

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA  
CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

2022-HC-DEM-CIV-FDA-1314 BETWEEN:

In the Matter of an Application for Orders of  
Mandamus, Prohibition and Declarations in the  
matter of the Judicial Review Act, Cap 3:06

**1. FREDERICK COLLINS**

**2. GODFREY WHYTE**

Applicants

- and -

**ENVIRONMENTAL PROTECTION AGENCY**, a body  
corporate established under the  
Environmental Protection Act, Cap 20:05

Respondent

**ESSO EXPLORATION AND PRODUCTION**

**GUYANA LIMITED**

Added Respondent

The Honourable Justice Sandil Kissoon

Appearances:

Mr. Seenath Jairam S.C., Ms. Melinda Janki and Ms. Abiola Wong-Inniss, Attorneys-at-Law for the Applicants

Mr. Francis Carryl, Ms. Shareefah Parks and Ms. Naiomi Alsopp, Attorneys-at-Law for the Respondent

Mr. Edward Luckhoo S.C., Mr. Andrew Pollard S.C. and Ms. Eleanor Luckhoo for the Added Respondent

Delivered May 3, 2023

## **DECISION**

The antecedent circumstances giving rise to these proceedings for judicial review has disclosed the existence of an egregious state of affairs that has engulfed the Environmental Protection Agency (EPA) in a quagmire of its own making.

It has abdicated the exclusive statutory responsibilities entrusted to it by Parliament under the Environmental Protection Act 1996 and the Environmental Protection Regulations 2000 to ensure due compliance by ESSO Exploration and Production Guyana Limited with Condition 14 of the Environmental Permit ( Renewed) issued on the 31/05/22 and numbered 201 607 05. The EPA has relegated itself to state of laxity of enforcement and condonation compounded by a lack of vigilance thereby putting this nation and its people in grave potential danger of calamitous disaster.

In the course of these proceedings, the Court found on the evidence before it that ESSO Exploration and Production Guyana Limited was engaged in a disingenuous attempt which was calculated to deceive when it sought to dilute its liabilities and settled obligations stipulated and expressed in clear unambiguous terms at Condition 14 of the Environmental Permit ( Renewed) while simultaneously optimizing production at the Liza Phase 1 Petroleum Production Project in the Stabroek Block Offshore Guyana.

ESSO Exploration and Production Guyana Limited engaged in a course of action made permissible only by the omissions of a derelict, pliant and submissive Environmental Protection Agency.

These proceedings brought to the fore that singular fact highlighted by the former Chief Justice of India, Prafullachandra Natwarlal Bhagwati, the doyen of Public Interest

Litigation that “ but for the vigilance of citizens society shall perish”.

The Court found that ESSO was never in doubt as to what its liabilities are as captured under Condition 14 of the Environmental Permit ( Renewed) for the Liza Phase 1 Petroleum Production facility as the stipulations were neither unusual, unique or unauthorized. It was simply as a matter of law, fact, and consequence the norm that prevails which bound ESSO as singularly and exclusively responsible for all liabilities without restriction, implied or expressed, from its operations at the Liza Phase 1 Petroleum Production facilities, in the Stabroek Block offshore Guyana. It included all activities connected therewith as stipulated in condition 14 of the Environmental Permit ( Renewed) No. 201 607 05-EEDPF extending to and inclusive of the transition to Petroleum Production Operations and all activities incidental thereto.

Equally, the concomitant financial assurance obligations imposed on ESSO by Condition 14:10 of the Permit ( Renewed) in the form of environmental liability insurance together with an unlimited parent company guarantee agreement are but the legitimate corollary flowing from its uncapped and unlimited liabilities arising from an event and pollution as encapsulated in the permit, to provide such financial assurance, in the form of insurance and unlimited parent company guarantees to cover its liabilities.

These matters were not unknown to ESSO or the EPA and consistent with the benefits of its Petroleum Production Activities to which ESSO is entitled, comes the burden of fulfilling its obligations under the Permit which were intended for the protection of the State, its citizens and the environment and for which the EPA was the sole authority mandated with oversight to ensure compliance by ESSO.

The EPA, before and subsequent to the filing of these proceedings, but for a consequential order of this Court, refused to disclose any information as to the status of compliance by ESSO with its financial assurance obligations for pollution damage set out at Condition 14 of the Environmental Permit ( Renewed).

The Agency sought refuge in silence, avoidance, concealment and secrecy notwithstanding the grave potential danger and consequences to the State and citizens if an event occurred at the Liza Phase 1 Petroleum Production facilities in the Stabroek Offshore Guyana in absence of such financial assurances mandated by the Environmental Permit ( Renewed) at Condition 14.

Four issues arose for consideration in the course of these proceedings, two preliminary procedural issues and two substantive issues.

These are:

- (1) Whether the Applicants have locus standi to commence the present claim for Judicial Review.
- (2) Whether there is a duty on the EPA to disclose to the public and to the Court, information as to the status of ESSO's compliance with Condition 14 having regard to its mandate.
- (3) Whether ESSO is in compliance with its financial obligations stipulated under Condition 14 of the Environmental Permit ( Renewed) for the Liza Phase 1 Project and its operations of petroleum production in the Stabroek Block Offshore Guyana.

(4) Whether the EPA has acted in breach of its statutory duty, unreasonably and permitted ESSO to carry out petroleum production operations at the Liza Phase Project on the absence of compliance by ESSO with the terms of Condition 14 of the Environmental Permit ( Renewed).

The Court, in resolving the preliminary procedural issues, considered as a relevant material factor and circumstance, the specific nature and underlying gravity of the matter before it and the potential calamitous effect upon the State, the environment and its people in adjudicating upon these matters of procedure.

The Court has set out below the background and arguments in summary of the parties to these proceedings before addressing the issues highlighted individually.

The Court has, in the course of these proceedings, rendered two oral decisions on issues which overlap with the present decision in which reference is made to same for completeness and is not intended to be repetitive.

1. The Applicants commenced these proceedings in their capacity as citizens of Guyana on the 13<sup>th</sup> of September, 2022, seeking by way of Judicial Review, certain orders of Mandamus and Prohibition together with Declarations against the Environmental Protection Agency, the Respondent, as the sole authority and body corporate created by Act of Parliament No.11 of 1996 vested with exclusive responsibility for the management, oversight and regulation of all matters pertaining to the environment and incidental thereto.

2. The Applicants allege that the Environmental Protection Agency ( the EPA) abrogated its statutory duties and functions for which it is clothed and possessed of exclusive authority, when it failed and/or omitted to mandate compliance by ESSO Exploration and Production ( Guyana) Limited (ESSO) with its obligations for financial assurance and liability for Pollution Damage, inclusive of unlimited Parent Company guarantees, indemnities and insurance as set out and stipulated at Condition 14 of the Environmental Permit ( Renewed) N0. 201 607 05 issued by the EPA on the 31/05/2022 to ESSO for the Liza Phase 1 Development Project within the Stabroek Block Offshore Guyana where ESSO is engaged in petroleum production activities.
3. The Applicants contend that the decision of the EPA, its failure and/or omission in these circumstances to mandate compliance by ESSO with its obligations and financial undertakings expressed at Condition 14 of the Environmental Permit ( Renewed) No. 201 607 05 is plainly irrational and untenable, unreasonable, unlawful and constitutes an illegality in violation of the provisions of the EPA No. 11 of 1996 including Sections 30( c), 31 (4) and Regulation 15 (1) of the Environmental ( Authorisation) Regulations.
4. On the 22/11/2022, at the preliminary stage of the proceedings upon the application of ESSO, this Court granted an order joining ESSO as an Added Respondent to fully participate in the proceedings and to be afforded an opportunity of being heard upon the issues which arose for determination.

The Court issued a separate oral judgment in the course of the proceedings giving reasons for its decision.

Central among those reasons for the Court's ruling joining ESSO as an Added Respondent was that the party in whose favour the Environmental Permit ( Renewed) numbered 201 697 05 and dated 31/05/22, had been issued and who was directly affected by the outcome of the proceedings if the orders sought were granted had not been made a party and consequentially was not being granted the opportunity of being heard upon its alleged non-compliance with Condition 14.

