABRO, of No. 2216 Juliet Soberanis St., Belama Phase 1, Belize City, Belize being duly sworn, MAKE OATH AND SAY as follows:

1. I am an Environmental Consultant with Belize Environmental Technologies, a company duly incorporated and existing under and by virtue of the Companies Act, Chapter 250 of the Laws of Belize, whose registered office is situate at No. 2216 Juliet Soberanis St.,

Belama Phase 1, Belize City, Belize and I am duly authorized to swear this Affidavit on behalf of the Interested Party herein.

2. This affidavit is made in response to the affidavits of Mary Toy dated 29th July, 2010 and Dr. Mark Cherniak dated 30th July, 2010 who have sworn affidavits on behalf of the Claimant in support of the Fixed Date Claim filed herein. I make reference to their affidavits where appropriate..
3. The facts contained in this affidavit are, save where is otherwise stated or appears from the context, within my own personal knowledge and are, to the best of my belief, true and correct.
4. I hold a Bachelor of Science Degree in Biology with emphasis in Ecology and a minor in Chemistry and a Master of Science Degree in Ecology from the University of Mankato State, an affiliate of the Minnesota State University.
5. I have eighteen years experience in Environmental Management as Belize's Chief Environmental Officer from 1990 to 2008. As Chief Environmental Officer I was responsible for the institutional development of the Department of the Environment (DOE) and played a major role in the development of Belize's National Environmental Agenda.
6. It was under my watch as Chief Environmental Officer of the DOE that the DOE was legally established under the Environmental Protection Act, 1992 (Chapter 328). Since then the Act has undergone several amendments aimed at improving Belize's ability to respond to new environmental challenges reflecting the dynamic nature of environmental management in Belize.
7. During my tenure, I also spearheaded the development of Belize's current national environmental policies, Pollution regulations, Effluent Limitation Regulations and the Environmental Impact Assessment Regulations 1995 and Belize's acceptance of

Multilateral Environmental Conventions. I actively participated in the drafting of the Environmental Protection Act and the Regulations and in their enactment and implementation.

8. Since July, 2008 after deciding to leave the office of Chief Environmental Officer, I have been an environmental consultant in Belize. I have been engaged as a consultant by both governmental and private entities in respect of my area of expertise. Of relevance, I have been involved in the preparation of Belize's *National Profile for the Management of Chemicals and Wastes* for the Central American Commission on Environment and Development and the DOE, November, 2010; Government of Belize's *IVth National Report to the United Nations Convention on Biological Diversity*, May 2010; *The Placencia Golf Course, Limited Level Studies*, September, 2009; *Yum Balisi's Environmental Impact Assessment, Fishermen's Caye*, August, 2009; the "*National Environmental Guidelines for Marinas and Berthing Facilities*, DOE, April, 2009"; "*National Environmental Guidelines on Overwater Structures*, DOE 2009"; the *Environmental Audit and Review for the Old Belize Adventure Cucumber Beach Marina*, December 2008; the *Revised Environmental Impact Assessment for Mile 22 Sanitary Landfill and Transfer Station* for Inter-American Development Bank and the DOE, February, 2009; and the *Feasibility and Environmental Studies for the Renewable Technology (Hydroelectric) for the Douglas D'Silva Forest Station in Mountain Pine Ridge Forest Reserve*, Cayo, October 2008 among other environmental projects in Belize.

Background:

9. Prior to the submission of the Environmental Impact Assessment (EIA), Placencia Marina Limited had submitted and the DOE had approved in accordance with the Environmental Protection Act, Cap. 328 as amended (the Act) and the Environmental Impact Assessment Regulations 1995 as amended by Statutory Instrument No. 24 of 2007 (the Regulations), the Terms of Reference to guide the preparation of the EIA for the Marina project (the Marina Project). A copy of the Terms of Reference is now produced and shown to me and marked "IF1" and is attached hereto.

14. As a result of the NEAC's comments on the said EIA Placencia Marina Limited engaged Belize Environmental Technologies to assist in the EIA revision and completion process and it was at this point that I became involved in the preparation of the revised EIA for the Marina Project. Belize Environmental Technologies thereafter produced a supplementary environmental impact assessment dated December 2009 (the December addendum) to strengthen and improve the then existing EIA in order to meet the standards and requirements of the Terms of Reference approved by the DOE

13. After reviewing the EIA, the NEAC requested a resubmission of the EIA in a form that would more accurately respond to the Terms of Reference which had been approved by the DOE for the Marina Project.

12. I am further informed and verily believe that on the 10th August, 2009 the Placencia Marina Limited was notified by the DOE that the NEAC met on 5th August, 2009 to review the EIA for Marina Project and to provide their recommendations thereon. A copy of the letter dated 10th August, 2010 is now produced and shown to me marked "IF4" and is attached hereto.

11. I am also informed and verily believe that a public consultation was therefore held on 16th July, 2010 in respect of the EIA for the purpose of giving the general public the opportunity to be heard in respect of the Marina Project. A copy of the Public Notice in respect of the meeting is now produced and shown to me marked "IF3" and is attached hereto.

