

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA**

**CONSTITUTIONAL AND ADMINISTRATIVE DIVISION**

**PROCEEDING FOR JUDICIAL REVIEW**

**2022-HC-DEM-CIV-CM-FDA-94**

**IN THE MATTER of an Application by SINIKKA HENRY, (First Applicant), SHERLINA NAGEER (Second Applicant) and ANDRISKA THORINGTON (Third Applicant) for Orders of Certiorari, Mandamus and Prohibition**

**BETWEEN:-**

- 1. SINIKKA HENRY**
- 2. SHERLINA NAGEER**
- 3. ANDRISKA THORINGTON**

**Applicants**

**THE ENVIRONMENTAL PROTECTION AGENCY**

**Respondent**

**-and-**

**ESSO EXPLORATION AND PRODUCTION  
GUYANA LIMITED**

**Added Respondent**



**Mr. S. Jairam, SC, Mr. Ronald Birchsmith, and Ms. M. Janki for the applicants**

**Ms. F. Carryl and Ms. N. Allsopp for the respondent**

**Mr. E. Luckhoo SC, Mr. A Pollard SC and Ms. G. Macedo-Singh for the added respondent**

**JUSTICE ROXANE GEORGE, CHIEF JUSTICE (ag)**

**JUDGMENT**

**Introduction**

- [1] The Applicants in this Fixed Date Application, 2022-HC-DEM-CIV-FDA-94, (FDA), Sinika Henry, Sherlina Nageer, and Andriska Thorington, claim that the Environmental Protection Agency (EPA) acted unlawfully and ultra vires the Environmental Protection Act, Chapter 20:05, (EP Act) when it issued what they claim is a purported modified Environmental Permit (modified EP) dated May 15, 2021, which governs the conduct of petroleum operations and production by Esso Exploration and Production Guyana Limited (Esso).
- [2] The applicants therefore sought an order of certiorari to quash the decision to replace the original permit dated September 25, 2020 with the said modified permit, and a declaration that a charge of \$30.00 US per tonne of carbon dioxide equivalents as set out in the said modified EP is in breach of the polluter pays principle. They also sought a number of orders mandamus directing the EPA to issue certain orders and directions to Esso as regards its operations in the production of oil.
- [3] The modified permit had been previously amended pursuant to an order of Court so as to limit its validity to 5 years as stipulated by the EP Act.
- [4] The orders sought are as follows:

a) An Order of Certiorari directed to the EPA quashing its decision purportedly made under the EP Act and/or the Environmental Regulations 2000 (the Regulations") to replace the environmental permit dated 25th September, 2020 numbered 20160705-EEDPF ( the 'Liza 1 Permit') as granted to Esso with a modified permit dated 15th May, 2021, on the grounds that the decision to grant the modified permit is so flawed at, and/or contrary to, or in breach of the law as to amount to, inter alia:

- (i) a nullity, is void and of no legal effect, was made without or in want of or in excess of jurisdiction, is ultra vires; is unreasonable or irrational; is arbitrary, capricious or erroneous at law; is illegal; disproportionate; in

defiance of logic; without any legal foundation or basis of the provisions of the Act and/or the Regulations;

(ii) a breach of or omission to perform a duty;

(iii) a failure to satisfy or observe conditions or procedures required by law;

(iv) an abuse of power;

(v) an improper purpose or irrelevant consideration;

(vi) a conflict with the policy of the Act and/or Regulations and;

(vii) an exercise of a power in a manner that is so unreasonable that no reasonable or respectable person or public authority, acting judicially or quasi-judicially and properly instructed as to the relevant law could or would have so exercised the power to modify the said Liza 1 Permit.

b) An Order of Mandamus directed to the EPA to issue an order to Esso to immediately cease all flaring.

c) An Order of Mandamus directed to the EPA to issue an order to Esso to immediately reduce or cease production in order to stop flaring safely.

d) An Order of Mandamus directed to the EPA directing the EPA to issue an order to Esso to immediately refrain from venting gas.