5. ESSO Exploration and Production Guyana Limited is an external company registered in Guyana and is an affiliate of EXXON MOBIL Corporation.
6. ESSO Exploration and Production Guyana Ltd as Operator together with Hess Guyana Exploration Ltd and CNOOC Petroleum Guyana Ltd as its coventurers, entered into a Petroleum Agreement with the Government of Guyana on the 27/06/2016 for the Stabroek Block Offshore Guyana in which Esso, as the Operator, conducted exploration activities and drilling with the subsequent discovery of petroleum in sufficiently large commercial quantities to warrant the transition to production.
7. Pursuant thereto, and in keeping with the provisions of the Environmental Protection Act Guyana No. 11 of 1996, ESSO, the Added Respondent, would

have submitted an EIA in relation to the Liza Phase 1 Development Project as a precursor to the approval of an Environmental Authorisation or Permit by the Respondent Agency.

8. The relevance, bearing and correlation of the Environmental Impact Assessment upon the grant or refusal of a project, the issue of an Environmental Permit and the specific conditions stipulated therein are set out at Part 1V of the EPA Act No. 11 of 1996 and Sections 11 through 14.
9. Para. 3 of the Executive Summary of the Environmental Impact Statement (EIS) submitted to the Agency for the Liza Phase 1 Development Project states:

“A key permit responsible for ESSO Exploration and Production Guyana Limited to develop the Liza Fields is the Environmental Authorization from the Guyana Environmental Protection Agency in accordance with the Guyana Environmental Protection Act of 1996. As part of its regulatory role, the EPA considering recommendations from the Environmental Advisory Board (EAB) and G.G.M.C., is responsible for deciding whether and under what conditions to grant ESSO Exploration and Production Guyana Limited application for environmental authorization.....”

The purpose of the EIA is to provide the factual and technical basis required by EPA, EAB and the GGMC to make an informed decision on EEPGL application....”

10. The EPA subsequently approved the Liza 1 Development Project and issued an Environmental Permit on the 1<sup>st</sup> June, 2017 to ESSO Exploration and Production Guyana Ltd as the Operator on behalf of itself and its co-venturers which expired. A Petroleum Production Licence was thereafter issued by the Government of Guyana to the Operator on behalf of itself and its co-venturers. The Added Respondent is currently engaged in petroleum production activities at the Liza Phase 1 Development Project and the Liza Phase 2 Development Project in the Stabroek Block, Offshore Guyana.

11. On the 31<sup>st</sup> May, 2022, the EPA issued to the Added Respondent, ESSO Exploration and Production Guyana Limited, an Environmental Permit (Renewed) numbered 201 607 05 for the Liza Phase 1 Project- Operation of Production Facilities, Stabroek Block Offshore Guyana, which is the subject of the present proceedings.

12. Prior to commencing these proceedings for judicial review, the Applicants, through their Attorneys-at-Law, had written to Mr. Khemraj Parsram, the Executive Director of the Agency, on the 10/08/22 requesting copies of the insurance, undertakings and indemnities required to be provided by ESSO pursuant to its obligations to provide financial assurance for its liability for Pollution Damage under Condition 14 of the Environmental Permit ( Renewed) Ref No. 201 607 05-EEDPF dated 31/05/2022.

There was no response.

13. On the 17<sup>th</sup> August, 2022, the Applicants, through their Attorneys-at-Law, wrote to the Executive Director of the EPA to enquire what steps, if any, had been instituted by the EPA to enforce the provisions of the ESSO Environmental Permit, in particular, Conditions 14 and 14.02. There was again no response.

14. Thereafter, the Applicants instituted the present proceedings seeking a range of Orders against the EPA firstly, Orders directed to the Agency to file with the Court, inter alia, copies of the Insurance provided under Condition 14 together with the unlimited financial undertaking by EXXON MOBIL Corporation, the ultimate Parent Company of ESSO, the Added Respondent.

15. In its Affidavit in Defence filed in these proceedings on the 16/11/22, the EPA, through its Executive Director, contended:

(1) The EPA had no obligation or duty to respond to the correspondence or request made by or on behalf of the Applicants as it related to compliance by ESSO with its obligations under Condition 14.

(2) The Applicants had failed to provide any evidence of ESSO's failure to comply with its obligations under Condition 14.

(3) There was no ascertainable ground for Judicial Review disclosed in the Application as there is no obligation on the EPA to cancel an Environmental Permit for proven breaches of a condition.

(4) That the Applicant's claim was speculative, a fishing expedition and an abuse of the process of the Court.

(5) The Applicants had no locus standi to institute the present claim for Judicial Review.

16. Noticeably absent from the Affidavit in Defence filed by the EPA was any reference to the fact that ESSO had complied with its obligations to provide certain financial assurances as stipulated under Condition 14 and of the existence of any such insurance, assurance or unlimited parent company guarantees.

17. ESSO, in its Affidavit in Defence filed in these proceedings, on the 5<sup>th</sup> of December, 2022, deposed to by Alistair Routledge, contended as follows:

(1) The Applicants had no locus standi to institute the present claim for Judicial Review.

(2) The Applicants had failed to show a legal or factual basis to warrant the grant of the orders sought and had failed to identify the breach of statutory duty which the EPA is alleged to have contravened.

- (3) The allegation of breach of the Environmental Permit was based on pure conjecture and speculation and unsupported by evidence or facts to establish any specific breach of the Environmental Permit.
- (4) ESSO further asserted that the Applicant's contention that Condition 14 imposed, inter alia, unlimited liability upon ESSO and the requirement for an unlimited Parent Company undertaking to indemnify ESSO, was erroneous and an attempt to insert words or an interpretation into the EPA Act and the Environmental Permit which were never intended or contemplated. ESSO further stated the absence of words in Condition 14.1, 14.10 and 14.15 imposing a numerical liability cannot have the effect of rendering the Condition as being "unlimited" or "without limit".
- (5) ESSO further contended that, in this regard, Section 31(2) of the EPA Act, No. 11 of 1996, provided the EPA with a discretion to include, in any Permit, a requirement for financial assurance which is quantified by Section 31(2) which provides that "any requirement under subsection (1) shall specify the amount of financial assurance and may provide the financial assurance may be provided, reduced or released in stages specified in the Environmental Authorisation" which was considered by the EPA and is reflected by Condition 14.3 of the Environmental Permit which stipulates that the financial assurance required is to be "guided by an estimate of the sum of the reasonably credible cash, expenses and liabilities that may arise from any breaches of this permit".

- (6) ESSO asserted that, in these circumstances, both by the requirements of the EPA Act, and the conditions of the Environmental Permit, the Financial Assurance to be secured by ESSP was not unlimited.
- (7) ESSO further contended that it was in compliance with the terms and conditions of the Environmental Permit and the Applicants had failed to establish any breach or non-compliance with a condition of the Permit. It stated that, in the event of a breach, the EPA, by Section 26 of the Act, had the authority to issue an enforcement notice to ESSO if it were of the opinion that there was or was likely to be a breach of the Environmental Authorisation.
- (8) ESSO further contended that the Applicant had failed to adduce any evidence of ESSO's failure to comply with Condition 14 and the words of the Permit allowed ESSO a reasonable time within which to comply following the signing of the Permit on the 31/05.22 to provide the requisite financial assurance. Such assurance was to be guided by the sum of the reasonably credible costs, expenses and liabilities that may arise from any breach of the Permit.
18. Significantly, ESSO, whilst contending at para. 14 of its Affidavit in Defence that it is in compliance with the terms of the Environmental Permit, did not state the nature of the financial assurances or parent company guarantee agreements that it had provided to the EPA in discharge of or pursuant to its obligations under the Conditions. There is no burden of proof placed upon ESSO generally

in matters of this nature as the EPA argued “ he who asserts must prove” and cited several authorities to support the dismissal of the proceedings.

This matter came on for hearing and amplification on the 16/01/2023 before the Court.

The Court, based on the filings of the parties before it, could not adjudicate or pronounce upon what it considered to be the substantive issue, that is, whether the EPA had discharged its statutory duties and functions and whether there had been compliance by the Added Respondent, ESSO, with its financial obligations and insurance undertakings stipulated and contemplated by

Condition 14(2), (3), (5), (8), (9) and (10) of the Environmental Permit ( Renewed). This would determine whether the Agency had, by extension, acted lawfully in concord with its statutory functions, duties and responsibilities or whether it had adopted a posture of condonation and laxity of enforcement and acted unlawfully in breach of its statutory duty and unreasonably . Further, whether by its omissions, it had acted contrary to the provisions of the EPA Act No. 11 of 1996 and had committed an illegality to warrant the grant of the Orders sought.