10. I am informed and verily believe that in or about June, 2009 Natural Resource Consulting submitted the EIA for the proposed marina for Placencia Marina Limited to the DOE for review by the National Environmental Appraisal Committee (the NEAC) and approval by the DOE. A copy of the EIA for the Marina Project dated June 2009 is now produced and shown to me and marked "IF2" and is attached hereto.

and the recommendations of the NEAC. A copy of the December addendum for the Marina Project is now produced and shown to me marked "IF5" and is attached hereto.

15. On 21st January, 2010 the NEAC reviewed the December addendum for the Marina Project and made further comments and recommendations to improve the EIA consistent with its duties under Regulation 25(1) of the Regulations to review all environmental impact assessments; advise the DOE of the adequacy or otherwise of environmental impact assessments; advise the DOE of circumstances warranting a public hearing; and make recommendations to improve the efficiency and effectiveness of the environmental impact assessment process.

16. I have been given access to the minutes of the said meeting dated 21st January, 2010 as a result of these legal proceedings and take note that the minutes indicate that some NEAC members were of the view that the document did not have sufficient scientific data to support the design of the marina and to address potential negative impacts. The document did not identify the proposed site for obtaining fill material for the geotubes and the source of material for use as rip-rap, the impacts on such location and applicable mitigation measures. Some members were also of the view that the document did not include a habitat map or coring results to determine the depth and sediment distribution of the seabed. Further, a bathymetric map of the project site was not provided and the oceanographic data used in justification for the design of the marina was not adequate as it was not site specific. It was also recommended that the proposed source of potable water for the project be tested to determine its sustainable yield and zone of influence. A concern was also raised as to the accessibility of 200ft. vessels from the easternmost end of the marina as the space between the breakwaters appeared to be too narrow based on the scale diagrams in the EIA.

17. I appeared along with Mr. Juan Rancharan as the consultants for Belize Environmental Technologies at the said meeting to discuss the EIA with the NEAC and was able to hear first-hand some concerns which were expressed by some members of NEAC regarding the EIA.

18. We informed the NEAC in respect of the oceanographic data that the wave, climate and sand transport information was included which had been gathered from different reports conducted in the Placencia and Caribou Caye which were relevant to the Marina Project area.
19. We also explained the limitations in regards to the use of existing data and software to generate a coastal model for the project site due to the lack of long term data to calibrate the model "Genesis" which is one of the best models to use in the circumstances.
20. We explained to the NEAC that the pump test on the well had not been done since the well was in operation for more than five years and had been providing the Placencia Hotel and other resorts in the area with their potable water for all these years. In addition, it was explained to the NEAC that the information contained on the well and that of nearby wells also indicated that the well was believed to be in the same aquifer as the Big Creek well that provides Placencia and Seine Bight villages with their potable source of water. We felt that the pump test at this stage was in our view not necessary since these are normally carried out for new wells before being put into production.
21. In respect of the maneuverability and access of 200ft. vessels to access the marina, we noted to the NEAC that their concerns would be submitted to the designers of the marina so that the issue could be addressed and the designs modified.
22. In respect of the bathymetric data, we informed the NEAC that the equipment used to collect bathymetric data would not yield any different information than the equipment used by the Belize Port Authority. We acknowledged that while all the site specific bathymetric data had been collected, a bathymetric profile was not done as the Echo Map Software was unable to process the huge volume of data which had been collected and stored, but could only process small portions of the data. We committed to

preparing and presenting a profile/map based on the data which had already been gathered from the site.

23. I also take note that based on NEAC's review of the EIA along with the December addendum, and the discussion with the consultants, NEAC made the following recommendations for improvement of the EIA as follows:

“6.1 NEAC agreed that at least one to two months site specific oceanographic data (wave height, wind direction, currents flow, sediment transport) be collected and compared with the data used in the EIA (eg. Caribou Caye) to show correlation of more than 70%.

6.2 That a bathymetric profile be prepared using other available software;

6.3 The source of the geotube fill and material for rip-rap be identified, as well as identification of the potential environmental impacts to the area of sourcing and their mitigation measures;

6.4 An assessment of the capacity of the existing well needs to be conducted to ensure its capability of meeting the added water demands of the marina;

6.5 The marina design be adjusted to ensure the accessibility of 200ft. vessels and that the final design be submitted prior to making any decision.

6.6 Once the information has been submitted then NEAC would be in a better position to recommend on the EIA.”

A copy of the Minutes of the NEAC meeting dated 21st January, 2010 is now produced and shown to me marked “IF6” and is attached hereto.

