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3/2/13

REPUBLIC OF TRINIDAD AND TOBAGO:

AMENDED NOTICE OF APPEAL

IN THE ENVIRONMENTAL COMMISSION

E.A.P No. 4 of 2008

BETWEEN

SOUTH WEST TOBAGO FISHERMENS ASSOCIATION

Appellant

AND

THE ENVIRONMENTAL MANAGEMENT AUTHORITY

Respondent

1. TAKE NOTICE that the South West Tobago Fishermens Association Limited, ("the Association") being dissatisfied with the decision of the Respondent made on 5<sup>th</sup> June 2008 (hereinafter "the said decision"), do hereby appeal to the Environmental

Commission upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

**AND** the Association further states that the names and addresses including its own of the persons directly affected by the Appeal are those set out in paragraph 6

## **2.1 PARTICULARS OF DECISION OR ORDER APPEALED AGAINST**

- i) The decision of the Respondent to process an application dated the 17<sup>th</sup> day of March, 2008 filed by **PGS Geophysical AS (PGS)** to conduct a 2-D Seismic survey in the East, West and North of Tobago without requiring an environmental impact assessment pursuant to Section 35 of the Environmental Management Act 2000 (EM Act) and Rule 4(1)(c) of the Certificate of Environmental Clearance Rules 2001 (CEC Rules) to ensure a comprehensive analysis of the environmental issues and implications presented by the conduct of seismic surveys in the waters of Tobago including but not limited to its likely impact on fish life in the said waters as well as the impact on spawning grounds, nesting areas and seabed and the likelihood that such a seismic survey would have an adverse impact on these species and thus on the income of the members of the Appellant.
- ii) The decision of the Respondent to grant the CEC on the 5<sup>th</sup> day of June 2008 to PGS to conduct a 2-D Seismic Survey in the East, West and North of Tobago without giving sufficient consideration to the economic interests of the Appellant, its members and other fisher folk in Tobago accruing to them from their fishing in the waters to which the CEC related for over 50 years contrary to Section 36 of the EM Act.
- iii) The decision of the Respondent in breach of its duty under Section 37 of the EM Act not to monitor the performance of the obligations conditions and/or requirements imposed by the CEC.

- iv) The decision of the Respondent not to provide effective terms and conditions in the CEC to protect the resource user groups and/or fish life and the sea bed contrary to Section 40 of the EM Act.

~~The decision of the Respondent to issue Association seeks a variation of the Certificate of Environmental Clearance CEC No. 2224/2008 (hereinafter "the said CEC) more particularly Clause ii (f) thereon on Mitigation Measures which provides:~~

~~"PRE SURVEY PREPARATION~~

~~(a) (e)~~

~~(f) The Applicant shall formulate, in collaboration with the relevant resource user groups (i.e. fishers, other operators within the project area, etc.), a mutually acceptable agreement to treat with, but not necessarily be limited to, the following:~~

- ~~Required conduct of fisherfolk/other marine operators during the survey operators to minimize loss/damage to life/property;~~
- ~~Restricted access to the project area during survey operations;~~
- ~~Compensation for loss of revenue to resource users resulting from the restricted access to the area, where applicable, and from the loss/damage to life /property; and~~
- ~~Environmental and safety precautions and protocol.~~

~~Written document of this agreement shall be made available to the EMA/DNRE upon request."~~

**2.2 PROVISION OF THE ACT UNDER WHICH NOTICE OF APPEAL IS SUBMITTED**

The application herein is made pursuant to sections 81(5)(a), and/or 81(5)(f) and/or 81(5)(i), of the Environmental Management Act, Number 3 of 2000.

**2.3 THE NAME AND TITLE OF THE PERSON WHOSE DECISION IS THE SUBJECT OF THE NOTICE OF APPEAL**

Dr.Joth Singh, ~~Dave McKintosh~~, Managing Director and Chief Executive Officer on behalf of the Respondent.