### **ISSUE #1**

### **WHETHER THE APPLICANTS HAVE LOCUS STANDI TO INSTITUTE THESE**

### **PROCEEDINGS FOR JUDICIAL REVIEW AND TO OBTAIN THE RELIEF SOUGHT**

The Applicants commenced this claim for Judicial Review against the EPA, a Public Authority, in their capacity as citizens of Guyana, on a matter of public interest environmental concerns.

The EPA and ESSO contended that the Applicants lacked locus standi within the meaning of the law to bring the present claim for judicial review and were, at best, meddlesome busybodies.

The Court found and held that age old pitfalls and archaic arguments on locus standi premised on a narrow, restrictive approach and interpretation that ought not to have survived the prerogative writs have no place in Judicial Review proceedings commenced under the Judicial Review Act, No. 23 of 2010. The Act mandates a broad approach to standing, public interest litigation and, in particular, public interest matters pertaining to the environment as enshrined at Article 149(J) 2 of the Constitution of the Co-operative Republic of Guyana which does not attract the application of narrow common law orders as to standing.

Parliament, by Act No. 10 of 2003 Constitution (Amendment) No. 2 Act 2003, repealed and replaced Art. 36 of the Constitution of the Co-operative Republic of Guyana which contained a non-justiciable statement on matters pertaining to the environment.

Art. 36:

“ In the interest of the present and future generations, the State will protect and make rational use of its land, mineral and water resources as well as its fauna and flora and will take all appropriate measures to conserve and improve the environment.”

Art. 39 following stated:

“ Parliament may by law provide that any provision of this chapter shall be enforceable in any court or tribunal and only where and to the extent to which such law provides for the enforcement of any such provision and not otherwise shall that provision be enforceable in any court or tribunal.”

Parliament, by Act. No. 10 of 2003, amended the Constitution of Guyana in accordance with Article 66 and 164 and repealed and replaced Art. 36 and created Art 149 (J) under Part II of the Constitution captioned “ Protection of the Fundamental Rights and Freedoms of the Individual”.

Art. 149 (J):

- (1) “ Everyone has the right to an environment that is not harmful to his or her health or well being.
- (2) The State shall protect the environment for the benefit of present and future generations through reasonable legislative and other measures designed to
  - (a) Prevent pollution and ecological degradation.
  - (b) Promote conservation and
  - (c) Secure sustainable development and use of natural resources while promoting justifiable economic and social development.

The logical effect of the elevation from a non-justiciable right under Art. 36 to a justiciable fundamental right and freedom which protected and guaranteed to every citizen the right to a safe and healthy environment with attendant duties and obligations

imposed on the State to protect the environment for present and future generations creates an interest and standing in relation to the environment where none previously existed.

On this issue in his Article “ Strengthening Locus Standi in Public Interest Environmental Litigation: Has the Leadership moved from the United States to South Africa” 6/2 Environmental and Development Journal (LEAD) 2010, p. 163, Tumai Murombe, Senior Lecturer, University of Witwatersrand(Wits) School of Law, South Africa, at page 172:  
 “ Given the uniqueness of environmental disputes, the anachronism of the common law must give way to modern nuanced approaches to public interest litigation.....Thus the Court rightly exhorted in Director Mineral Development Gauteng Region, and another v. Save the Vaal environment and others (1999) 2 SA 709 ( SCA) at para. 20 per Olivier J.A. that:

“ The South African Constitution by including environmental rights as fundamental justiciable rights by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.”

“ It may be argued that the enshrinement of an environmental right in the South African Constitution was partly responsible for the broadening of standing.....”

Similarly, Professor Albert Fiadjoe in his text, “ Commonwealth Caribbean Public Law”,

Third Edition, 2008 at page 162, considered the decision of the Court of Appeal of the OECS in the case of Pierre v. Redhead, Civil Appeal No. 11 of 1991, where the Court of Appeal dismissed an appeal on the basis that the Applicant lacked locus standi to bring the proceedings based on principles of the common law.

Professor Fiadjoe had this to say:

“ It is submitted that the flaw with this approach is that it seeks to apply the principle of the common law to the situation of the written constitution which contains both fundamental rights and non-fundamental rights provisions. The latter providing a legitimate basis for individuals to seek declarations from the Courts as long as they are not busybodies. It is beyond doubt now that the Caribbean Constitutions embrace much more than the common law and Caribbean Courts are urged to give concrete expression to that philosophy in a meaningful and purposive way....”

These proceedings were commenced by the Applicants under the Judicial Review Act, No. 23 of 2010.

S. 4(1) of the Act provides:

“The Court may on an application for judicial review grant relief in accordance with this Act:

(a).....

(b) to a person or group of persons if the Court is satisfied that the Application

is justifiable in the public interest in the circumstances of the case. S. 7(4) provides:

“ In determining whether an application is justifiable in the public interest the

Court may take into account any relevant factor including:

- (a) The need to exclude a mere busybody.
- (b) The importance of vindicating the rule of law.
- (c) The importance of the issue raised
- (d) The genuine interest of the Applicant in the matter
- (e) The expertise of the Applicant and the Applicant's ability to adequately present the case.
- (f) The nature of the decision against which relief is sought.

I am satisfied that their application is justifiable in the public interest. The Respondent is amenable to Judicial Review by virtue of its public function. The Applicants are not busybodies and have in these proceedings raised an issue of grave importance of national significance for the well-being of the environment, the citizens and the State enshrined, guaranteed and protected under Art. 149 (J) of the Constitution.

Parliament birthed the EPA by Act No. 11 of 1996 and entrusted to it exclusive authority for oversight of all matters pertaining to the environment, to act in the interest of the protection of the environment, its safety and wellbeing of flora and fauna, for the present and future generations.

The filings and submissions rendered on behalf of that Agency do not engender confidence on what is by no means a complex issue. This is an entirely unfortunate position since the question of liabilities of ESSO arising from an event or occurrence and its obligations to provide financial assurances consistent with its liabilities does not require speculation as it is contained in the Environmental Authorisation issued by that agency to ESSO.

The dicta of Chief Justice Bhagwati in the Supreme Court of India in S.P. Gupta v. President of India and Ors, AIR 1982 SC 149, on this question of locus standi is both relevant and applicable:

“.....but if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to the public interest the question arises as to who can maintain an action for vindicating the rule of law.....or enforcing the performance of the public duty.

If no one can maintain an action for redress of such public wrong or public injury it would be disastrous for the rule of law for it would be open to the State or the Public Authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it.

The Court cannot countenance such a situation where the observance of the rule of law is left to the sweet will of the Authority bound by it without any redress if the law is contravened.

The view has therefore been taken by the Courts.....that whenever there is a public wrong or public injury caused by the act or omission of the State or a public authority which is contrary to the constitution or law any member of the public acting bona fide and having sufficient interest can maintain an action for redress of such public wrong....

The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is

not a mere busybody or a meddlesome interloper but who has sufficient interest in the proceedings.

There can be no doubt that the risk of legal action against the.....public authority by any citizen will induce the.....public authority to act with greater responsibility and care.....”

Chief Justice Bhagwati cited with approval the dicta of Lord Diplock in the case of R. V. Inland Revenue Commissioner [1981] 2 WLR 722 at page 740 where he stated on this issue:

“ restrictive rules of standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away merely because he is not sufficiently reasonably affected that means some Government agency is left free to violate the law and that is contrary to public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake, in the rare cases where they wish to sue out of public spirit why should they be discouraged”.

Similarly, in this regard, Professor Fiadjoe in his text, Commonwealth Caribbean Public Law, ( supra), at page 161, citing Bogart, “ Standing and the Charter, Rights and Identity, in Sharpe, 1986, Chapter 1, points out that in the context of Canadian jurisprudence, the argument for a liberal approach to locus standi has been canvassed for reasons including

“.....the lesson for the law at the close of the twentieth century has to be that it cannot only concern itself with means and exclude ends if it seeks to lay claim to justice.....even more tentative and abstract values such

as.....health, access to nature and the environment.....impress themselves upon an undivided and collective consciousness and in turn upon the law. Liberalised standing no longer tied to traditional legal interests will allow developing interests a voice of their own in the discussion to the appropriate solution to the problem at hand....what is essential is that they should not be turned aside only because they appear very different in form and in substance from those long cherished by the law”.