24. In view of the recommendations made by NEAC, on 25th January, 2010 I wrote a letter to the Chief Environmental Officer as agent for Placencia Marina Limited wherein I stated as follows in respect of the several issues raised by the NEAC:

a. Marina Site Specific Oceanographic Data (Wind speed, wave height, sea current and sediment loading): Instead of the requested 2 months period for data collection, the Developer [Placencia Marina Limited] is requesting that this condition be included in the ECP and proposes a data collection period of 5 consecutive years. The results of the study would be submitted on a yearly

basis to the Department of the Environment. This data could then be useful in the calibration of the GENESIS model or other shoreline change prediction model for the Placencia Area.

...

- b. Marina Site Bathymetric Map: [Belize Environmental Technologies] has made arrangements for the process in the bathymetric data collected for the site and will be using ARC-GIS to generate the site bathymetric map. This will be provided on 28th January 2010.*
- c. GEO Tube Fill Material: [Belize Environmental Technologies] has initiated the process in classifying the GEO Tube fill material to be used.*
- d. Pump Test/Aquifer Test: The developer is requesting that you consider this test to be conducted as part of the ECP [Environmental Compliance Plan] with the results to be provided within a two weeks period since this well has already been in production for more than five years.*
- e. Marina Entrance: The architects and engineers have been notified of the restrictive entrance to large yachts and adjustments will be made to the design.*
- f. Social Benefits: After further review of project collateral business the developer feels that the total amount of Belizean full time employees will be increase[d] to a total of 60 persons.*

A copy of the letter sent to the Chief Environmental Officer dated 25th January, 2010 is now produced and shown to me marked "IF7" and is attached hereto. A copy of the said letter dated 25th January, 2010 sent to the Chief Environmental Officer was also attached as Annex 1 to the February Addendum ("IF8") submitted to the NEAC.

- 25. In its response to the 25th January 2010 letter, the DOE informed that it did not accept the five-year study in substitution for the 1-2 months data collection and that once the results of the data collection correlated more than 70% with the data from the site referenced in the EIA (Caribou Caye), then the representativeness for the proposed site would be acceptable to NEAC and the EIA could be recommended favourably.
- 26. The DOE further stated that the NEAC was still interested in the continued 5 year data gathering as proposed. A copy of the letter of response dated 1st February 2010 is now produced and shown to me and marked "IF8" and attached hereto.

27. In view of the representations which I made on behalf of Placencia Marina Limited and in view of NEAC's recommendations from the meeting at which I was present, I prepared on behalf of Placencia Marina Limited a second supplement dated January, 2010 but delivered to the DOE on 12th February 2010 (the February addendum). A copy of the cover letter with the February addendum for the Placencia Marina Limited is now produced and shown to me and marked "IF9" and is attached hereto.
28. By the cover letter to the February addendum also dated 12th February, 2010 I responded to the correspondence of the Chief Environmental Officer dated 1st February, 2010 that I was submitting the information recommended by NEAC save that Belize Environmental Technologies and the Placencia Marina Limited were attempting to obtain the required oceanographic information of the micro-climatic conditions of the project area and had approached several local experts in the field and that the oceanographic study would mean a significant delay to the environmental clearance process.
29. I informed that three of the four individuals contacted namely, Ramon Frutos, Rudolph Williams and George Hanson responded that for them to be able to conduct the studies the investor [Placencia Marina Limited] would be required to purchase specialized equipment not then available in Belize which would require additional time and would cause delays in the project.
30. I also indicated that this was probably the first time that a project in the nature of a marina would generate the type of specific information for a relatively small project site and drew attention to the fact that the Ara Macao's 67 acre land-locked marina, three miles north of the project site was granted clearance without being required to provide this specific type of data.
31. Ultimately I informed the Chief Environmental Officer that Placencia Marina Limited was not objecting to meeting NEAC's recommendation for the oceanographic data but

that the data could not be gathered expeditiously. As such, Placencia Marina Limited was requesting that the DOE consider the inclusion of the purchase of the equipment and oceanographic data gathering as a condition of the Environmental Compliance Plan (“ECP”).

32. It is also pertinent as I noted in the letter that the former Chief Meteorological Officer, Ramon Frutos, had given his professional opinion that the oceanographic information of the micro-climatic conditions to be gathered should not vary significantly from the oceanographic information already provided in the EIA.
33. Therefore Placencia Marina Limited requested that the DOE defer the provision of the oceanographic data, and require that such oceanographic data be provided as a condition of the ECP, a binding document, which had to be duly executed by Placencia Marina Limited.
34. At a meeting of NEAC on 24th February 2010, NEAC discussed the February addendum. I take note that the minutes of the NEAC included the following observations in respect of the February addendum:

“4.1.1 A narrative description of the bathymetric data was needed to accompany the maps presented, this would allow for a greater understanding of the technical data. The bathymetric sheets presented were much better and show the depth contours;

4.1.2 Both the international and national standards for the operations of port facilities were not included in the EIA or the Addendum. This should be brought to the attention of the Developer. This is important if the marina is to serve as arrival points for international passengers.

4.1.3 The finalized technical designs need to be reviewed and approved by the [Belize Port Authority], Ministry of Works, and DOE, prior to any construction activities.

