COUNTRY REPORT: THE BAHAMAS

Access to Environmental Information, EIAs and Public Participation in Development Decisions

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It seem the Council dem tek a big liberty,
Them called up man with machinery,
They tear down the front line vicinity,
But not a word was said to da community,
So evening come; the youth get angry,
Start trow firebomb in da old property. – In A Mi Yard, Papa Levi

Introduction

This report will be a brief overview of two series of cases in The Bahamas dealing with access to environmental information and public participation in development decisions. At the time of these cases, and to date, there is very little domestic environmental legislation governing the process and content of environmental impact assessments or public participation in developmental decisions. In addition, as a small jurisdiction, there are not many environmental decisions which come before the judiciary in the Bahamas, and therefore these two series of cases constitute important environmental legal developments in the jurisdiction. The first case was brought by residents of Great Guana Cay which culminated in a Privy Council decision in 2009. The Guana Cay decision formed an important judicial precedent to the most recent case involving Wilson City in Abaco. The final appeal of this case was dismissed by the Privy Council in May 2013. These national cases build on recent Caribbean jurisprudence regarding access to environmental information and EIAs, and a short summary of this regional jurisprudence is provided as background information.

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Regional Cases

The BACONGO Challilo Dam Case

The outcome of a series of cases brought by a coalition of environmental NGOs, the Belize Alliance of Conservation Non-Government Organizations (or BACONGO), against the Department of the Environment and the Belize Electricity Company Ltd., has had significant influence in the region. BACONGO brought an action to quash the decision of the Department of the Environment to approve the building of a hydroelectric plant in the Chalillo Dam of the Macal River. This development was anticipated to flood an area of pristine and rare biological diversity along the river and to displace local inhabitants. Under the 1995 Environmental Impact Assessment Regulations, the Department of the Environment was to carry out an EIA, and the National Environmental Appraisal Committee (or NEAC) was to review the EIA, advise the Department on its adequacy, and advise whether a public hearing on the EIA was necessary. Justice Conteh in the High Court supported the notion that the EIA is meant to be an iterative process, and decided that the project was so significant that the Department of the Environment should have required a public hearing on the project itself.

On appeal, the Court decided that although it was arguable that the Department of the Environment had acted unreasonably, given the wide public consultation and the fact that stopping the project would seriously prejudice the government and investors, they decided not to order a public hearing.

Belize, like The Bahamas, is a commonwealth country and an appeal was made to the final court of justice, the Privy Council. In this decision further facts regarding the incompleteness of the EIA, which had been concealed by the developers, were brought to light. One of the members of the NEAC, Mr. Cho, had disputed the statement in the EIA that the ground of the valley upon which the dam would be built was made of granite. Despite this, the NEAC decided it would approve the EIA as it was. The Privy Council issued a split three to two decision on the case, with Lord Hoffman delivering the majority opinion not to order a public hearing or overturn the Department of the Environment's decision to approve the project. Lord Hoffman argued that any defects in the EIA could be cured by follow up monitoring of the project. Lord Walker delivered a powerful dissenting opinion, stating that the EIA was based on a previous survey that was so full of fundamental errors that it should not be relied upon, and that it was unreasonable to withhold fundamental geological facts from the public.

The majority opinion in the BACONGO case has served as a precedent for other common law cases in the region, but has been critiqued.[1] The considerable deference provided by the judiciary to developers and the government for projects already underway has also become influential in regional jurisprudence as later cases will demonstrate.

The Fishermen and Friends of the Sea Cases

From 2002-2005 two series of cases were brought in Trinidad and Tobago by Fishermen and Friends of the Sea (F&FS) against the Environmental Management Authority (EMA) regarding liquified natural gas (LNG) facilities. These cases appeared to adopt the majority opinion of the Privy Council in the *BACONGO* case, and provide useful regional guidance on whether continuing public consultation is required.