There is another fundamental consideration why old strictures of standing have no application within our jurisprudence and why, in particular, in relation to matters pertaining to the environment and oil and gas. An invitation to strike proceedings for want of capacity and standing on procedural grounds must be rejected out of hand.

Guyana has a nascent oil and gas sector. It is a new frontier where there is an absence of capacity, oversight, expertise, experience or an established regulatory framework. Traditional institutions and bodies discharging public functions lack capacity and are without experienced knowledgeable or skilled personnel.

The legislation in most cases governing the operation of institutions tasked with oversight as in the case of the environment in particular and the EPA was passed by Parliament by Act No. 11 of 1996 at a time when the oil and gas industry was not in existence nor a reality.

Restrictions on standing in such an environment of weak institutions without capacity lends to disaster and a denial of access to justice.

There is no question in the Court's mind of whether the Applicants have standing and possess the requisite capacity having regard to the matter of subject interest and the issue before the Court. Every citizen of this land would equally possess standing to make this inquiry, and I do so hold. If the unthinkable occurs and there is an event resulting in the release of hydrocarbons or contaminants in the course of the Added Respondent's operations, the consequences will be devastating not only to the citizens of this land and the environment but to inhabitants of neighbouring states and territories as well. If such an event occurs and there has been non-compliance with the obligations contained in Condition 14 by the Added Respondent, then the potential consequences are elevated and borders on catastrophic.

The Respondent Agency before this Court is empowered and tasked with the responsibility to ensure adherence by ESSO to the Conditions in the Environmental Permit, inclusive of Condition 14 and the sub-Conditions contained therein where the impact of an omission may adversely affect persons beyond the shores of this nation in the event of an occurrence resulting in a spill. The public is entitled to know whether there has been compliance and in the absence thereof, what arrangements have been put in place to secure compliance by the Added Respondent within a reasonable time to ensure the stipulated insurance coverage, assurances and/or unlimited parent company guarantees of the type envisaged under Condition 14 are in place.

In the circumstances of the foregoing, I find as a matter of law and fact that the issue canvassed by the Applicants, the grounds of challenge and the evidence placed before this Court, raise a matter of fundamental importance in the public interest with potential disastrous consequences to the environment, the citizens of Guyana and ultimately

the State, arising from the omissions of the EPA, the Respondent authority and public body carrying out functions in the public interest.

The Claim presented by the Applicants is neither frivolous, vexatious nor speculative nor are the Applicants to be considered meddlesome busybodies.

The Applicants, having regard to all of the circumstances, are possessed of sufficient interest to institute and prosecute this claim for Judicial Review, and I so find.

## **ISSUE # 2**

**Whether there is a duty on the EPA to disclose to the public and to the Court, information as to the status of ESSO's compliance with Condition 14 having regard to its mandate.**

The second issue is whether having regard to its mandate and function, the EPA could seek refuge in silence, avoidance, concealment and secrecy or whether it had a duty to disclose the information to the Public and the Court of and concerning ESSO's compliance with Condition 14.

The EPA filed an Affidavit in Defence on the 16/11/22 in answer to the Applicants' claim for Judicial Review.

The EPA failed and/or omitted to address the substantive allegations raised by the Applicants in the proceedings. That is, that ESSO was not in compliance with Condition 14 whilst it continued to engage in and optimize petroleum production at the Liza Phase 1 facility offshore, a circumstance to which the EPA continued to turn a

blind eye. By its failure and/or omission, it placed the nation, its citizens and the environment in grave peril.

The EPA notwithstanding this grave allegation of dereliction of its functions and potential calamitous consequences adopted a stance of avoidance, concealment and secrecy and, in unison with ESSO, agreed that the proceedings ought to be struck for reasons the Court found to be without merit.

The matter came on for hearing and application on the 16/01/2023 and up to that point, the Agency had not furnished a single statement of and concerning the status of Esso's compliance with its stipulated financial assurances set out at Condition 14.

The Court gave an oral decision on the 16/01/23 and ordered the EPA to file a supplementary affidavit within a specified time setting out the status of Esso's compliance with its obligations at Condition 14 of the Environmental Permit (Renewed) which affidavit was subsequently filed by the EPA.

In relation to this issue, Parliament saw fit to legislate in 1996 the Environmental Protection Act No. 11 of 1996.

The entire scheme of the legislation which by Section 3(1) birthed the Agency, is built on the cornerstones of transparency, inclusivity, public interest, public participation and complete disclosure . The substantive issue which raises matters of utmost public interest could only properly be adjudicated upon with the assistance of the parties to the proceedings and, in particular, the Agency which is tasked with exclusive authority for regulation and oversight of all matters pertaining to the environment and incidental thereto.

Specifically, it is the Agency which issued the Environmental Permit ( Renewed) to Esso on the 31/05/22 and which is tasked with the responsibility of mandating and enforcing of the conditions of that Permit.

The duty and responsibility of the EPA required of it to inform the Court, at the earliest opportunity, whether there had been compliance by Esso and, in the absence thereof, what measures and steps had been taken by the Agency to mandate compliance or cancel the Permit in the absence of a prolonged period of refusal by the Permit Holder to fulfil its obligations. The ultimate object was to ensure the safety and well being of the citizens, the environment and the State.

Prior to the commencement of this Claim, there is evidence that the Applicants, through Counsel, had sought to ascertain from the Agency whether Esso had provided the financial assurances stipulated under Condition 14 as the failure to do so had potential dire consequences.

The Agency, in the course of the proceedings, acknowledged receipt of same, but contended, through its Executive Director, that there was no duty or obligation to respond or provide such information.

In the text “ Garner’s Environmental Law ,Binder 1 , Part 1 at page 12, the editor referenced “ the principle of open access to environmental information.....” had its origin in the Royal Commission on Environmental Pollution which in its 10<sup>th</sup> report recommended “ A guiding principle behind all legislative and administrative controls relating to environmental pollution should be a presumption in favour of unrestricted access for the public to information which the pollution control authorities obtain or receive by virtue of their statutory powers with provision for secrecy only in those circumstances where a genuine case for it can be substantiated “

The position of the Agency and its Executive Director is wholly erroneous and misconceived.

As a matter of law, even where there is in existence an express prohibition against disclosure contained in the subject legislation of the Public Authority, such disclosure is construed as subject to disclosure in the public interest. That is, disclosure in the interest of public health, safety or protection of the environment.

The approach adopted by the EPA, in the course of these proceedings, was inconsistent with its mandate and statutory functions, which is one of transparency and accountability to engender trust and confidence of the citizens and members of the public on whose behalf and in whose interest it carries out its functions as a Public Authority in the public interest.

Separately, by Section 4(1) of the EPA Act, No. 11 of 1996, the Agency is required

“.....to maintain and make available to members of the public a Register of all Environmental Impact Assessments carried out and Environmental Authorisations ( Permits) granted.....”

The Agency, in its filing before the Court, sought refuge in silence, concealment, avoidance and secrecy. Such conduct is nothing short of reprehensible and inconsistent with its mandate and functions. Were the sphere of persons who may potentially be adversely affected by Esso's non-compliance with its obligations under Condition 14 be limited to the Agency then certainly the Applicants could be considered as meddling busybodies.

On the other hand, where, as in this case, the Respondent Agency is but the repository of the authority entrusted to exercise same on behalf of and for the benefit of the citizens and the environment, then that institution remains accountable and is duty bound to provide information and clarity on matters exclusively within its mandate such as compliance by the Added Respondent, ESSO, with its obligations set out at Condition 14, non-compliance with which may be to the detriment of the livelihood of members of the public.

### **ISSUE# 3**

#### **WHETHER ESSO, THE ADDED RESPONDENT, HAS COMPLIED WITH ITS OBLIGATIONS UNDER CONDITION 14 OF THE ENVIRONMENTAL PERMIT (RENEWED)**

The Court, in order to determine Esso's compliance with its Condition 14 Financial Assurance obligations, had to ascertain the extent of Esso's liability for Pollution Damage under the Permit. It is that liability that determines the concomitant obligation upon Esso to provide financial assurances, in the form of insurance and a parent company undertaking providing indemnification for liabilities by the Operator, Esso, and/or its Co-Venturers.