4.1.4 The oceanographic data (wave height, wave direction, currents, etc.) requested was not provided since this data is required to draft the technical designs for the marina, it was decided that a minimum of six (6) months data collection be required to establish a minimum baseline. If granted

approval, this information should be submitted for review to incorporate any required change that may be necessary in the designing and construction phases of this project.

4.1.5 The pump test for the aquifer is critical to determine the maximum sustainable yield on the aquifer for this project and others in the surrounding communities. This aquifer test can be requested in an ECP with a short timeframe for the test to be conducted.

4.1.6 If clearance is granted for the development, it should be done in phases, and construction activities should only be allowed to occur after the required oceanographic data is collected, submitted, reviewed, and approved by the relevant agencies.

4.1.7 The option presented for obtaining fill material from 10 acres in the lagoon while dredging to a deeper depth, is the preferred option. With this option there is no need for dredging the seafront. The original option of dredging 100 acres in the sea at a shallower [area] was unacceptable.

4.1.8 The identified location for dredging in the addendum is an area previously used for another development. Hence, there is minimal potential impact as the area has been previously disturbed. The substrate has been previously assessed and most of these areas are bare bottom substrates, and the material is acceptable for geo-tube fill. It is preferable for the developer to dredge deeper utilizing a smaller footprint as identified in the document, than having a larger footprint and disturbing a larger area. Furthermore, it has been observed that the deeper burrow sites, after dredging, become a sustainable habitat for fish.”

A copy of the Minutes of the Meeting dated 24th February, 2010 is now produced and shown to me and marked “IF10” and is attached hereto.

35. From the correspondence sent to Placencia Marina Limited it would appear to me that the NEAC therefore proceeded “after much discussion and deliberation”, [to recommend] that Environmental Clearance be granted [to the Placencia Marina Limited] subsequent to the signing of an [Environmental Compliance Plan] with the following conditions:

“The project is granted approval in three (3) phases:

- a) Phase 1 shall consist of Oceanographic Data Collection as stipulated in the Terms of Reference for the development of the ELA, for a minimum of 6 months.*

- b) *Phase 2 shall consist of the approval of the Detailed/Technical Engineering Designs for the proposed marina. The technical designs will be developed using the findings gathered by the data collection exercise. The final designs shall be vetted and approved by the Ministry of Works, with input from the Belize Port Authority, Geology and Petroleum Department, and the Department of the Environment.*
- c) *Phase 3 shall encompass all the construction activities above water, which shall commence only after Phase 1 & Phase 2 has (sic) been completed.*

The NEAC recommend[s] that a performance bond is required for this development.”

Copies of the letter sent to Placencia Marina Limited dated 1st March, 2010 and the signed ECP are now produced and shown to me marked “IF11” and “IF12”, respectively and are attached hereto.

The Claim:

36. The Claimant filed a claim in the Supreme Court dated 29th July, 2010 against the DOE as Defendant and the Placencia Marina Limited as Interested Party seeking the following relief:

- (1) A Declaration that the Defendant failed to approve the Placencia Marina Limited Environmental Impact Assessment [in] accordance with its duties under Section 4 of the Environmental Protection Act, Chapter 328 of the Laws of Belize, as amended by Act No. 5 of 2009, and the Environmental Impact Assessment (Amendment) Regulations, No. 24 of 2007.
- (2) A Declaration that the Defendant failed to exercise its statutory duties under Section 4 of the Environmental Protection Act, Chapter 328 of the Laws of Belize, as amended by Act No. 5 of 2009, and the Environmental Impact Assessment (Amendment) Regulations, No. 24 of 2007 when it purported to approve and sign the Environmental Compliance Plan for Placencia Marina Limited, and therefore acted *ultra vires*.

- (3) A Declaration that the Defendant acted unlawfully by delegating, in the Environmental Compliance Plan for Placencia Marina Limited, its jurisdiction to vet and approve the final detailed technical/engineering designs of the Placencia Marina Limited Project to the Ministry of Works.
- (4) An Order that the Environmental Compliance Plan dated 6th April 2010 is illegal and therefore null and void.

No breach of statutory duty in approving EIA

37. The Claimant says that the DOE failed to approve the EIA in accordance with its duties under sections 4, 20(2) and 20(4) of the Act as amended and the Regulations. In the First Affidavit of Mary Toy dated 29th July, 2010 the regulations identified as grounding the claim are regulations 5, 15(2), 16, 19, 20(3), 21, 22, 25 and 26.
38. At all times the Placencia Marina Limited ensured that it used its best efforts to conduct tests and provide the data and any information required by the NEAC and the DOE to facilitate their decision-making process.
39. It is also clear from the Minutes of the meetings of the NEAC and correspondence from its members that whenever the NEAC and the DOE believed information provided to be deficient, their concerns and recommendations were made known to Placencia Marina Limited which worked to implement the recommendations and to improve the EIA. This is seen clearly in exhibit "MT5" to the First Affidavit of Mary Toy dated 29th July, 2010 wherein Ms. Toy makes reference to comments made by the Fisheries Department, as a member of NEAC, in regard to their view of the deficiencies in the EIA. The Placencia Marina Limited ensured that it duly addressed all recommendations by the NEAC and that where the DOE accepted those recommendations, that it duly complied.