In 2002 F&FS brought an action to judicially review the decision of the EMA to issue a certificate of environmental clearance (CEC) to a company to pipe LNG from an offshore drilling platform to an LNG industrial complex.[2] The EMA had failed to carry out public consultation on the project. In the High Court Justice Bereaux refused the application for judicial review, although he acknowledged that the issue of public interest had caused him significant anxiety, as the case involved the lives and wellbeing of approximately 110,000 people. In a majority opinion, the Court of Appeal upheld Bereaux's decision not to review the EMA's approval, relying on 'good administration', deference to affairs of the state and to the oil and gas industry.[3] On appeal to the Privy Council, Lord Walker criticized Bereaux's opinion.[4] According to Walker, Bereaux had not paid sufficient attention to the need for public consultation, which Walker stated was of high importance in a democracy.

In a 2004 dispute brought by F&FS against the EMA and a different company, Atlantic LNG, the EMA exercised its discretion not to hold a further consultation after issuing the CEC. Justice Stollmeyer of the High Court stated that the rules of natural justice do not require that a formal, oral hearing take place in public and include no requirement for ongoing public debate.[5] These decisions demonstrate a judicial deference to good administration and

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[1] Francis Botchway, 'Privy to Unsustainable arguments in the Belize Dam Case' (2006) 8(2) ELR 144.
[2] Re: Fishermen and Friends of the Sea (2002) TT HC 148.
[3] *Fishermen and Friends of the Sea v The Environmental Management Authority et al* (2003) TT CA 45 The dissenting judgment by Lucky in this case criticized this deference to potential hardship caused to the company, and that environmental concerns should have been fully addressed.
[4] Fishermen and Friends of the Sea v The Environmental Management Authority and BP Trinidad and Tobago LLC (2005) TT PC 15.
[5] Fishermen and Friends of the Sea v Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (2004) TT HC 113.

private industry over the right of the public to be consulted, reflecting the majority opinion in the BACONGO case.

The Pear Tree Bottom Case

There is only one Caribbean case to date which takes up the minority opinion in the *BACONGO* case, the 2006 Supreme Court decision of *Northern Jamaica Conservation Association v Northern Resources Conservation Authority and National Environment and Planning Agency (No.1).*[6] The dispute involved an application to quash the decision of the National Resources Conservation Authority to issue a permit to construct a 2,000 room hotel in an area of rich biodiversity called Pear Tree Bottom in Jamaica. In comparing Lord Hoffman's majority opinion and Lord Walker's minority opinion in the *BACONGO* case, Justice Sykes stated a clear preference for the latter. In this dispute the EIA was posted on the government's website but was missing a marine ecology report which was never disclosed to other government agencies or the public. Justice Sykes decided that the public had a legitimate expectation to be told that the EIA was incomplete, and be provided with the rest of it when it was available. He stated, 'The people of Jamaica are entitled to be properly informed about the project by being given full and accurate information…concealing information and failing to disclose its existence will undermine public confidence in the decision making process.'[7]

Recent Bahamian Case Law

The Great Guana Cay Cases

Great Guana Cay is a small cay in the chain of islands called The Abacos in The Bahamas. Residents on Great Guana Cay include a number of expatriates who own second homes there, and Bahamians who make their living through fishing, the rental industry, restaurants, dive shops and bed and breakfast establishments.

The Supreme Court decision by Justice Carroll sets out the facts of the case. The applicants consisted of hundreds of landowners and residents of Great Guana Cay. One of the orders they sought was an order of mandamus requiring that the respondents conduct a full and proper public consultation prior to the Government of The Bahamas granting or issuing any

[6] (2006) JM SC 49.
[7] Ibid, para 115.

leases or approvals, and to prohibit construction until an environmental management plan was completed. The government had already entered into a Heads of Agreement (HoA) on 1 March 2005 with the developers. The proposed development, Baker's Bay Golf & Ocean Club, included 400-500 residential units, a 240 slip marina and eighteen hole golf course within a private, gated community which would extend to cover over half of Great Guana Cay.