This is not a complex issue as Esso and the EPA have stipulated these liabilities and financial assurance obligations in clear, unambiguous terms and language set out in the Environmental Authorisation issued to Esso on the 31/05/22 and which contain the conditions governing the operation of its Petroleum Production Facility at the Liza Phase 1, Stabroek Block, Offshore Guyana.

The procedure under the provisions of the Environmental Protection Act No. 11 of 1996 leading to the issue of an Environmental Permit for a Petroleum Development Project is summarized hereunder and set out at Sections 10 and 11 of the Act.

Section 11(1) provides:

“ A developer of any project listed in the Fourth Schedule.....which may significantly affect the environment shall apply to the Agency for an Environment Permit.....”

The extraction of mineral resources is an activity at No. 9 of the Fourth Schedule.

Section 11 (2)(b) provides that where it is determined by the EPA that the Project may significantly affect the environment it will require an Environmental Impact Assessment (EIA).

Section 11 (4) provides:

“ Every EIA shall be carried out by an independent and suitably qualified person approved by the Agency and shall:-

(a) Identify, describe and evaluate the direct and indirect effects of the proposed project on the environment including:-

- (i) Human beings
- (ii) Flora, fauna and species habitat
- (iii) Water
- (iv) Soil

- (v) Air and Climate factors
  - (vi) Material assets, the cultural heritage and the landscape
  - (vii) Natural Resources including how much of a particular resource is degraded or eliminated and how quickly the natural system may deteriorate
  - (viii) The ecological balance and ecosystem
  - (ix) The interaction between the factors listed above
  - (x) Any other environmental factor which needs to be taken into account or which the Agency may reasonably require to be included and
- (b) Assess every project with a view to the need to protect and improve human health and living conditions and the need to preserve the stability of the ecosystems as well as the diversity of species....”

Section 11(5) provides:

“ Every Environmental Impact Assessment shall contain the following information:

- (a) (i) .....
- (ii).....
- (iii) “ and estimate, by type and quantity, of expected contaminants, residues and emissions ( water, air and soil pollution, noise, vibration, light, heat, radiation) resulting from the operation of the proposed project.”

Section 11(c): “ a description of the likely significant effects of the proposed project on the environment resulting from :

- (i) The existence of the project
- (ii) The use of natural resources
- (iii) The emission of contaminants, the creation of nuisances and the elimination of waste, and .....
- (d).....
- (e).....
- (f) “ a description of any hazards or damages which may arise from the project and an assessment of the risk to the environment”.

Section 11 (6), (7), (8), (9), (10), (11), (12) and (13) of the Act provides for

- Notification to the public of the project and project summary via publication
- Submission and receipt of queries by the Public to the Agency
- Consultation by the Agency with the person conducting the EIA to define and mandate the scope and terms of the EIA based on submissions and consultations
- Extended consultations by the Developer and person carrying out the EIA with members of the public
- Submission of the EIA by the Developer to the EPA together with Environmental Impact Statement (EIS)
- Publication of a Notice of Submission of the EIA and EIS to the EPA
- Submissions by the Public on the EIA and EIS 60 days thereafter.
- Submission of the EIA and EIS to the Environmental Assessment Board by the Agency for its consideration and recommendation.

Section 12(1) provides:

“ the Agency shall approve or reject the project after taking into account:

(a) The submissions made under Section 11(10) i.e. ( the EIA, EIS together with the submissions of members of the public thereon) and the recommendations of the EAB.....and

(b) The views expressed during the consultations under Section 11 (a) and

(c) The Environmental Impact Assessment and the Environmental Impact

Statement.

Where the Project is approved by the EPA then an Environmental Permit is issued.

Sections 13 and 14 of the Act are relevant to the issue of an Environmental Permit, and the conditions contained in the Permit.

Section 13(1) provides:

“ A decision by the Agency to issue an Environmental Permit for a project shall be subject to conditions which are reasonably necessary to protect human health and the environment and each environmental permit shall contain the following implied condition:

(a) The Agency shall have the right to cancel or suspend the Environmental Permit if any of the terms or conditions of the Environmental Permit are breached

(b) .....

(c) .....

(d) .....”

Section 13(2) provides:

“ The Agency shall not issue an Environmental Permit unless the Agency is satisfied that:

- (a) The developer can comply with the terms and conditions of the project and
- (b) The developer can pay compensation for any loss or damage which may arise from the project or breach of any term or condition of the Environmental Permit”.

The Court has reviewed the procedure under the Act leading to the issue of an Environmental Permit to determine the origin, the process and the material considerations that informed the stipulations and conditions of liability and the provision of Financial Assurance required under Condition 14 of the Permit.

The Court rules that the issue of an Environmental Permit under the Act follows what is intended to be a thorough informed, transparent consultative process based on technical assessments where a common consolidated position is conceived. This is based on the EIA, driven by the Developer, the EIS, the submissions of the Public, considerations of preservation and protection of the environment, ecosystem, flora and fauna which remain paramount and where a balance is concerned, to approve and permit the Development Activity to be carried out. In this case, the activity being petroleum production whilst regulating same with conditions necessary and intended for the preservation, protection and restoration of the environment having regard to the nature of the activity and magnitude of the impact of any potential event or pollution arising in the course of the Developer’s Activity as projected and forecast by its EIA and EIS.

The Court, in determining the stipulation at Condition 14 of the Permit proceeded by examining the Permit as a whole. The Court reviewed the language contained in the Permit, the terms, the context, the meaning and the usage thereof, attributing the literal meaning to the terms used considering the scope and magnitude of the activity permitted by the Environmental Authorisation as set out on the face of the Permit.

The Court found that the duties, the liabilities and the obligations of Esso as stipulated at Condition 14 of the Permit was set out in clear and unambiguous terms , in simple language that boded no uncertainty or lent itself to ambiguity. The Court divested its mind of the fact that the Permit Holder was the subsidiary of an oil major with a wealth of experience, talent and expertise in the area of this activity whilst the Liza Phase 1 Development Project appears to have been among the second such Permit issued by the Agency.

What is the extent of the liability assumed by the Permit Holder for Pollution Damage under Condition 14 of the Environmental Permit bearing in mind that the liability determined the nature and extent of the Financial Assurance to be provided.

Condition 14 Financial Assurance and Liability for Pollution Damage provides at :

14:1 The Permit Holder **is liable** for **all costs** associated with clean up, restoration and compensation for any damages caused by an discharge or any contaminant including the cost of all investigations into pollution incidents or discharge of contaminants conducted at the instance of the Agency.

This sub-Condition is all-encompassing in several aspects.

It imposes and under it the Permit Holder, Esso,

- (a) Assumes liability for all costs
- (b) Assumes liability for any damages
- (c) Liability accrues to the Permit Holder from any discharge howsoever it occurs
- (d) Liability for discharge flows from the release of any contaminant.

S. 2 of the EPA Act No. 11 of 1996 which by Condition 1.1 (a) of the Permit is incorporated into the Environmental Permit, provides an all encompassing definition of contaminant to “ mean any solid, liquid, gas, odour, sound, vibration, radiation, heat or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect.”

Adverse effect, by Section 2(b) is defined to mean one or more of the following:

- (1) Impairment of the quality of the natural environment or any use that can be made of it.
- (2) Injury or damage to property or to plant or to animal life.
- (3) Harm or material discomfort to any person
- (4) An adverse effect on the health of any person
- (5) Impairment of the safety of any person
- (6) Rendering any property or plant or animal life unfit for use by humans or unfit for its role in its ecosystem
- (7) Loss of enjoyment of normal use of property and
- (8) Interference with the normal conduct of business

Condition 14:01 does not contain any word or term of limitation upon liability, quantum of costs, quantum of damages nor restrictions on the circumstances of release or

discharge nor on containment nor restriction on the sphere of adverse effects caused directly or indirectly.

The Court finds and holds that in the circumstances of the clear, express, unambiguous language of the stipulation at Condition 14 :01 of the Environmental Permit ( Renewed), the Permit Holder assumed unlimited liability for all costs of clean up, restoration and compensation for any damage from any discharge of any contaminant.

The unlimited liability which is exclusively that of the Permit Holder, Esso, is by no means unusual in any sense, in that Esso, together with its co-Venturers, are engaged in Petroleum Production Activities in the Stabroek Block, for profit.