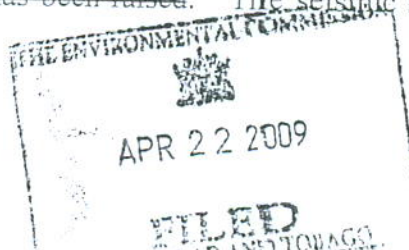




## 2.4 FULL DETAILS OF THE OBJECTIONS ARGUMENTS AND SUBMISSIONS IN RESPECT OF THE DECISION OR ORDER APPEALED AGAINST:

- v) The first objection and submission of the Association is that the Respondent did not give sufficient consideration to the economic interests of the Association, its members and other fisherfolk in Tobago accruing to them from their fishing in the waters to which the CEC related for over 50 years.
- vi) The second objection is that the Respondent did not conduct a comprehensive analysis of the environmental issues and implications presented by the conduct of seismic surveys in the waters of Tobago including but not limited to its likely impact on fish life in the said waters as well as the impact on spawning grounds, nesting areas and seabed and the likelihood that such a seismic survey would have an adverse impact on these species and thus on the income of the members of the Association.
- vii) The third objection is that the Respondent was in breach of its duty under Section 37 of the Environmental Management Act, 2000 to monitor the performance of the obligations conditions and/or requirements imposed by the CEC ~~and specifically to ensure compliance with the requirement that the Appellant PGS collaborate with resource user groups to formulate a mutually acceptable agreement to address the matters therein stated).~~
- viii) ~~Fourthly the Respondent has shown disdain for the Association and has supported and/or colluded with PGS in showing disdain for the Association in that the Respondent completely ignored and/or failed to acknowledge receipt of its letter of 14<sup>th</sup> July 2008 in which the Association informed it that the Respondent had commenced the seismic survey without complying with the Respondent's requirement to formulate "a mutually acceptable agreement" with resource user groups.~~

- ~~ix) The Respondent failed to provide a contingency plan to protect the resource user groups and/or fishlife and the sea bed in the event that PGS fails to comply with the requirement/condition laid down in the CEC~~
- x) By 14<sup>th</sup> July 2008 the Association wrote to the Respondent and the Department of Natural Resources and the Environment (DNRE) of the THA seeking assistance with respect to a compensation agreement for its members ~~realized the futility of seeking amicable negotiations with PGS to arrive at a mutually acceptable agreement as required by the CEC, it wrote to the Respondent and the Department of Natural Resources and the Environment (DNRE) of the THA.~~ A copy of the letter to the Respondent dated 14<sup>th</sup> July 2008 is hereto annexed and marked "A". There was no response thereto and no follow up action as requested in the said letter. On 17<sup>th</sup> July 2008, the Attorney for the Association telephoned the Respondent and was advised that the Respondent will respond more swiftly if the Association's letter were dispatched to the DNRE. The Attorney complied by sending a letter of 17<sup>th</sup> July 2008 to the DNRE. There has there been no response by either the Respondent or the DNRE to either of these letters and no action was taken as far as the Association is aware. A copy of the letter of 17<sup>th</sup> July 2008 to the DNRE is annexed hereto and marked "B"
- xi) On 29<sup>th</sup> July 2008 having lost all hope in the Respondent and the THA the Association filed *inter alia* for an injunction to restrain PGS from continuing the survey until it had formulated the required agreement with the Association and other resource user groups. The matter has been resolved on the basis of a dismissal of proceedings against the Respondent and PGS being that jurisdiction was properly vested in the Environmental Commission of Trinidad and Tobago to hear the particular issue ~~is still pending because the issue of jurisdiction of the High Court has been raised.~~ The seismic survey has however been completed by PGS.





xii) The Association further cites as grounds of its appeal against the Respondent:

- i) The failure of the Respondent to require ~~the Appellant~~ PGS to produce and submit an Environmental Impact Assessment for the project in keeping with CEC Rules 3(i)(d)
- ii) The failure of the Respondent to consider all relevant matters pursuant to Section 36(1) of the EM Act ~~environmental Management Act, 2000~~, including but not limited to:
  - a) the economic interests that the Association and its members have in the project area as users of the area to earn their livelihood
  - b) the impact of the conduct of seismic activities in the project area on the livelihood of fishermen
  - c) the impact of restricted access or the possibility of such restriction to the project area on the livelihood of fishermen
  - d) the impact of the seismic survey on fishlife and on the sea bed generally.
  - e) the issue of compensation to fishermen for the loss of their livelihood during the period of the survey
- iii) The failure of the Respondent to monitor ~~the Appellant's~~ PGS's implementation of and compliance with the CEC contrary to Section 37 of the Environmental Management Act, 2000.
- ~~iv) The failure of the Respondent to investigate the complaint brought against the Appellant PGS by the Association in its said letter of 14th July 2008 in order to "avoid or expeditiously resolve disputes" in~~

~~keeping with Section 16(2) of the Environmental Management Act,  
2000.~~

xiii) The Association is firm of the view that such seismic surveys would have adverse effects on fish life, nesting areas and spawning grounds and thus impact negatively on the income that its members derived from fishing activities. They would also have lost income as a result of the restrictions or perceived restriction of their access to the fishing areas as well as their fishing pots and rafters. It is inevitable that the right of access to the fishing grounds would either be restricted or curtailed by the seismic activities and compensation should have been payable to fisherfolk.