At the time of the dispute there was no statute which provided for the undertaking of an EIA, access to environmental information or public consultation procedures; rather it was the practice of successive governments to ask a developer to undertake an EIA. This was usually submitted to the Bahamas Environment Science and Technology (or BEST) Commission, which engaged an independent consultant to review the EIA. It is important to note that the BEST Commission is not established by statute and therefore has no statutory functions. EIAs are often posted on the BEST Commission's website, and the public is often allowed to comment on them. The BEST Commission's mandate is to provide advice to the National Economic Council (or NEC), also not a statutory body, made up of the Prime Minister and his Cabinet. The NEC makes a decision whether or not to enter into an HoA, and then the required permits and licences for the development are subsequently granted by the relevant departments and Ministries. In this instance, the developers had submitted an EIA to the BEST Commission in October 2004, and the BEST Commission listed 25 concerns. The concerns of the BEST Commission, and its recommendations to government, are not made available to the general public. The concerns of the BEST Commission were cited in the judgements, and included the lack of a landfill site, lack of clarity regarding responsibility for the clean up of hazardous waste and abandoned structures, concern regarding the impact of the development on wetlands, lack of reports from public meetings, lack of mitigation measures from dredging the marina, lack of an environmental management plan, and concerns regarding potential contamination of groundwater wells and marine areas from the golf course.[8]

According to the judgments, two public meetings had taken place. Although residents had been promised a further meeting with the Minister of Financial Services, this meeting never took place. Representatives of the developers, including the author of the EIA, provided presentations to the residents on 20 August 2004, but no copies of the EIA were made available (the EIA would not be officially submitted until October 2004). Nineteen concerns

[8] Save Guana Cay Reef Association Ltd and others v The Queen and others (2008) BS CA, Judgment of Justice Osadebay, para 56.

of residents were recorded, including that they be provided with copies of the documents. The residents were generally opposed to the project, although some favoured a scaled down version of it without a marina.[9]

The EIA is not publically available on the BEST Commission's website, but a copy of the final EIA, dated March 2005, has been obtained from the internet by the author. One of the foundational ideas of the EIA was that as there was no organization currently taking responsibility and stewardship of the environment of the cay, allowing the cay to remain as an open access area would lead to further degradation of the environment. The EIA therefore justified approving the development so that one organization could take responsibility for rehabilitating and conserving the area.[10] Part of the site had previously been used by Disney Corporation but the project had been abandoned, leaving environmental damage on the site such as open paint cans, hazardous waste, abandoned buildings and infrastructure, abandoned fuel tanks and transformers. The development also left offshore debris which posed the danger of chemicals leaching into the nearshore environment.[11] None of this damage had ever been remediated.[12] The EIA promised a commercial centre for the benefit of residents, including public parks, and to establish an independent foundation in cooperation with the development's management and academic institutions.[13] The developers also stated in the EIA that they would assist in the monitoring and regulatory process by preparing timely progress reports, funding external review processes, and facilitating on-site inspections by civil servants.[14]

The provisions of the EIA are important as a number of judges decided not to halt the development on the basis of the provisions of the EIA. Justice Carroll, in the Supreme Court Judgment, stated that the EIA was quite positive,[15] and that he was most impressed by the mitigation regime set out in it.[16] He also cited from the EIA issues such as the poor condition of parts of the cay from the abandoned Disney development, and the lack of environmental stewardship by various constituents, such as bleaching techniques used for fishing and

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[9] Save Guana Cay Reef Association Ltd and others v The Queen and others (2008) BS SC.
[10] Ibid para 21.
[11] Kathleen Sullivan-Sealey and Nicolle Cushion, 'Efforts, resources and costs required for long term environmental management of a resort development: the case of Baker's Bay Golf and Ocean Club, The Bahamas' (2009) 17(3) Journal of Sustainable Tourism 375, 383.
[12] Passerine at Abaco Community Development, Environmental Impact Assessment, Prepared for The Bahamas Environment, Science and Technology Commission, March 2005, http://www.notesfromtheroad.com/files/eia.pdf, 21, and *Save Guana Cay* (n9), 32.
[13] Ibid 12.
[14] Ibid 21.
[15] Save Guana Cay (n 9), 32.
[16] Ibid 47.

unregulated use by yachtsman and residents.[17] It is curious that at no time was it ever suggested by the judiciary that it was the responsibility of the government to remediate environmental damage, discipline environmentally damaging actions by residents, or take on overall environmental stewardship of the area. The incapacity of the government to monitor developments and remediate damage from failed developments was assumed. It was also assumed that a subsequent development would cure the defects of a previously failed development.