e) An Order of Mandamus directed to the EPA to publish the annual aggregate GHG emissions from all facilities and offshore support activities which are required to be quantified under Article 3.1 of the Liza 1 Permit.

f) An Order of Mandamus directed to the EPA to publish a report setting out what methods Esso has adopted to control and reduce fugitive emissions in compliance with Article 3.2 of the Liza 1 Permit.

g) An Order of Mandamus directed to the EPA directing the EPA to commission an independent and expert investigation into whether and to what extent Esso has complied with Article 3.3 of the Liza 1 permit and has (i) operated its mechanical equipment in particular its gas compression equipment in accordance with the manufacturer's standards and (ii) has regularly maintained and operated its

mechanical equipment in particular its gas compression equipment to minimize atmospheric emissions.

h) An Order of Mandamus directed to the EPA directing the EPA to commission an independent and expert investigation into the petroleum operations being carried out by Esso purportedly under the Liza 1 Permit in order to assess the safety of the said petroleum operations, to identify Esso's systems failure and failures of procedure, to identify, examine and assess failures of Esso's equipment including Esso's gas compression equipment, to identify and assess the danger that Esso's petroleum operations and failures pose to the people and environment of Guyana and the Caribbean, and to make recommendations to protect the people and environment of Guyana and the Caribbean from harm arising or which may arise from Esso's Petroleum operations or failures in the Liza Phase 1 Development.

i) An Order of Mandamus directed to the EPA directing the EPA to publish a statement setting out from 1st June, 2017 to 15th May, 2021 (1) the total amount of oil that has been extracted from the Liza Phase 1 Development Project; (2) the total amount of gas that Esso has flared; (3) the total amount of gas that Esso has vented; (4) the total amount of gas that Esso has reinjected; and (5) the gas to oil ratio.

j) An Order of Mandamus directed to the EPA directing the EPA to publish a statement setting out (1) the total amount of Green House Gas (GHG) emissions from the gas that Esso has flared from 1st June, 2017 to 15th May, 2021; (2) the total amount of GHG emissions from the gas that Esso has vented from 1st June, 2017 to the 15th May, 2021; and (3) the methodologies used to calculate all such greenhouse emissions.

k) An Order of Mandamus directed to the EPA directing the EPA to publish a statement setting out (1) the total amount of gas that Esso has flared from 15th May, 2021 to the date of the Order; (2) the total amount of GHG emissions from such flaring; (3) the total amount of gas that Esso has vented from 15th May, 2021 to the date of the Order; (4) the total amount of GHG emissions from such

venting; and (5) the methodologies used to calculate all such greenhouse emissions.

l) An Order of Mandamus directed to the EPA directing the EPA to publish a report covering the period from 1st June, 2017 to the date of the order setting out for each month the quantity of each pollutant emitted by the petroleum operations carried out by Esso in the Liza Phase 1 Development Project including carbon dioxide, nitrogen oxides, sulfur oxides, carbon monoxide, particulate matter, hydrogen sulphide, volatile organic compounds, methane, ethane, benzene, ethyl benzene, toluene, xylenes, glycols, polycyclic aromatic hydrocarbons.

m) An Order of Mandamus directed to the EPA directing the EPA to publish a report setting out the volumes of hydrocarbons flared each month from 1st June, 2017 to the date of the Order.

n) An Order of Mandamus directed to the EPA directing the EPA to enforce Section 13(1)(d) of the EPA Act and require Esso to restore and rehabilitate the environment by removing the GHGs emitted by Esso's flaring.

o) An Order of Mandamus directed to the EPA directing the EPA to apply the 'polluter pays principle' as set out in section 4(4) (a) of the EP Act and in application thereof to issue an order to Esso directing Esso to ensure that the environment is restored to an acceptable state by removing the GHGs emitted by Esso's flaring and requiring Esso to bear the cost of such measures.