40. The approval of an EIA is a dynamic process, one that is always evolving, as all parties concerned attempt to improve and ultimately generate an EIA report that adequately identifies, predicts, evaluates, mitigates and manages the environmental as well as key social and economic impacts of development projects and activities.
41. It was therefore the duty of the Fisheries Department and all other relevant agencies with representation on the NEAC to comment critically on the EIA and make recommendations for its improvement. The Environmental Impact Assessment Regulations 1995 as amended by SI No 24 of 2007 provides at Regulation 25(1)(d) that the NEAC may make recommendations to the Department “*on ways to improve the efficiency and effectiveness of the environmental impact assessment process.*”
42. This process of the NEAC/DOE critically analyzing the EIA and the Placencia Marina Limited responding to recommendations from the NEAC/DOE occurred throughout the EIA process as is illustrated by the December and February addenda submitted by the Placencia Marina Limited upon requests for further information or improvement to the EIA.

Oceanographic Information and Prediction Modeling:

43. At paragraph 23 of the First Affidavit of Mary Toy dated 29th July, 2010, Ms. Toy states that in a “private” letter dated 12th February, 2010, I requested that DOE and NEAC approve the Marina Project without bathymetry and modeling studies. The letter written to the DOE was done in the normal course of communication between myself as representative of Placencia Marina Limited and the DOE and was not in any way a “private” letter. I must also correct the statement made that I requested approval “*without bathymetry and modeling studies.*”
44. At no point in the said letter of the 12th February, 2010 did I make mention of bathymetry and modeling studies as asserted. In the letter I only requested that *oceanographic information* of the micro-climatic conditions along with the purchase of the relevant equipment to collect such information be included as a condition of the ECP,

which would by virtue of its presence in the ECP be binding on Placencia Marina Limited.

45. The EIA contained sufficient qualitative data in the nature of general oceanographic information (in respect of wind speed and wave height etc.) in order for the EIA preparers as well as the NEAC to make informed conclusions and inferences on what some of the general impacts resulting from the project would be and to identify mitigation measures. However, in view of the recommendation from NEAC for site specific oceanographic information on micro-climatic conditions of the project site and based on the fundamental delays which would be caused to the Marina Project, the Placencia Marina Limited requested that the oceanographic information be collected as a condition of the ECP.
46. The Placencia Marina Limited, recognizing the importance of having oceanographic information which could be utilized *usefully and accurately* in future projects in the Placencia area initially sought to recommend that it undertake at its own cost, a five year study of oceanographic information (as opposed to the two months study requested) with the results to be submitted on a yearly basis to the DOE. Once this five-year study is done, the oceanographic data could then be used in the calibration of the GENESIS model or other shoreline change prediction models for the Placencia area so as to generate more specific data on impacts to the shoreline.
47. This offer for the five-year data collection in place of the two month data collection period was initially rejected but the NEAC, in recognizing its importance and the importance of collecting such data , indicated that it would be “interested” in any data collection proposed by Placencia Marina Limited.
48. The reason the Placencia Marina Limited requested that the oceanographic data be provided in the ECP for the purpose of collecting long-term data is because there was no long-term statistical data available which is required to calibrate or run the models in order to study the impacts of the structure on the shoreline. In the absence of such a

model, general theory and knowledge analysis of prototype structures are often used to predict impacts caused by such a structure on the shoreline.

49. Such a prototype structure for instance would be seen in the case of Old Belize which protected the mouth of its marina from siltation by using groyne (perpendicular) breakwater structures. The Marina Project would then be conducted on the basis of general predicted impacts but would serve an essential purpose as it would be used to collect and monitor long-term data which could then be used by the DOE and other developers to study and predict impacts of developments in the Placencia area.
50. Therefore, based on the amount of data received for the area, the information to be generated from the modeling referred to by the Claimant would not be reliable because longer term baseline data is needed in order to accurately calibrate the model.
51. In making its decision to allow qualitative data in the nature of general predicted impacts and to request also quantitative data in the form of a two month data collection so as to be able to achieve some specific predicted impacts, the DOE in no way acted contrary to the TOR nor did it breach any of its statutory duties.
52. Further, the NEAC was entitled to recommend, and the DOE was at liberty to approve the EIA on the basis of qualitative data alone which would provide a good appreciation of what the general impacts would be without the need for quantitative data on the area.
53. Ultimately the NEAC recommended, and the DOE approved the inclusion of the quantitative aspect of the oceanographic information as a condition of the ECP as Phase 1 of the Marina Project. Phase 1 of the Project is therefore phrased in the ECP as follows:

a) Phase 1 shall consist of "Data Collection" and the construction of the "Land Components". This phase shall include the collection and submission of the requested oceanographic data on the microclimatic condition of the project site. This includes the following parameters:

- 1) *Wind speed and direction*
- 2) *Sea currents*
- 3) *Wave height*
- 4) *Tide*
- 5) *Sediment transport (See: Page 2 of the ECP)*

....