Condition 14 holds the Permit Holder accountable for all costs, damages and liabilities caused by any event occurring in the course of its operations. In other words, Condition 14 simply holds Esso accountable for events in the course of its activities. The law does not contemplate any other party sharing that liability save if Esso attempts to apportion liability to its contractors which has no bearing on the present matter.

Condition 14:02 of the Permit mandates Esso, as the Permit Holder, to provide Financial Assurances to the EPA that accords with its unlimited liabilities set out at Condition 14:01.

Condition 14:02 provides:

“ The Permit Holder shall provide and/or declare within a reasonable time following the signing of this Permit, a combination of the following forms of Financial Assurances to cover all its legitimate liabilities under this Permit

- (a) Insurance in accordance with Condition 14.5 and shall cover well control and/or clean up and third party liability on terms that are market standard for the type of coverage;
- (b) A Parent Company/Affiliate of Operator and Co-Venturers (COVs) undertaking that provides indemnification for liabilities under this Permit.

Condition 14.03 provides:

“ The forms of financial assurance shall be guided by an estimate of the sum of the reasonably credible costs, expenses and liabilities that may arise from any breaches of this Permit.

Liabilities are considered to include costs associated with responding to an incident , clean up and remediation and monitoring.....”

Condition 14.05 stipulates as to the type of insurance mandated under this Permit, ie “ environmental liability insurance of such type and such amount as is customary in the international Petroleum Industry for Petroleum Operations in relation to this Permit..... and shall include but may not be limited to insurance in respect of:

- (i) Loss or damage to all assets used in the Project
- (ii) Environmental damage caused in the course of the Project for which EEPGL will be jointly and severally held responsible
- (iii) Loss or damage to property or bodily injury suffered by any third party in the course of the Project for which EEPGL is liable
- (iv) The cost of removal of wreckage and clean up operations required as a result of an accident occurring in the course of permitted activities

- (v) EEPGL's liability to its employees engaged in the Project
- (vi) Any other requirements made by the Agency

Condition 14:8 provides

“ This Permit is issued subject to the obligations outlined in Condition 14:5 above. Failure to fulfill such obligations.....is in breach of this Permit and will result in its immediate cancellation.”

Condition 14:9 requires the Permit Holder, Esso, to submit to the Agency, as soon as reasonably practicable, upon its request, copies of the Environmental Liability Insurance Policies and the requirements thereof and thereunder.

Condition 14:10 of the Permit provides:

“ The Permit Holder must as soon as is reasonably practicable, provide from the Parent Company or affiliate Companies of the Permit Holder and its CoVenturers one or more legally binding agreements to the Agency in which the Parent Company or Affiliate Companies of the Permit Holder and its CoVenturers undertake to provide adequate financial resources for the Permit Holder and its Co-Venturers to pay or satisfy their respective environmental obligations regarding the Stabroek Block if the Permit Holder and/or its CoVenturers fail to do so and to indemnify and keep indemnified the Agency and the Government of Guyana against all such environmental obligations regarding the Stabroek Block.”

Condition 14:10 (1) provides conditions and certain minimum requirements to ensure that the affiliate company guarantee is obtained from a company possessed of the financial strength and capacity to honour its obligations under the guarantee, that it is properly authorized so to do and that it has the capacity so to do.

14.10(2) sets out the obligations of the Affiliate Company to the Agency in relation to the Parent Company Indemnity Agreement.

Condition 14:11 and 14:12 expressly incorporates Sections 19(1), 19(3)(e), together with Section 39(2) and (4) of the Act into the Permit and makes Esso the Permit Holder liable for payment of compensation to any person who suffers any loss or damage as a result of pollution of the environment in the course of its Petroleum production activities and constitutes an offence under the Act.

The Court makes the following findings and holds:

1. The Environmental Permit ( Renewed) issued by the Agency to the Permit Holder, Esso, on the 31/05/22, numbered 201 607 05 EEDPF, contains the legally binding conditions and obligations of the Permit Holder required for an activity of significant environmental impact and determined by the Agency to be reasonably necessary for the protection of human health and the environment in accordance with Section 13(1) of the Environmental Protection Act No. 11 of 1996 and the Regulations thereto.
2. Condition 14 of the Permit captioned Financial Assurance and Liability for

Pollution stipulates four specific areas.

Firstly:

- (1) Condition 14:1, 14:11, 14:12 and 14:15 defines and sets out in clear, unambiguous terms the nature and extent of the liability of the Permit Holder for all pollution incidents including but not limited to the discharge or release of a contaminant in any circumstances.

By a confluence of measures set out below, Condition 14 stipulates and imposes full, complete and unlimited liability upon the Permit Holder for any discharge of any contaminant into the environment and for all costs of clean up, restoration and any damages all of which constitute legitimate liabilities under the Permit.

3. These measures are

- (a) The clear and unambiguous terms, words and phrases used at Condition 14:1, 14:11, 14:12 and 14:15 in their ordinary, literal meaning and context.
- (b) The specific use of all encompassing terminology and language to express and convey with certainty that liability extends but is not limited to all costs, all damages, any discharge, any contaminant, all compensation, all costs involved in clean up and restoration, all costs of investigations, liability to pay compensation for any loss, liability to compensate any person.

(c) The complete absence of the usage or incorporation of any word, term, phrase, circumstances or event of limitation or restriction or exclusion of liability, apportioned liability or shared liability, uncapped liability is exclusively that of the Permit Holder.

(d) The incorporation of domestic law generally into the Permit and in particular

Section 19(1) and 19(3) of the Environmental Protection Act at Condition 14:11 which statutory provisions deal specifically with pollution and all encompassing liabilities arising therefrom.

(e) The application of the principles of Environmental Management set out at

Section 4(4) of the Act

(a) The Polluter Pays principle

(b) The strict liability legal principle

(f) The norm or standard in relation to activities of this nature has been and continues to be that the Permit Holder is exclusively and solely responsible for all such liabilities arising from its operations without limitation or exception.

4. Condition 14 of the Permit stipulates the nature of the Financial Assurances that the Permit Holder is mandated and obligated to provide in keeping with and

consistent with all encompassing, complete, unlimited liability for pollution and everything incidental thereto.

5. Condition 14:2 stipulates in unambiguous, clear, mandatory language the type of financial assurance considered to be acceptable and the nature and extent of such financial assurance deemed acceptable is required to be of a nature to cover all legitimate liabilities of the Permit Holder under the Permit.

All legitimate liabilities under the Permit is inclusive of but is not limited to the liabilities expressed at 14:01 and extends to all liabilities, all costs, all compensation, all damages, all sums associated with or incidental to clean up, restoration, compensation and investigation.

Legitimate liabilities, in short, means the sum totality of all of the above without exception or limitation.

Condition 14 also sets out the consequence of the failure of the Permit Holder to perform its obligation expressed under Condition 14

The Court holds that the Permit Holder is by Condition 14:02 and 14:05 mandated to provide environmental liability insurance as stipulated at Condition 14:05 (i) (ii) (iii) (iv) (v) and (vi) within such time as envisaged at Condition 14:08.

The Court further holds and finds that the Permit Holder is mandated to provide by Conditions 14:02, 14:03 and 14:10 a further financial assurance in the form of an unlimited parent or affiliate company guarantee to indemnify and keep indemnified the Agency and the Government of Guyana for the duration of the

petroleum production activities in the Stabroek Block against all such environmental obligations and liabilities of the Permit Holder and its Co-Venturers.

The rationale for the stipulations as to the nature and extent of the Financial Assurances in the form of an unlimited Parent Company or Affiliate Company undertaking and indemnity accords with the reality that the Permit Holder does not possess the financial strength or resources or capacity to cover its unlimited and all encompassing, uncapped liabilities arising under the Permit.

6. Condition 14 further stipulates at 14:2, 14:8 and 14:9 the time mandated for compliance by the Permit Holder with its obligations for the provision of Insurance and Parent Company or Affiliate Company Indemnity Agreements to provide full coverage for its uncapped liabilities that are all encompassing and without limitation.

The Agency and Esso have argued that there is no such obligation imposed upon Esso arising from the Permit.

The Agency and Esso have contended that the effect of Condition 14:03 of the Permit is that an assessment and estimate is required to be done of the reasonably credible costs, expenses and liabilities that may arise from a breach of the Permit.

The Agency, together with Esso, further contended that Condition 14:03 is in conformity with Section 31(1) and (2) of the Environmental Protection Act, No. 11 of 1996, which provides that a Guarantee shall specify the amount of financial assurance and hence the need for an estimate.