p) A Declaration that the charge of US \$30 per tonne of carbon dioxide equivalents as set out in Article 3.7 of the purportedly modified permit is a breach of the 'polluter pays principle' as set out in section 4(4) (a) of the EP Act.

q) An Order of Mandamus directed to the EPA directing the EPA to issue a statement setting out dates and amounts of all payments purportedly made by Esso under Article 3.7 of the purportedly modified permit up to and including the date of the Order.

r) An Order of Mandamus directed to the EPA directing the EPA to publish a report setting out the inspection, maintenance and surveillance systems that are in place to identify and prevent unplanned emissions on board the Floating Production Storage Offloading vessel that is covered by the Liza 1 Permit.

- s) An Order of Mandamus directed to the EPA directing the EPA to publish a statement setting out the systems and procedures the EPA has established or has relied on since 1st June, 2021 to ensure proper monitoring and enforcement of Esso's obligations under the Liza 1 permit.
- t) An Order of Mandamus directed to the EPA directing the EPA to issue an order to Esso requiring Esso to shut down without delay, in a safe manner and without exposing the people and environment of Guyana to danger, all petroleum operations in the Liza Phase 1 Development Project until the EPA submits to the court an independent expert statement confirming that it is safe to allow Esso to restart the petroleum operations authorized by the Liza 1 Permit.
- u) An Order of Mandamus directed to the EPA directing the EPA to maintain an effective presence on board the Floating Production Storage Offloading vessel to monitor all activities in the Liza Phase 1 Development Project.
- v) Costs.
- w) Such further or other orders, directions and/or relief as the Court deems just.

**[5] The grounds for the application are:**

- 1) The EPA is a public authority with the exclusive statutory responsibility for granting environmental permits under the EP Act;
- 2) The EPA granted an Environmental Permit No. 20160705-EEDPF dated 1st June, 2017 to Esso for the Liza Phase 1 Development Project on the basis *inter alia* of an Environmental Impact Assessment (EIA) dated 1st June, 2017, an Environmental and Socioeconomic Management Plan dated 1st June, 2017 and a Revised Oil Spill Response Plan and Wildlife Response Plan dated 1st June, 2017;
- 3) that the EIA dated 1st June, 2017 stated *inter alia* that Esso would re-inject gas and that produced gas not used as fuel gas on the FPSO would be re-injected under normal operations;
- 4) On the 25th September 2020, following court proceedings and in anticipation of a consent order entered on 7<sup>th</sup> October, 2020, the EPA issued to Esso an amended environmental permit No. 20160705-EEDPF in which the term

of the said environmental permit was reduced from more than twenty-three years to five years ending on 31st May, 2022;

5) On the 12th May, 2021, the EPA purported to issue to Esso a modified environmental permit No. 20160705-EEDPF in which the EPA purported to allow Esso Exploration Production Guyana Ltd. to flare gas and to apply the 'polluter pays principle';

6) On the 24th August 2021 the EPA admitted that Esso had flared a total of 15.089 Billion Standard Cubic Feet of gas as at July 26, 2021;

7) The EPA purported to modify the Liza Phase 1 permit under Regulation 14 of the Regulations;

8) Regulation 14 authorizes the EPA to modify an environmental permit provided that a modification shall not give rise to an additional adverse effect;

9) The EPA's purported modification gives rise to an additional adverse effect;

10) In view of this factual background the applicants aver that a) the EPA's act in issuing the purported modified permit constitutes a violation of the EP Act and Regulations and b) the EPA has violated the 'polluter pays principle' in the EP Act.

11) Section 13(1) of the EP Act implies into every environment permit an obligation to restore and rehabilitate the environment.

[6] The source of claims for relief flows from the applicants' contentions that flaring by Esso and the failure to re-inject gas is an environmental hazard which must be supervised and controlled by the EPA. In addition, it is contended that the EPA must apply the polluter pays principle as regards any environmental hazard created, and the EPA must enforce the polluter pays principle for the environmental health and well-being of the people of Guyana. It is deposed that flaring and the non reinjection of gas would lead to an increase in GHGs and an additional adverse effect.