~~xiv)~~ This issue of compensation is a critical factor and it should have been an express condition for the grant of the CEC. As stated it is somewhat and vague. For this reason the Association argues that a clear condition or requirement should have been stipulated by the Respondent in the CEC that PGS the Appellant should compensate fisherfolk for the negative impacts on their livelihood. ~~As it happens no agreement was pursued and none materialized. It is due inter alia to the failure of the Respondent to so stipulate in the CEC that the Association has lodged its appeal against the Respondent.~~

~~xv)~~ ~~Once it became known to the Association's members that the seismic survey was commenced and that damage was done to the fish pots of the said Arthur Stewart and others they decided to stay away from the area until the survey was completed. This was due to fear of losing their gear equipment and/or vessel. In addition it was reported that the Appellant PGS had required a few fishermen who actually tried to fish to move aside and this resulted in their expedition being aborted. This entailed a loss of funds expended in preparing for the trip. Furthermore the Association nor its members was ever officially informed or forewarned by the Appellant PGS as to the coordinates of the areas where the surveys were being done by the Appellant PGS. Members~~



~~did not want to have to be moved or have their equipment damaged after outfitting themselves for a productive fishing event. Thus they decided it was most prudent to stay away from fishing altogether until the survey was completed. All of the foregoing realities caused them to lose tremendous income during the period of the survey as they were unable to fish. The Respondent should have anticipated these eventualities and required that the members should be compensated for their losses.~~

~~xvi) The Association says that there are reasonable bases for the variation of the CEC one of which is to require PGS to compensate resource users as hereinabove argued thus allowing them stay out of the area altogether and avoiding danger to their lives, and damage to their gear equipment and pots. PGS had argued in their consultation sessions (all of which were held before the CEC was granted) that fisherfolk would not be affected by the seismic survey. That argument fails to appreciate the unique manner in which fisherfolk engage in the "drift" type of fishing. Thus the Respondent failed to take into consideration the peculiar fishing culture of fisherfolk in Tobago~~

~~xvii) Another reasonable basis for variation of the CEC was the failure of the Respondent to stipulate compensation for the negative impact on fish life and disturbance of spawning grounds which will adversely impact both the marine resources of the area and the income of the fisherfolk. Damage to the sea bed is also a factor that should have been addressed and for which compensation should have been provided by the Respondent. The Respondent abdicated its responsibility under Section 16 of the Act by leaving these matters to an agreement between PGS and resource user groups which never materialized. Articles relative to these issues and other relevant documents are attached hereto in a bundle and marked "C"~~



## 2.5 A DESCRIPTION OF THE RELIEF SOUGHT;

~~An order that sub paragraph (f) of Clause ii of the CEC 2224/2008 be amended as follows:~~

### ~~"PRE-SURVEY PREPARATION~~

~~(a) (e)~~

~~(f) The Applicant shall formulate in collaboration with furnish relevant resource user groups (i.e. fishers, other operators within the project area, etc.), with written information pertaining to a mutually acceptable agreement to treat with, but not necessarily be limited to, the following:~~

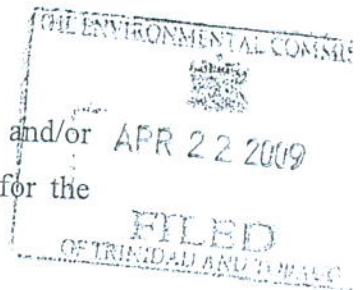
- ~~Required conduct of fisherfolk/other marine operators during the survey~~
- ~~operators to minimize loss/damage to life/property;~~
- ~~Restricted access to the project area during survey operations;~~
- ~~Compensation for loss of revenue to resource users resulting from the restricted access to the area, where applicable, and from the loss/damage to life/property; and~~
- ~~Environmental and safety precautions and protocol.~~

~~Written document of this agreement shall be made available to the EMA/DNRE upon request."~~

2.5.1 A declaration that the Respondent acted *ultra vires* Rule 4(1)(c) and/or irrationally and/or unreasonably in deciding that the application for the CEC did not require an environmental impact assessment.