3.01.1 Prior to commencing construction of the marina proper, save and except the pilot project on section 1(a), the Developer will first embark on a data collection exercise to gather oceanographic data on the microclimatic conditions of the specific project site. The parameters to be gathered are: wind speed and direction, sea currents, wave height, tides and sediment transport.

3.01.2 All costs associated with the oceanographic data gathering exercise at the project site, inclusive of the initial equipment purchase, will be borne by the Developer. (See Page 5 of the ECP)

54. It is therefore the case that the NEAC and the DOE sufficiently addressed their minds to sufficient qualitative data in order to make a decision in respect of the general impacts on the shoreline.
55. I have been informed and verily believe that in full compliance with the ECP in respect of Phase 1, the Placencia Marina Limited had engaged Eco Solutions and Services Ltd which is managed by Ramon Frutos, former Chief Meteorological Officer, Government of Belize, to collect the site specific oceanographic information in response to the recommendation from the NEAC to conduct systematic oceanographic and climatic monitoring of the marine environment in the vicinity of the proposed marina. A copy of the data with cover letter dated 14th October, 2010 is now produced and shown to me marked "IF13" and is attached hereto.

Bathymetric Data:

56. The TOR for the EIA provides at "2.0 Physical Environment" that "*a detail[ed] description of the bathymetry of the project site*" was to be provided by the Placencia Marina Limited.

57. Both the Affidavits of Mark Cherniak dated 30th July, 2010 and Mary Toy dated 29th July, 2010 for the Claimant suggest that there was non-compliance by the DOE with the TOR in respect of bathymetric studies in that such studies were limited in scope covering only a portion of the proposed marina.
58. The bathymetric studies for the EIA, however, were conducted in respect of the entire marina basin area for the project site and the data was duly submitted along with the bathymetry map in the EIA and December and February addenda.
59. All the bathymetric data collected was ultimately sent to the Land Information Center, Belize where the entire survey plan of bathymetric data was produced for the entire marina basin area and duly submitted for the consideration of the NEAC and approval of the DOE.
60. Mark Cherniak and Mary Toy also suggest that there was non-compliance with the TOR in respect of the bathymetric studies in that such studies do not cover the location of the proposed burrow site in the lagoon where dredging may occur.
61. In respect of the lagoon, no bathymetric studies were required for that area in the TOR but the Placencia Marina Limited conducted a linear profile of the depth of the lagoon area where material would be dredged and provided the profile to the NEAC and the DOE.
62. In recommending that the EIA be approved and environmental clearance be granted the NEAC noted in respect of the lagoon area identified by Placencia Marina Limited that:

“...The option presented for obtaining fill material from 10 acres in the lagoon while dredging to a deeper depth, is the preferred option. With this option there is no need for dredging the seafront. The original option of dredging 100 acres in the sea at a shallower [area] was unacceptable.”

...The identified location for dredging in the addendum is an area previously used for another development. Hence, there is minimal potential impact as the area has been previously disturbed. The substrate has been previously assessed and most of these areas are bare bottom substrates, and the material is acceptable for geo-tube fill. It is preferable for the developer to dredge deeper utilizing a smaller footprint as identified in the document, than having a larger footprint and disturbing a larger area. Furthermore, it has been observed that the deeper burrow sites, after dredging, become a sustainable habitat for fish."

63. The bathymetric information required by the TOR in respect of the project site itself was therefore provided by the Placencia Marina Limited to the satisfaction of the DOE. The NEAC and the DOE also gave a full and considered review of the proposed dredging site and made the recommendation that the dredging of the area by the Placencia Marina Limited be approved.
64. I have recently been informed and verily believe that in any event, the Placencia Marina Limited has written to the DOE to indicate that it will have no need to dredge sand/material from the lagoon for use in the Marina project. The original design of the breakwater for the Marina Project was to use a geo-tube construction process. This would have entailed filling the geotextile cylinders with sand to provide the wave breaking action required to protect the marina interior. The alternative design of the rock-mounds will now be utilized. This would render the concerns associated with the proposed dredging inconsequential as the developer has chosen to use this alternative option. A copy of the letter sent by the Placencia Marina Limited to the DOE is now produced and shown to me and marked "IF14" and is attached hereto.

No unlawful delegation of jurisdiction

65. In her First Affidavit dated 29th July 2010, Mary Toy states that the "NEAC abdicated its duty to require and consider specific plans for the Marina Project in determining whether to approve the Marina Project. NEAC also could not lawfully delegate its authority to vet and approve the project designs to the Ministry of Works, or to approve the marina project conditionally or unconditionally

without first considering same.” In the First Affidavit of Mark Cherniak dated 30th July, 2010 he also states that, “It is also clear from the ELA that, despite the clear requirements of the TOR, no architectural design of the project has been finalized. The design of the project is directly relevant to its environmental impact and determinative of the type of environmental impact assessment which needs to be carried out.”