[7] Based on applications, Esso was added as a respondent to these proceedings, while the Attorney-General was not permitted to join as a party. A separate ruling was given in these regards.

### **Affidavit of the first applicant**

[8] The first applicant, Ms. Sinikka Henry, deposed to the contentions advanced by the applicants, though she did not specifically state that she was doing so on behalf of the other two applicants. She swore the following:

- a) According to the Esso Lisa 1 EIA gas re-injection is necessary to reduce emissions from the project. Also flaring is to be avoided because of the emissions into the air. (See Section 2.16 .2 Development Concept Alternatives on p.67)
- b) The EPA has not decided upon measures to reduce pollution and is not requiring the polluter, Esso, to pay for measures to ensure that the environment is in an acceptable state in the modified environmental permit.
- c) Under the modified EP the EPA may give Esso approval to flare continuously for up to seventy-four (74) days: fourteen days (14) days for special circumstances and sixty (60) days as approved by the EPA. Further, any such approval would result in the emission of additional GHGs and additional pollutants listed in Article 3.15.17 of the modified permit and cause a further 'additional adverse effect'.
- d) The modified EP, which permits the Esso to flare up to 14 days under special circumstances and 60 days for start-ups, gives rise to an additional adverse effect on the environment. Section 2 (b) of the EPA Act defines an adverse effect as one or more of the following: (i) impairment of the quality of the natural environment or any use that can be made of it; (ii) injury or damage to property or to plant or animal life; (iii) harm or material discomfort to any person; (iv) an adverse effect on the health of any person; (v) impairment of the safety of any person; (vi) rendering any property or plant or animal life unfit for use by human or unfit for its role in the ecosystem; (vii) loss of employment of normal use of property; (viii) interference with the normal conduct of business.
- e) It is contended that the reference to occasional flaring means that any flaring would be temporary and not be regular or continuous for a prolonged or extended period. It is also advanced that by adding 'equipment failures' as a source of flaring, as stated in a press release, the EPA "has purported to extend Environmental Permit 2020 to permit Esso to flare as a result of the mechanical



failures in Esso's equipment" and that this is "because Esso's equipment cannot meet the original design expectations and is a breach of the EP 2020, which was predicated on the EIA." In this regard, the first applicant, on the advice of her attorneys-at-law, advanced an opinion that Esso is not using the most appropriate technology because Mr. Routledge stated in his affidavit that there have been mechanical failures of equipment which are subject to multiple repairs, and that technical solutions to correct these problems were in progress. These are expert areas on which the court cannot pronounce.

- f) The first applicant also expresses an opinion that "Esso's equipment cannot meet its specifications and the FPSO does not have the capability to process, dehydrate, compress, and re-inject the gas produced from the reservoir". Apart from the fact that the first applicant has not provided her qualifications to so state, she also has not given the basis for such an opinion.

#### **Affidavit in Defence of the Respondent, EPA**

[9] The EPA filed an Affidavit in Defence sworn by Ms. Sharifah Razack, Deputy Executive Director of the Agency and stated the following:

- (a) The EIA dated 1st June, 2017, was issued in accordance with which the Environmental Permit (Modified) Reference No. 20160705-EEDPF, and specifically states that some of the gas will be re-injected "while on some occasions gas may be occasionally flared". Furthermore, "the EIA contemplates instances in which gas may not be re-injected, and may instead be flared".
- (b) The EIA also states that "continuous flaring of gas on a routine basis is not preferred, although some gas may be occasionally flared on a non-routine, temporary basis".
- (c) Condition 3.7 of the Environmental Permit (Modified) Reference No. 20160705-EEDPF seeks to apply the 'Polluter pays Principle' as required and defined by s 4 (4) (a) of the EP Act. Further, the averment that "the Agency purports to apply a charge for flaring ... is an inaccurate oversimplification of what Condition 3.7 of the Environmental Permit (Modified)" intends. Rather, "Condition 3.7 seeks to ensure the cost of pollution control, cleanup efforts to put the environment in an

acceptable state, as well as compensation to citizens for pollution damage, is accounted for, as required by section 4(4) (a)” of the EP Act.