2.5.2 A declaration that the Respondent acted *ultra vires* Section 31 of the EM Act and/or irrationally and/or unreasonably in ignoring the precautionary principle when elected not to require an environmental impact assessment.

2.5.3 A declaration that the Respondent acted *ultra vires* Section 36(1) of the EM Act and/or irrationally and/or unreasonably in granting the CEC on the 5<sup>th</sup> day of June 2008 to PGS to conduct a 2-D Seismic Survey in the East, West and North of Tobago without consideration of relevant matters.



2.5.4 A declaration that the Respondent acted *ultra vires* and/or irrationally and/or unreasonably in breach of its duty under Section 37 of the EM Act to monitor the performance of the obligations conditions and/or requirements imposed by the CEC.

2.5.5 A declaration that the Respondent acted *ultra vires* and/or irrationally and/or unreasonably in failing to provide in the CEC effective terms and conditions to protect the resource user groups and/or fishlife and the sea bed contrary to Section 40 of the EM Act.

2.5.6 A declaration that the Respondent abdicated its statutory responsibility under Section 40 of the EM Act when it transferred responsibility to PGS to deal with issues pertaining to the environment and health and safety of users of the marine environment to be affected by the seismic activities of PGS.

2.5.7 A declaration that the Respondent abdicated its responsibility under Section 16 of the Act by leaving the matter of compensation of users of the marine environment to be affected by the seismic activities of PGS up to PGS.

2.5.8 Damages

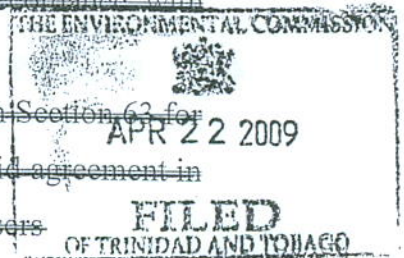
2.5.9 Costs

### **3.0 GROUNDS OF APPEAL INCLUDING REASONS WHY THE ASSOCIATION OBJECTS TO THE DECISION OR ORDER**

1. The Respondent acted *ultra vires*, arbitrarily and/or unreasonably and/or irrationally and or excessively and or unjustifiably and or contrary to law by its failure to:



- i. Require an environmental impact assessment as part of the application process for the CEC.
  - ii. Grant the CEC without considering all relevant matters.
  - iii. Monitor the performance of the obligations conditions and/or requirements imposed by the CEC.
  - iv. Provide effective terms and conditions in the CEC to protect the resource user groups and/or fishlife and the sea bed.
  - v. Fulfill its statutory duty with respect to issues such as the environment, health, safety and compensation.
- ~~ii) take action in response to the Association's letter of 14<sup>th</sup> July 2008 or investigate the complaint being made in the said letter~~
- ~~iii) ensure that the CEC was effective in protecting the environment to wit fishlife, spawning grounds and nesting areas as well as the sea bed as well as the interests of resource users of the area in the said environment and to provide compensation for losses incurred by damage and loss thereto~~
- ~~iv) monitor the performance of the CEC by PGS in accordance with Section 37~~
- ~~v) to serve a notice of violation on PGS in accordance with Section 63 for its failure to comply with the CEC and formulate the said agreement in collaboration with the Association and other resource users~~



- ~~2. The Respondent failed to require PGS to produce and submit an Environmental Impact Assessment for the project in keeping with CEC Rules 3(i)(d)~~
- ~~3. The Respondent failed to consider all relevant matters pursuant to 36(1) of the Environmental Management Act, 2000, including but not limited to:~~