66. The TOR for the EIA did not require the specific architectural and engineering designs for the Marina Project. The TOR specifically requested in the EIA a “Project Description” which was duly included by Placencia Marina Limited at Chapter II of the EIA. This requirement of a “Project description” is in compliance with the Environmental Impact Assessment Regulations 1995 which provides that a report of an environmental impact assessment shall include: “*a description* of the development proposed, comprising information about the site, the design and size and scale of the development, and its immediate surroundings”.
67. Further, it has never been the practice of the NEAC and the DOE to require final architectural designs prior to environmental clearance and to compel the developer to invest in detailed designs at a stage where they have no idea whether or not the project will be approved. Normally NEAC and the DOE require preliminary designs in the form of the conceptual development plan.
68. It is only when the studies are approved that the ECP would then include provisions for submission of the detailed architectural and engineering designs by the developer taking into account all the data and information which has been gathered throughout the EIA process. This is because following the various studies which must be conducted and if the project is approved, the investor will then be required to provide detailed architectural and engineering designs which are subject to approval by the various agencies with technical expertise and which properly take into account the results of the various data collected.

69. In this regard, the ECP specifies that the Marina Project will be implemented in three phases with the first dealing with data collection and the second dealing with approval of the technical/architectural designs as follows:

b) *“Phase 2 shall entail the “approval of the Detailed Technical/ Engineering Designs” of the proposed marina. These technical designs will be developed using the findings accumulated during the data collection period. The final marina designs shall be approved by the Ministry of Works, with input from the Belize Port Authority, Geology and Petroleum Department, and the Department of the Environment.” (See Page 2 of the ECP)*

The ECP further provides as follows:

3.01.3 The final design of the marina, and the type of construction materials to be used on the marina, shall be submitted for approval by the Ministry of Works, with input from, Geology and Petroleum Department, Belize Port Authority, and the Department of the Environment, prior to commencing any construction activities associated with the marina....

...

3.01.5 The marina design should take into consideration the need to accommodate vessels of approximately 210 feet length, being primarily transient vessels. The design of the marina will allow enough spacing for safe turning and maneuvering of vessels, particularly at the entrance/exit of the marina area. (See page 5 of the ECP)

70. It is also relevant to note that under the Regulations the TOR are drafted with the guidance of the DOE and are ultimately approved according to what the DOE considers or deems necessary in the particular circumstances of the case with the inclusion of the information which must be included in an ELA as prescribed by the Regulations.

71. It is also the case that there is no provision in the Regulations which mandates that the NEAC must review the specific technical and engineering designs once it has already

reviewed the Project description in Chapter I of the EIA and made recommendations on same. It has to be made clear that this process focuses on the vetting of the environmental issues and information contained in the EIA. The NEAC is not a body that is created with expertise to vet architectural or engineering designs.

72. Further, the DOE would in fact be abdicating its duty if it failed to ensure that the technical and engineering designs are reviewed, as they are in this case, by departments with the technical expertise to make such assessments such as the Ministry of Works, with input from the Belize Port Authority, the Geology and Petroleum Department, and the Department of the Environment.
73. The DOE therefore acted lawfully in ensuring that it reviews the environmental aspects of the EIA while the technical/engineering designs are properly reviewed and approved by the appropriate governmental agencies, with input from DOE itself.
74. I have been informed and verily believe that on 19th May, 2010 the DOE submitted a copy of the proposed engineering details of the Marina project to the Ministry of Works for their review (from an engineering perspective) and requested that the Ministry of Works submit its comments to the DOE. The proposed design was also submitted to the Belize Port Authority for input with respect to the navigational and post state issues. The approval of the designs by both the Belize Port Authority and the Ministry of Works was also duly forwarded to the DOE.

A copy of the initial designs submitted in May, 2010 to the DOE is now produced and shown to me marked "IF15" and is attached hereto.

A copy of the letter of approval of the engineering/technical designs from the Belize Port Authority dated 17th June, 2010 is now produced and shown to me marked "IF16" and is attached hereto.

A copy of the letter of approval of the engineering/technical designs by the Ministry of Works to the Chief Environmental Officer, DOE dated 5th November, 2010 is now produced and shown to me marked "IF17" and is attached hereto.

A copy of the final approved designs incorporating the recommendations of the Ministry of Works and Belize Port Authority is now produced and shown to me marked "IF18" and is attached hereto.