- (d) The EP specifically states that “11. ... some of the gas will be re-injected while on some occasions gas may be occasionally flared.” It is further contended that “12. ... the EIA contemplates instances in which gas may not be re-injected, and may instead be flared.” Ms. Razack contended at para 13 that the “EIA states that continuous flaring of gas on a routine basis is not preferred, although some gas may be occasionally flared on a non-routine, temporary basis.” The applicants’ quotes from the EIA were all admitted while it was stated that there was no legal duty to respond to letters written to the Agency.

#### **Affidavit in Defence of the Added Respondent, Esso**

[10] Esso states the following through the affidavit of Mr. Alistair Routledge, President of Esso:

- (a) Esso acknowledges the design basis of the FPSO was to re-inject associated produced gas that is not used as fuel under normal operations; however, Esso contends that the EIA also contemplated that flaring would occur on a non-routine basis as a result of an emergency, operational upset, or mechanical breakdown.
- (b) Esso contends that both EPs (Amended and Modified) permit non-routine flaring, and prohibit routine flaring with the exception of identified operational flaring by design. Further, it is contended that there is a distinction between routine and non-routine flaring.
- (c) The modified EP places limits on non-routine flaring, requires the EPA’s approval to flare beyond those limits, and a fee is imposed where flaring is done beyond the approved limits set out by the EPA.
- (d) Flaring is a result of partial mechanical failure of the flash gas compression system, which is a component of the gas processing equipment that handles the associated gas produced along with crude oil on the Liza Destiny FPSO. While the flash gas compression system has had multiple repairs and

although it is currently operating onboard the FPSO, it is still experiencing a partial failure which is making it unable to meet its design specifications that results in non-routine incremental flaring. Esso stated that multiple technical solutions to correct these issues are well advanced and being diligently applied to achieve a long-term solution.

(e) Although the flash gas compression system cannot currently achieve original design expectations, the gas processing equipment onboard the FPSO is able to re-inject or consume over 96% of the produced gas which is the preferred mechanism as stated in Clause 3.12 of the Modified Environmental Permit. It was further deposed that the current non-routine flaring was due to partial mechanical failure of the flash gas compression system and that the modified EP gives permission for this category of flaring of gas.

(f) Flaring resulting from mechanical failure of certain components of the gas processing systems are categorized as non-routine flaring and this is recognised in the Global Gas Flaring Reduction Partnership (GGFR).

(g) Referring to a document published in 1995 by the Organisation for Economic Cooperation and Development entitled 'Environmental Principles and Concepts', Esso states that the 'polluter pays principle' is essentially a principle of economic policy, rather than a legal principle, which states that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.

(h) The modified EP contains the EPA's exercise of authority and discretion by requiring Esso to pay for carbon equivalent emissions resulting from approved non-routine flaring beyond the permitted time periods as seen in Condition 3.7, 3.8 and 3.9 of the modified EP.

(i) The modified EP limits and reduces the scope for non-routine flaring substantially over the amended and original permits and therefore it cannot be said that it has created any additional adverse effect.

(j) The modified EP does not give rise to an additional adverse effect, rather it requires 1) the EPA's approval before non -routine flaring can take place in special circumstances and start-ups; 2) it prohibits routine flaring; and 3) where

the EPA has approved non-routine flaring that exceeds the time limits of 60 days for Start-Ups and 14 days for Special Circumstances, the EPA has implemented the payment of a fee of US \$30 per tonne of carbon dioxide equivalents emitted to be paid by the Added Respondent (ESSO).