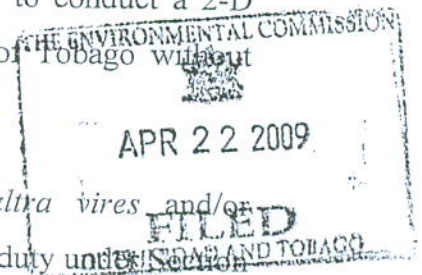
- ~~f) the economic interests that the Association and its members have in the project area as users of the area to earn their livelihood~~
  - ~~g) the impact of the conduct of seismic activities in the project area on the livelihood of fishermen~~
  - ~~h) the impact of restricted access or the possibility of such restriction to the project area on the livelihood of fishermen~~
  - ~~i) the impact of the seismic survey on fishlife and on the sea bed generally~~
  - ~~j) the issue of compensation to fishermen for the loss of their livelihood during the period of the survey~~
- ~~4. The Respondent failed to monitor PGS PGS implementation of and compliance with the CEC contrary to Section 37 of the Environmental Management Act, 2000.~~
- ~~5. The Respondent failed to investigate the complaint brought against PGS~~
- ~~6. by the Association in its said letter of 14<sup>th</sup> July 2008 in order to "avoid or expeditiously resolve disputes" in keeping with Section 16(2) of the Environmental Management Act, 2000.~~

#### 4.0 RELIEF SOUGHT

- i) That the Commission do allow this appeal ~~and/or modify the decision of the Respondent by ordering the Respondent to amend Clause ii(f) of the CEC 2224/2008 in manner submitted in Clause 2.5 herein~~
- ii) A declaration that the Respondent acted *ultra vires* Rule 4(1)(c) and/or irrationally and/or unreasonably in deciding that the application for the CEC did not require an environmental impact assessment.



- iii) A declaration that the Respondent acted *ultra vires* Section 31 of the EM Act and/or irrationally and/or unreasonably in ignoring the precautionary principle when elected not to require an environmental impact assessment.
- iv) A declaration that the Respondent acted *ultra vires* Section 36(1) of the EM Act and/or irrationally and/or unreasonably in granting the CEC on the 5<sup>th</sup> day of June 2008 to PGS to conduct a 2-D Seismic Survey in the East, West and North of Tobago without consideration of relevant matters.
- v) A declaration that the Respondent acted *ultra vires* and/or irrationally and/or unreasonably in breach of its duty under Section 37 of the EM Act, to monitor the performance of the obligations conditions and/or requirements imposed by the CEC.
- vi) A declaration that the Respondent acted *ultra vires* and/or irrationally and/or unreasonably in failing to provide in the CEC effective terms and conditions to protect the resource user groups and/or fishlife and the sea bed contrary to Section 40 of the EM Act.
- vii) A declaration that the Respondent abdicated its statutory responsibility under Section 40 of the EM Act when it transferred responsibility to PGS to deal with issues pertaining to the environment and health and safety of users of the marine environment to be affected by the seismic activities of PGS.
- viii) A declaration that the Respondent abdicated its responsibility under Section 16 of the Act by leaving the matter of compensation of users of the marine environment to be affected by the seismic activities of PGS up to PGS.



~~i) That PGS do pay to the Association compensation to be assessed by the Court for losses incurred by the Association's members for the loss of livelihood caused by the restricted access to the project area during seismic survey or for the perceived restricted access created by their uncertainty as to where and how the seismic survey was being conducted.~~

ix) An Order That the Respondent do pay damages to the Association for breach of statutory duty under Section 16, 36, 37 and 40 of the EM Act and CEC Rule 3(1)(d).

x) An Order That ~~PGS and~~ the Respondent do pay the Association's costs for this application.

xi) Costs and/or other relief

5.0 THE PERSONS DIRECTLY AFFECTED BY THIS APPEAL ARE:

i. THE APPELLANT PGS Geophysical AS  
69 Luis Street  
Port of Spain  
Trinidad

ii. The Environmental Management Authority  
8 Elizabeth Street  
St. Clair  
Trinidad

Dated this            day of            200~~8~~9

  
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Renée Gift  
Instructing Attorney at Law for the Association.





Deborah Moore-Miggins  
Deborah Moore-Miggins and Company  
Advocate Attorneys at Law for the Association.

The address for service on the Association is c/o Deborah Moore-Miggins and Company  
Young Street, Scarborough, Tobago, Tel/Fax: 639-3175.

TO:

The Registrar of the Environmental Commission  
E.F Telly Paul Building  
Cor. New and St. Vincent Street  
Port of Spain

AND TO:

The Secretary  
The Environmental Management Authority  
8 Elizabeth Street  
St. Clair  
Port of Spain  
Trinidad

AND TO:

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