Statutory duties complied with in approving ECP and ECP not illegal, null and void:

75. The Claimant asserts that the DOE approved and signed the ECP for the Marina Project which (1) failed to specify the proposed developments and identify and evaluate the effect of the development on the environment; (2) without having available to it or evaluating the bathymetric and oceanographic data or (3) any data regarding the land based components, availability of potable water, or appropriateness of the project site as required for properly assessing the effect of the Marine Project on the environment and (4) unlawfully delegated to the Ministry of Works its function to vet and approve the final detailed technical/engineering designs of the Marina Project subsequent to the grant of approval for the project.
76. The Environmental Impact Assessment (Amendment) Regulations, S.I. No. 24 of 2007 introduces the requirement of an ECP which is defined as a legally binding document developed by the DOE as a follow-up program to the EIA and which consists of a set of legally binding environmental conditions, guidelines, policies and restrictions which the developer or his representative agrees to in writing to abide by as conditions for project approval.
77. In respect of (1), the Placencia Marina Limited provided in its EIA the project description for the proposed developments (Chapter I of the EIA) and also identified and evaluated the effect of the development on the environment as seen in Chapters 13 and 14 which deal with "Potential Cumulative Impacts" and "Environmental Impacts"

and Mitigation”, respectively. These were therefore not items which were to be replicated and included in the ECP as suggested by the Claimant.

78. In respect of (2) the bathymetric and oceanographic data, I refer to my statements on same at paragraphs 43 to 64 above.
79. In respect of (3) dealing with the data regarding the land based components, availability of potable water, or appropriateness of the project site as required for properly assessing the effect of the Marina Project on the environment, I am informed and verily believe that in respect of the land based components, this was not a requirement of the TOR and as such Placencia Marina Limited did not include same in the EIA.
80. The DOE had made the decision in its discretion that as the area for the land based developments had been previously disturbed and was in fact the previous location of the Calico Jack’s Resort and in view of the fact that it was a development under Regulation 8, Schedule 2 of the Regulations, no EIA was required in respect of that development. See Chapters 1,5,6,7, 9 and 14 of the December Addendum in respect of the water quality issue.
81. In regard to (4) the vetting of the technical/engineering designs for the Marina Project, I refer to my statements at paragraphs 65 to 74 above.
82. The Claimant also asserts that there are several types of data which were requested in the TOR and should have been submitted prior to approval of the EIA but which were in fact again requested in the ECP since they had not been adequately addressed in the EIA.
83. All the data referred to by the Claimant as being required by the TOR were duly provided in the EIA and the ECP only builds upon the EIA and provides environmental conditions, guidelines, policies and restrictions with which Placencia Marina Limited is expected to comply.

84. The data referred to at paragraph 35 of the First Affidavit of Mary Toy dated 29th July, 2010 is in respect of the following:

- (1) *sea currents (TOR – 6.02.9);*
- (2) *wind speed and direction (TOR – 6.02.11);*
- (3) *near shore and off shore sedimentation patterns (TOR – 6.02.10);*
- (4) *wave conditions (6.02.12);*

Response: In respect of 6.02.9, 6.02.11, 6.02.10 and 6.02.12, there was only a need to evaluate options for the storage of water borne vessels and examine these parameters in respect thereto if the Marina Project had entailed such storage of water borne vessels. However, the Marina Project does not allow for the storage of water borne vessels and as such these parameters were not required for the particular purpose of evaluating available options.

- (5) *specifications and dimensions of proposed docking facilities, pier, breakwaters and boardwalk and type of construction materials to be used (TOR – 6.07);*

Response: See Chapter 1 of the EIA at pages 5 to 14 where this information was provided.

- (6) *dimensions to scale (length, height, width) for all related structures, both land and water based, berthing and mooring arrangements as well as specific location of the various facilities such as fuel dispensing and boat storage off-land (TOR – 6.09);*

Response: See Chapter 1 of the EIA at pages 5 to 14 where this information was provided.

- (7) *conducting a proper pump test to verify the recharge rate of the proposed water supply of the Marina Project;*

Response: This was not included in the TOR but the TOR did provide for information on Water Resources in 2.0 which is dealt with at Chapter 5 of the EIA. Further, a specific request was made by the Placencia Marina Limited that since the proposed water source had already been in use for five years prior to the EIA that the tests are done as a binding condition of the ECP. The NEAC and the DOE duly considered this factor and the DOE was at liberty to include this as a binding condition of the ECP.

(8) *An inventory of other users in the zone of influence with respect to the selected water supply source and identity and impacts thereon and mitigation measures to be undertaken (TOR – 2.04).*

Response: Se Chapters 5, 9, and 14 of the EIA.

85. The EIA is compliant with the TOR and the Regulations and has been recommended by the NEAC and duly approved by the DOE as it adequately provides for the protection of the environment in accordance with the Act and the Regulations. The ECP builds upon the process of ensuring that a proper monitoring mechanism is activated and that binding environmental compliance measures are in place.

SWORN at Belize City by)
Ismael Fabro)
This day of)
2010)



ISMAEL FABRO

Before me,



COMMISSIONER OF THE SUPREME COURT

This Affidavit is filed on behalf of the Interested Party and it is intended that this Affidavit will be used at the hearing of the claim herein.