[11] Esso (para 8) “acknowledged that the design basis of FPSO was to re-inject associated produced gas that is not used as fuel under normal circumstances; however, the EIA also contemplated that flaring would occur on a non-routine basis as a result of an emergency, operational upset, or mechanical breakdown.” It was further stated that while s 13(1)(d) of the Act “provides for environmental permits to contain an implied condition that ‘the developer shall have an obligation to restore and rehabilitate the environment’ ... this is not an absolute obligation, but rather the EPA must consider the [Act] in its entirety as well as the [EIA] dated the 1<sup>st</sup> June, 2017 and the modified permit in exercising its discretion to require any particular actions regarding restoration and rehabilitation.” It is contended that the applicants fail to recognise “the explicit language allowing certain flaring and venting described in condition 3.6 of the Amended Permit, other conditions of the Amended Permit, and the EIA, in accordance with the Original Permit and the Amended Permit.” In this regard it was stated that both the original and amended permits allow non-routine flaring with routine flaring being expressly prohibited “with the exception of identified operational flaring by design.”

[12] That said, the EIA as quoted by the first applicant permits non-routine flaring where it states at 2.5.4.3 on the flaring system, that Esso “intends to re-inject all operationally produced gas under routine conditions. ... A flare system will be provided for the collection and safe disposition of produced hydrocarbon gases resulting from unplanned, non-routine relief and blowdown events. ... In addition, temporary, non-routine flaring will occur during equipment maintenance, process upsets, and start-up.”

#### **Affidavits in reply**

[13] In reply to the EPA’s affidavit in defence, the first applicant contended that flaring by Esso as a result of equipment failure does not accord with the agency’s

admission that ‘on occasions gas may be occasionally flared’; nor does it accord with what the EIA contemplates as instances of gas flaring.

[14] In her reply to the added respondent’s affidavit in defence, the first applicant reiterated her claims while admitting that there were some typographical errors in the quotes of provisions of the EP. In particular, she corrected her reference to “environmental drilling” to “developmental drilling” She also stated that the reference to “temporary and routine flaring” should read “temporary and non-routine flaring”. She restated that “by purporting to allow Esso to flare in return for paying a charge based on the amount of CO<sub>2</sub>e emitted, the EPA has admitted that there is an additional adverse effect from Esso’s flaring as a result of mechanical failure of its equipment.”

#### **Legislation and other frameworks**

[15] **Section 4 of the EP Act** sets out the functions of the Agency and the mechanisms that can be used to aid its overall duty to manage, conserve, protect and improve the environment including the prevention or control of pollution.

**Section 4(1) (g) of the EP Act** states:

*“The functions of the Agency are: ... to ensure that any developmental activity which may cause an adverse effect on the natural environment be assessed before such activity is commenced and that such adverse effect be taken into account in deciding whether or not such activity should be authorised;”*

**Section 4(2) (h) of the EP Act** further states:

*“In the exercise of its functions the Agency may ... request, examine, review, evaluate and approve or reject environmental impact assessments and risk analyses and make suitable recommendations for the mitigation of adverse effects of any proposed activity on the environment.”*

**Section 4 (4) of the EPA Act** states that:

*“In performing its functions the Agency shall make use of current principles of environmental management, namely -*

*the “Polluter pays Principle”: the polluter should bear the cost of measures to reduce pollution decided upon by public authorities, to ensure that the environment is in an acceptable state, and should compensate citizens for the harm they suffer from pollution.”*

**Regulation 14(1) of the Environmental Protection (Authorisation) Regulations 2000** (the Regulations ) states that:

*“The Agency may at any time by notice in writing to the holder of the permit, cancel or suspend an environmental authorisation or impose such conditions as the Agency considers appropriate in addition to or in place of the existing conditions, with effect from such date as the Agency may specify provided that the cancellation, suspension or modification shall not give rise to an additional adverse effect.”*

[16] The EIA as quoted by the first applicant permits non-routine flaring where it states at 2.5.4.3 on the flaring system, that Esso “intends to re-inject all operationally produced gas under routine conditions. ... A flare system will be provided for the collection and safe disposition of produced hydrocarbon gases resulting from unplanned, non-routine relief and blowdown events. ... In addition, temporary, non-routine flaring will occur during equipment maintenance, process upsets, and start-up.”