Justice Carroll also dismissed the applicants' major concern of chemicals leaching from the golf course, stating that no evidence was submitted to support it. This aspect of the decision is puzzling as chemical leaching from the golf course was one of the concerns listed by the BEST Commission, which necessitated the developers to submit a redesigned golf course.

Justice Carroll acknowledged that the EIA had no legal status in Bahamian law. Reference was made to Justice Conteh's decision in the *BACONGO* case, with Justice Carroll concluding that the government's decision to carry out the development was not unreasonable based on the existing damage at the site, that the BEST Commission had made recommendations to the developers, and that the development would provide jobs to the local economy.[18] Very little mention was made by Justice Carroll of the rights of the public to participate in development decisions, as he stated that he had not had time to fully research and determine whether a common law right existed.[19]

On appeal, Osadabay's judgment makes numerous references to the EIA, and he assumes that the development will be of the 'highest environmental standards and management practices.'[20] Heavy reliance was made by both Ganpatsingh and Osadabay on the Privy Council's majority decision in the *BACONGO* case, with both judges concluding that these types of development decisions were a matter of national policy for sovereign, democratically elected government to decide.[21] Osadabay relied on the *BACONGO* test for EIAs. The past, poor practice of lack of environmental monitoring by government officials, and lack of post-project public consultation, was never raised to counter the practicality of adopting an iterative approach. The lack of access to environmental information, including the EIA, by residents was never raised in this judgment.

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[17] Ibid 32.
[18] Ibid 36.
[19] Ibid 42.
[20] *Save Guana Cay,* (n8), para 3.
[21] Ibid 34.

The Bahamas, like Belize, is a former British colony, and this case was appealed to the Privy Council in England. The Privy Council set out clearly the peculiarities of Bahamian law: that there are no statutory provisions governing EIAs, access to environmental information or public consultation. Unlike England or Belize, an EIA in The Bahamas is primarily designed to receive scrutiny by the BEST Commission, and is not designed to inform public consultation. Lord Walker points to the BEST Commission to fulfill the role of public watchdog, as the law itself does not provide for the inclusive and democratic procedure to include the public in the decision making process.

It is the argument of the author that Lord Walker's statement is not in line with the mandate of the BEST Commission. This mandate includes acting as a national focal point, coordinating national efforts to protect, conserve and manage the environmental resources of The Bahamas, acting as a forum for exchange of information between the government and the private sector, and to advise the government on the environmental impact of various development proposals submitted to the Commission for review.[22] The BEST Commission has no statutory powers or functions, and its mandate does not directly include acting as a watchdog for the public. Its primary function in relation to EIAs is to advise the government, not the public, on the impact of development projects. These recommendations are not made available to the public, and the government has no obligation to heed these recommendations. Although the public interest may indirectly form part of the context for the Commission's recommendations, its lack of statutory footing makes it subject to the whims of the political directorate of the day. This institutional structure is incompatible with the public watchdog role ascribed to it by Lord Walker. This statement by the Privy Council demonstrates a fundamental misunderstanding of the nature of the BEST Commission's role nationally, and leaves the public without a statutorily incorporated institution to protect its rights, forcing a reliance almost exclusively on the common law.