The Agency, through its Director, further contended in this regard the Permit Holder had retained the services of a Consultant to guide this process and the Agency, the Consultant and the Permit Holder were engaged in reviewing potential methodologies and engaged in data collection. In addition, the Attorney-General of Guyana and the Agency, on behalf of the Government of Guyana, were in negotiations with Esso, the Permit Holder, to secure compliance and negotiate a Parent or Affiliate Company Agreement which was in draft.

These arguments on the part of Esso and the Agency are entirely without merit and have no basis in law, fact and circumstance.

The Environmental Permit ( Renewed) and Condition 14 of the Permit was the product of a lengthy, transparent, informed, consultative process driven by technical assessments, the Environmental Impact Assessment, Environmental Impact Statement, the input and submissions of the public on these matters, the input of the technical staff of the EPA, projections of unplanned events, assessments of irreversible damage, all of which cumulatively informed and guided the conditions to be included in the Permit ultimately intended for the protection of the environment and the citizens.

Regulation 12(1) of the EPA (2000) provides:

“ The Agency shall establish in each Environmental Authorisation such terms and conditions as required on a case by case basis, which may include the following....”

At the conclusion of that process, the Agency issued the Environmental Permit (Renewed) on 31/05/22 with the stipulations in issue at Condition 14.

The stipulations of Condition 14 cannot be unilaterally and arbitrarily altered and changed by the Permit Holder, of his accord, for his benefit, facilitated by the Agency which has descended into a state of inertia and slumber at the critical juncture of an emerging oil and gas sector.

Condition 14 and the financial stipulations therein were inserted into the Environmental permit for the benefit of the citizens and the environment and it cannot be unilaterally altered to the detriment of the populace.

Any attempt to substitute a diluted guarantee constitutes a breach of the conditions of the Permit, a state of affairs which has prevailed for an extended period. In the meantime, the Permit Holder optimizes petroleum production and stands in stark violation of its obligation where consequences of an event will ascend to catastrophic in the absence of the stipulated unlimited Parent Company guarantee to indemnify and keep indemnified the Agency and Government of Guyana.

There is no ambiguity arising from Condition 14:03 that invokes the misconceived process of convenience set in train by Esso and supported by the Agency.

The Agency and Esso, prior to the execution of the Permit on 31/05.22, were fully aware of the contents of the Permit in view of the process that informed its compilation. All parties were knowledgeable of their respective duties and obligations and proceeded to execute same without objection or complaint.

Parliament legislated a process under the EPA. Sections 10, 11 and 12 detailed and informed by an Environmental Impact Assessment leading to the Permit. Therefore, the Director of the Agency could not, in any circumstances, purport to enter into private negotiation with a third party and Esso to circumvent the conditions of the Permit, flowing from the Environmental Impact Assessment and the legislative process.

Further, Part VI of the Environmental Protection Act “ Financial Assurance” at Section 30 (b) provides:

“ Financial Assurance means one or more of

- (i) Cash in the amount specified in the Environmental Authorisation.
- (ii) A letter or credit from a bank in the amount and terms specified in the Environmental Authorisation
- (iii) A guarantee in the form, terms and amount specified in the Environmental Authorization.....
- (iv) A performance bond in the form and terms specified in the Environmental Authorisation.

Section 31(1) provides:

“ The Agency may include in any environmental authorization a requirement that the person whom that environmental authorization is issued to shall provide assurance to the state from any one or more of the following:

- (a) The performance of any action or compliance with any condition specified in any environmental authorization.....”

Section 31(2) provides:

“ A requirement under subsection (1) shall specify the amount of financial assurance and may provide that the financial assurance may be provided, reduced or released in stages specified in the environmental authorization.” The Agency and Esso together argue that on the basis of this provision and Condition 14:03 of the Permit, an estimate of the sum is required and hence that the process of negotiations to which the Agency has alluded .

That argument is erroneous and self-serving.

Private discussions cannot circumvent an Environmental Impact Assessment and conditions in an Environmental Permit.

Further, an examination of S. 31(2) and the reference to S. 31(1) makes clear by S. 30(b) that what is intended is that the amount of the liability specified in the Environmental Authorisation or the Environmental Permit is the amount specified in the Financial Assurance be it a guarantee or a performance.

This does not mean it requires a specific amount to be quantified. What the provision is saying in no uncertain terms is that the liability contained in the Environmental Authorisation/Permit is the liability to be stipulated in the form of Financial Assurance.

In this case, the Environmental Permit mandates uncapped liability in view of the nature of the petroleum production activity as a source of significant environmental impact.

Esso, the Permit Holder, is in breach of this obligation and the attempt to procure and substitute a diluted Parent Company Guarantee that is inconsistent with its obligation under Condition 14 of uncapped or unlimited liability does not constitute performance

or compliance of its obligations. This is a state of affairs which cannot be condoned on the basis of the potential calamitous consequences were an event to occur and the stipulated unlimited Parent Company Guarantee is not in place.

It must be borne in mind at all times that the liability under Condition 14 is not a shared liability between the state of Guyana and Esso. It is exclusively the liability of Esso, uncapped and unlimited, for which it is obligated to provide an unlimited Parent Company Guarantee consistent therewith.

The question that logically arises is if the Parent Company Guarantee as mandated by Condition 14 is in place, then if the unthinkable occurs, and there is an event in the Stabroek Block resulting in the release of hydrocarbons then Esso, and to the extent that it is unable to do so as it is largely an assetless subsidiary without financial resources, then EXXON, the Parent Company comes into play. EXXON continues to derive a benefit from the operations of its subsidiary and will cover the liabilities and obligations of Esso as stipulated at Condition 14:01.

If, however, that event occurs and there is no uncapped Parent Company Guarantee in place to indemnify the State, then the State is liable for all that occurs.

It is simply not open to the Permit Holder to say it is engaged in a frolic of its own, aided and abetted by the EPA, to unilaterally, arbitrarily and unlawfully cap its unlimited liability and financial assurance. A Parent Company or Affiliate Company indemnity or guarantee to the extent of two billion dollars does not fulfill the obligations of the Permit Holder at Condition 14:10 and, in such circumstances, Esso will remain in breach.

There is no hurdle to the provision of the unlimited parent company guarantee and the unlimited affiliate company guarantee agreements stipulated at Condition 14:10 of the Permit.

The factual circumstances of the case Okpabi and others v. Royal Dutch Shell plc and another (2021) UKSC 3 before the UK Supreme Court highlights the catastrophic pitfalls of the course proposed by Esso and condoned by the Agency.

In the course of the arguments before the Court it was raised and canvassed that time for fulfillment of obligations under Condition 14 must be construed in the context of the stipulation and obligation to be performed.

Condition 14:10 makes reference to “as soon as reasonably practicable”.

Condition 14:02 provides “within a reasonable time”,

The Environmental Permit (Renewed) was issued on the 31/05/22, eleven months ago.

It has to be with utmost certainty any liberal interpretation applied to the time construct for performance of an obligation under Condition 14 had long expired and any obligation not carried out by the Permit Holder constitutes a calculated and settled act of non-compliance for the Permit Holder is in breach of its obligation.

The point must be made that the term “as soon as reasonably practicable” and “within a reasonable time” must be construed within the context of the activity permitted in this case which is petroleum production which bodes no time lapses for compliance of permit obligations.

I have reviewed the evidence before the Court and the conflicting submissions on the issue of the performance by Esso with its insurance obligations. I have reviewed the Policy before the Court which the Applicants have vociferously attacked on multiple grounds. I do find and hold that the insurance obtained by the Permit Holder from its Affiliate Company, AON UK Ltd, captioned “ Energy Package Policy”, and purporting to indemnify the Permit Holder and its Co-Venturers, both for the Liza Phase 1 and Phase 2 Projects, which benefit from separate environmental permits, does not satisfy the stipulation and obligation set out at Condition 14:5 of the Environmental Permit ( Renewed) which imposed an express and specific obligation on Esso to obtain environmental liability insurance in accordance with the prerequisites identified thereunder which threshold this policy does not satisfy. It does not constitute what is considered environmental liability insurance “ as is customary in the international petroleum industry” and for the petroleum production operations under this Permit. Further, the insurance has not been obtained by the Permit Holder from an insurance company of standing that equates to Grade A Plus.