[17] **Clause 3.2 of the EP (Amended)** provides that “... the overall objective is to reduce air emissions, while utilizing cost-effective and technically feasible options for reducing emissions should be evaluated and adopted as far as practicable.” **Clause 3.6 of the EP (Amended)** provides for the prohibition of routine flaring and venting on the FPSO with the exception of tank flashing emission, standing/working/breathing losses. However, routine flaring does not include flaring related to FPSO startup, emergencies /process upsets or maintenance events. Similarly, **Clause 3.6 of the Modified EP** also prohibits routine flaring and venting during the developmental drilling or production activities except with the approval of the EPA. It also provided for a set of conditions under which flaring may be permissible. These conditions were commissioning, start-up, or special circumstances.

[18] **Clause 3.7 of the modified EP** states as follows:

*“In accordance with the Polluter Pays Principle, enshrined in the Environmental Protection Act, Cap 20:05, the Permit Holder shall pay US\$30 per tonne of carbon dioxide equivalents (CO<sup>2</sup>e) emitted as a result of flaring in excess of periods of flaring expressly stipulated at 3.6 (ii) and 3.6 (i) above, which shall be calculated based on CO<sup>2</sup> equivalent (CO<sup>2</sup>e) emitted.”*

[19] The **Global Gas Flaring Reduction Partnership**<sup>1</sup> exhibited by Esso categorizes flaring into three key parts: 1) Routine Flaring; 2) Safe Flaring and 3) Non-Routine Flaring. Routine flaring is defined as “flaring during normal oil production operations in the absence of sufficient facilities or amenable geology to re-inject the produced gas, utilize it on-site, or dispatch it to a market.” Safety Flaring is defined as “flaring to ensure safe operation of the facility” and Non-Routine Flaring is defined as “all flaring other than routine and safety flaring. Non-Routine flaring is typically intermittent and of short duration. It includes temporary (partial) failure of equipment that handles the gas during normal operations, until their repair or replacement, e.g. failure of compressors, pipeline, instrumentation, controls etc.”

## **Decision**

### **Issues**

[20] The issues that arise for consideration are:

- 1) Whether the EPA’s act in issuing the modified EP constitutes a violation of the EP Act and Regulations in that it permitted additional adverse effects, that is, more flaring of gas;
- 2) Whether the EPA violated the ‘polluter pays principle’ in the EP Act.

[21] The applicants mounted this challenge on January 24, 2022, some 8 months after the issuance of the modified permit which was set to expire on May 31, 2022. It was not explained why the applicants delayed in so applying.

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<sup>1</sup> <https://documents1.worldbank.org/curated/en/755071467695306362/pdf/Global-gas-flaring-reduction-partnership-gas-flaring-definitions.pdf>

[22] Throughout the submissions, based on the queries by the court, Mr. Jairam, learned senior counsel, on behalf of the applicants, abandoned a number of the reliefs sought. He acknowledged that in many instances there was no evidential basis for the grant of the orders. Indeed, throughout the application, the first applicant simply deposed that she was advised by her attorney-at-law that if Esso had engaged in the conduct alleged, then it would be in breach of the permit.

[23] In addition, learned senior, in abandoning the reliefs sought for orders mandamus, encouraged the court to modify these reliefs and instead grant declarations. Also, since the application was filed to challenge a permit which was going to expire in what was then about two weeks from the date of hearing, it meant that in reality any decision would be purely academic. Therefore, of the 23 prayers for relief including costs, the applicants in actuality only sought five – (a), (j), (n), (o) and (p) - which learned senior for the applicants sought to modify from the claims for orders certiorari and mandamus to claims for declarations since the permit was then about to expire.