The Privy Council does, however, clearly state that the public does have a legitimate expectation of consultation, and this legitimate expectation derives not from the law itself, but from official statements which recognize the need to take the public's views and concerns into account.[23] As a result, according to the Privy Council, if there is a legitimate expectation of consultation, it must constitute proper consultation. Lord Walker considered the argument by the applicants that they had not been properly consulted, and that they had

[22] http://www.best.bs/about.
[23] Save Guana Cay Reef Association Ltd and others v The Queen and others [2009] UKPC 44.

not officially been provided with a copy of the draft EIA prior to the meeting of 20 August. The Court considered that these imperfections were cured by the following considerations:

- the author of the EIA was present at the meeting;
- the EIA was made available at or after the meeting;
- the residents were given a reasonably full picture of what was proposed;
- an expert hired by the residents acquired the EIA (from its author);
- the policy of the government was that the EIA was addressed to the BEST Commission and not to members of the public.[24]

This finding could be read to conclude that the public has no right to access the EIAs of development projects. The last consideration, in particular, is troubling. The inadequacy of the law to provide for access by the public to EIAs leads to the conclusion that the public has no right of access to EIAs at all as they are directed to the BEST Commission. This common law decision, therefore, compounds the lack of legislative protections for the public to access to environmental information.

Although a significant number of reports, plans and guides, together with monitoring, took place during early phases of the development,[25] after that time very little external environmental monitoring of the Baker's Bay development has taken place. The Save Guana Cay Reef Association continues to be concerned about coral reef disease and algae growth resulting from the development affecting the tourism and fisheries industries there.[26] No foundation has ever been established for research and environmental monitoring between The College of The Bahamas, the University of Miami and the developers. In an interview in January 2012, the Senior Vice-President for Environmental and Community Affairs for the development, Dr. Livingstone Marshall, admitted that there had been no environmental monitoring from 2008-2012. He is quoted as saying, 'Environmental monitoring is expensive. We are running a business, and looking for the proper balance, so we will go back in and do some additional monitoring this year.'[27] It is unclear whether the development has facilitated monitoring by government agencies, or developed environmental progress reports as provided for in the EIA.

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[24] Ibid para 43.
[25] Sealey and Cushion (n 11).
[26] Neil Hartnell, 'Baker's Bay Opponents: 'Our Worst Fears Realised'', *The Tribune*, (Nassau, 24 January 2012) http://www.bahamaslocal.com/what/Baker%20Bay/10/island/1 accessed 3 December 2013.
[27] Ibid.

The Wilson City Cases

The Wilson City cases involved an application for judicial review of a decision by the Government of The Bahamas to build a power plant in Wilson City, which included a proposal to burn Bunker C oil, one of the heaviest and dirtiest fuels. It was found in the case that the decision to build the power plant was made in 2005, and a construction contract was entered into on 31 December 2007, and actual work began in August 2009. In September 2009, after the concerns of residents were raised regarding the power plant, representatives of the government, the Bahamas Electricity Corporation (a government corporation), the BEST Commission and the construction company met with concerned residents. An EIA had been prepared in October 2008 but was not circulated until November 2009, after the public consultation was held. Partial copies were given to NGOs at the September 2009 meeting, in part to debunk the myth that no EIA had been undertaken. The applicant's arguments included that no EIA was provided to them in advance of the public meeting, and the project was presented at that meeting as a 'fait accompli'.

In the Supreme Court, Senior Justice Longley considered the *Guana Cay* decision, and the fact that there was no law requiring an EIA. He made the following comments about the *Gunning/Coughlan* guidance on EIAs[28]:

> *"This is undoubtedly an excellent guide for determining if consultation is adequate. But it is not legislative code. One has to look at the particular circumstances of each case. There may be cases where certain items will be more important than others. Whereas, depending on the circumstances less weight may be attached to others."*[29]

Longley decided that the consultation was meaningful and adequate as the government had decided to switch from Bunker C to diesel oil for electricity generation at the plant. His judgment can be criticized as it is clear that the decision regarding the building of the plant had already taken place prior to the consultation; in fact the land had already been cleared for construction. In addition, the switch to diesel fuel may have been as a direct result of a report by a local NGO, or as a result of the judicial review proceedings. At the consultation, stakeholders were told that the location of the site was not open for discussion, even though Wilson City is situated between one existing and two proposed national parks. The timing of the meeting, lack of access to the EIA, and the unwillingness of the government to entertain

[28] R v The London Borough of Brent ex parte Gunning and others [1986] 84 LGR 168 (HC), R v North East Devon Health Authority ex parte Coughlan [2000] 3 All ER 850 (CA).
[29] The Queen v The Right Honourable Hubert Alexander Ingraham Prime Minister of The Bahamas and others (2010) BS SC.

objections to the site, put this consultation in direct contravention with at least three of the four stages of the test from the *Gunning/ Coughlan* cases.