Condition 14.05 stipulates as to the type of insurance mandated under this Permit, ie “ environmental liability insurance of such type and such amount as is customary in the international Petroleum Industry for Petroleum Operations in relation to this Permit..... and shall include but may not be limited to insurance in respect of:

- (i) Loss or damage to all assets used in the Project
- (ii) Environmental damage caused in the course of the Project for which EEPGL will be jointly and severally held responsible

- (iii) Loss or damage to property or bodily injury suffered by any third party in the course of the Project for which EEPGL is liable
- (iv) The cost of removal of wreckage and clean up operations required as a result of an accident occurring in the course of permitted activities
- (v) EEPGL's liability to its employees engaged in the Project
- (vi) Any other requirements made by the Agency

The Respondent Agency has failed and/or omitted to take any step to hire an independent insurance consultant to guide its actions and conduct as it relates to the quality, type and nature of the insurance demanded by Condition 14:5. The Agency has further abrogated its function by simply issuing a letter to Esso and to acknowledge receipt of the copy of the insurance. The business of the Agency is not a clerical one.

In relation to the issues having set out the obligations of the Permit Holder, the Court finds and holds that the Permit Holder is in breach of its financial assurance obligations at Condition 14 and has failed to provide, inter alia, the stipulated financial assurance in the form of specified environmental insurance together with an unlimited Parent company Guarantee agreement to indemnify and keep indemnified the Agency and the Government of Guyana against the environmental obligations of the Permit Holder and Co-Venturers arising from its petroleum production and related activities within the Stabroek Block, Offshore Guyana.

#### **ISSUE # 4**

**Whether the EPA has acted in breach of its statutory duty and unreasonably and permitted ESSO to carry out petroleum production operations at the Liza Phase**

**Project in the absence of compliance by ESSO with the terms of Condition 14 of the Environmental Permit ( Renewed).**

The Agency has, at every juncture, from the 31/05/22 to present, engaged in a course of action to undermine and erode the terms and conditions of its own Environmental Permit.

The Agency in its filings before this Court, through its Officer, deposed on oath that Esso was in compliance with Condition 14 obligations of the Permit when this was not in fact so.

The Agency, a Public Authority, carrying out Public law functions, has notwithstanding the Permit Holder's approved activities are of significant environmental impact, failed and omitted to mandate compliance by the Permit Holder with its Financial Assurance obligations of environmental liability insurance together with an unlimited parent company guarantee. The Agency failed to take any meaningful step or any step whatsoever to assess what was provided to it by Esso, the Permit Holder, purportedly as environmental liability insurance when it was not in fact in keeping with Condition 14:05. This is notwithstanding that the Permit Holder has, through its public pronouncements, communicated its intention to increase production levels in its petroleum production facilities. It has failed to suspend and/or cancel the Environmental Permit (Renewed) notwithstanding the potential catastrophic consequences to the environment, citizens and the State.

The Agency has, in the circumstances, by its decision and omission, committed an illegality, acted unlawfully, ultra vires, unreasonably in the Wednesbury context of unreasonableness, in defiance of logic, irrationally and without any jurisdiction.

Council of Civil Service Union v. Minister for Civil Service [1984] UKHL 9.

Condition 14:17 of the Permit specified “ Should the Permit Holder contravene or be likely to contravene any condition of this Permit, the Agency may issue an Enforcement Notice in accordance with Section 26 of the Act”.

There is no evidence that any Enforcement Notice was issued to Esso notwithstanding its prolonged non-compliance over 11 months. There is no evidence that the Agency took any step whatsoever in relation to the Permit Holder’s compliance.

Regulation 15(1) of the EPA provides that

“ Where an Environmental Authorisation is in force it shall be the duty of the Agency to take the steps needed-

(b) For the purpose of ensuring that the conditions of the Environmental Authorisation are complied with.”

Section 13(1) of the Act provides

“.....each environmental permit shall contain the following implied condition:

(a) The Agency shall have the right to cancel or suspend the Environmental permit if any of the terms or conditions of the Environmental permit are breached.”

Section 25 of the Act sets out the procedure under the Act for cancellation, evocation and/or suspension of the Permit by the Agency in the public interest.

In all of the circumstances, on the evidence, the Court finds that in accordance with the Judicial Review Act, Chapter 3:06, the Agency is, by its acts and omissions, in breach of its statutory duty.

### **ORDERS**

- (1) A Declaration is hereby granted that the Environmental Protection Agency (EPA) is in breach of its statutory duty by its failure and/or omissions to enforce compliance by Esso Exploration and Production Guyana Limited of its Financial Assurance obligations stipulated at Condition 14:10 of the Environmental Permit ( Renewed) No. 201 607 05-EEDPF, dated 31/05/22, to provide an unlimited Parent Company Guarantee Agreement and/or Affiliate Company Guarantee Agreement to indemnify and keep indemnified the Agency and the Government of Guyana against all environmental obligations of the Permit Holder and Co-Venturers within the Stabroek Block, Offshore Guyana.
- (2) A Declaration is hereby granted that Esso Exploration and Production Guyana Limited has failed to comply with its Financial Assurance obligation stipulated at Condition 14:10 of the Environmental Permit ( Renewed) No. 201 607 05EEDPF, dated 31/05/22, to provide an unlimited Parent Company Guarantee and Indemnity Agreement and/or unlimited liability Affiliate Company Guarantee Agreement, to indemnify and keep indemnified the Agency and the Government of Guyana against the environmental obligations of the Permit Holder and its Co-Venturers from their activities in the Stabroek Block, Offshore Guyana.
- (3) A Declaration is hereby granted that Condition 14 of the Environmental Permit

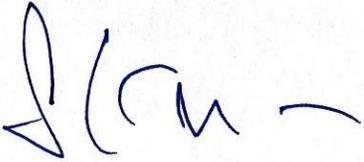
( Renewed) No. 20160705-EEDPF issued on the 31/05/22, imposes on Esso Exploration and Production Guyana Limited, unlimited and uncapped liability for all costs associated with clean up, restoration and compensation for all damages caused by any discharge of any contaminant arising from its exploration, development and petroleum production activities within the Stabroek Block, Offshore Guyana.

(4) A Declaration is hereby granted that the Environmental Protection Agency (EPA) is in breach of its statutory duty by its failure and/or omissions to enforce compliance by Esso Exploration and Production Guyana Limited of its Financial Assurance obligations stipulated at Condition 14:05 of the Environmental Permit ( Renewed) No. 201 607 05-EEDPF, dated 31/05/22, to provide environmental liability insurance of a type and nature stipulated in Condition 14 and to have an independent insurance consultant retained by the Agency to review and examine the insurance package to ensure its conformity with Condition 14 of the Environmental Permit ( Renewed).

(5) A Declaration is hereby granted that Esso Exploration and Production Guyana Limited has failed to comply with its Financial Assurance obligation stipulated at Condition 14:05 of the Environmental Permit ( Renewed) No. 201 607 05EEDPF, dated 31/05/22, to provide environmental liability insurance of such type and in such amount as is customary in the international petroleum industry from an insurance company of standing and repute that equates to Grade A Plus as envisaged by Condition 14:05.

(6) An Order of Mandamus is hereby granted directed to the Environmental Protection Agency (EPA) to issue an Enforcement Notice pursuant to Section 26(1) and (2) of the Environmental Protection Act, on or before 9/05/23, directed to Esso Exploration and Production Guyana Limited to perform its obligations under Condition 14:10 and 14:05 of the Environmental Permit ( Renewed) No. 206 607 05 issued on the 31/05/22 and to provide, within 30 days thereafter, on or before 10/06/23, the unlimited liability Parent Company Guarantee Agreement and/or unlimited liability Affiliate Company Guarantee to indemnify and keep indemnified the Government of Guyana and the Agency against all such environmental obligations of Esso and its Co-venturers within the Stabroek block, together with Environmental liability insurance as is customary in international petroleum industry in accordance with the Conditions at 14:05 (i), (ii), (iii), (iv), (v) and (vi) from an insurance company standing and repute that equates to Grade A Plus as envisaged by Condition 14:05, failing which the Environmental Permit ( Renewed) No, 206 607 05 dated 31/05/22 stands suspended.

Costs to the Applicants in the sum of \$1,500,000.00 (one million, five hundred thousand dollars).



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**JUSTICE SANDIL KISSOON**

Dated this 3<sup>rd</sup> day of May, 2023