On appeal, Mrs. Justice Allen overturned the Supreme Court decision. Allen cited the Privy Council statement from the *Guana Cay* case, which established that the public had a legitimate expectation to be consulted, and she rightly found there was a legitimate expectation that the public be consulted in relation to this project as well.[30] Allen cited the lateness of the consultation, the fact that the decision to build, and construction itself, had already taken place, and that the government had refused to discuss the location of the power plant, as reasons for overturning Longley's decision. In her view, these factors contravened the *Gunning* criteria, and she ordered a full and proper public consultation on the operation of the plant going forward.[31] As the plant had already been constructed, no order was made to stop construction or demolish it, following the 'good administration' deference employed by Bereaux in the *Re: Fishermen and Friends of the Sea* case.

The defendants applied to the Privy Council to appeal the Court of Appeal's decision, and this application was refused in May 2013 on the basis that it did not raise an arguable point of law of general public importance. Counsel for the applicants claimed that this rejection represented 'an historic point in the development of Bahamian environmental and regulatory law jurisprudence, a real tipping point in the fight for the protection of local rights and the environment.'[32]

New Research Agendas

It is clear from the *Wilson City* case that consultation must occur at a formative time in the project's life, before construction on the project has begun, and at a time when decision makers can fully take account of the public's views. There was no discussion in the *Wilson City* case regarding access to environmental information, and as a result the unsatisfactory decision of the *Guana Cay* case on this issue remains.

The Bahamas is not a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In addition, a Freedom of Information Act is now languishing in the Attorney General's office for review, and its

[30] Ibid 53.
[31] Ibid 56-57 and 72.
[32] Neil Hartnell, 'Privy Council refuses Gov't BEC plant appeal', *The Tribune*, (Nassau, 7 May 2013) http://www.tribune242.com/news/2013/may/07/privy-council-refuses-govt-bec-plant-appeal/ accessed 3 December 2013.

status is unclear.[33] In 2012 construction began on a 1,000 acre, $2.6 billion hotel resort of BahaMar, which is anticipated to have 3,000 hotel rooms. Little public consultation on the project has taken place. The Bahamas is also contemplating authorizing commercial offshore oil drilling.

These cases and future developments clearly point to legislative gaps with both the institutional structure of the BEST Commission, and general rights of the public to access environmental information and participate in development decisions. Without framework environmental legislation which establishes legal rights and obligations of an environmental agency, the BEST Commission will not be able to act as a watchdog for the public. Regional examples of environmental framework legislation, such as the Jamaican Natural Resources Conservation Act and the Trinidad & Tobago Environmental Management Act, are instructive. Further research in the region regarding the assistance that framework environmental Acts provide to agencies to carry out post-development monitoring activities is needed.

Like other small island developing states, The Bahamas struggles to monitor and enforce its environmental laws and regulations and suffers from institutional fragmentation. Travel and communication between islands is expensive, and monitoring and enforcement of development conditions is particularly taxing on understaffed public agencies. The government's inability to monitor developments should be taken into account by the judiciary when making decisions about EIAs, their contents, and public consultation. Under current circumstances of fiscal constraint, it is unlikely that EIAs and public consultation will be an iterative process, and therefore further emphasis should be placed on the completeness and adequacy of the initial consultation prior to the beginning of the development. In addition, the public should have a statutory right to environmental information. The government should consider requiring environmental bonds from developers to ensure they comply with the conditions of their development. Bonds could also help finance monitoring activities of developments, and employ trained, local inhabitants in the islands to monitor the progress of local developments or external third party monitors. The utility of environmental bonds for development monitoring would also be another area of useful research in the region.

[33] The Bill was passed towards the end of 2012 but had no enforcement date.