[24] While courts can and do pronounce on issues that are academic, they seek to avoid doing so. Despite these deficiencies, I decided not to dismiss the applicants' case from the inception as being totally misconceived. As such, I considered the five remaining reliefs, as modified by learned senior counsel, that appeared to have some merit.

[25] I mention here that at the conclusion of the first applicant's affidavit in reply, she sought an additional remedy that the modified EP be suspended or cancelled. But this was not sought in the original prayers for relief, is therefore not considered, and so is not granted.

#### **Remaining reliefs considered**

[26] (1) (a) In place of the certiorari the applicants sought: *A declaration that the decision of the EPA under the EP Act, Chapter 20:05 and/or the Environmental Protection Regulations 2000 to replace the environmental permit dated 25<sup>th</sup> September, 2020 and numbered 20160705-EEDPF (the Liza 1 Permit) as granted to Esso Exploration and Production Guyana Ltd with a purportedly modified permit dated 15<sup>th</sup> May 2021 was flawed and or contrary to, or in breach of the law so as to amount to a*



*nullity, a breach of or omission of duty, a failure to satisfy or observe conditions or procedures required by law, an abuse of power, for an improper purpose or irrelevant considerations, in conflict with the policy of the Act and/or the Regulations and an exercise of power in a manner that is so unreasonable that no reasonable or respectable person or public authority, acting judicially or quasi judicially and properly instructed as to the relevant law could or would have so exercised the power to modify the said Liza 1 Permit.*

[27] There is no evidence in the affidavit in support of the application to support the grant of this declaration that is now sought. I gathered from the first applicant's affidavit that the applicants are contending that the modified permit breached regulation 14 of the EPA Act "by purporting to allow [Esso] to flare gas and thereby emit pollutants which would not otherwise be emitted" [para 67] and "by purporting to allow [Esso] to flare gas resulting in additional adverse effect for a sum of money" [para 79]. The applicants based their conclusions in this regard on their opinion that "Having regard to the above I say, and in fact I am advised by my attorneys-at-law and verily believe, that the emission of these pollutants gives rise to an additional adverse effect." But it is not evident from the applicant's affidavit how the regulation was breached. Further, there is no evidence that the modified EP will cause additional adverse effects outside of the first applicant's opinion in this regard. And it is noted that there is no evidence that the original EP relied on by the applicants, which permitted flaring, placed any restriction on flaring over and above that which is also included in the modified EP.

[28] The first applicant also deposed that in the absence of reasons, the decision to modify the EP was irrational, unreasonable, arbitrary and therefore unlawful. In the factual context of this case it is unclear to whom the EPA would have given such reasons other than Esso. There is no evidence that there was a breach of the consultation requirements in relation to the issuance of the EP as was dealt with by Harnanan J. in *Radzig & Singh v Schlumberger*, FDA 193 of 2022 DEM.

[29] The applicants cite Esso's EIA under clause 2.16.2 - Development Concept Alternatives. However, it is noted that this does not prohibit flaring and refers to "continuous flaring of gas on a routine basis is not preferred, primarily due to the associated air emissions."

[30] The EIA recognizes that flaring causes air emissions and that routine gas flaring is to be avoided. The modified EP states that routine flaring is prohibited. The first applicant also stated (para 59) that “since [Esso] is not re-injecting gas but is flaring it, the [Esso] Liza 1 EIA’s prediction of ‘minor impact’ is incorrect and the [Esso] Liza 1 EIA is no longer valid.” But there is no evidence that Esso was not re-injecting gas but was flaring it. The way in which the applicants have couched their claim lends to the view that Esso was not re-injecting any gas, that it was only flaring, and that the EIA prohibited any flaring - all of which is incorrect.

[31] The fact that the applicants’ attorney-at-law had written the EPA on April 30, 2021, stating that the Esso’s flaring was illegal and asking the agency to confirm the amount of gas that was flared and what steps the agency was taking to stop Esso from flaring above pilot levels does not prove their claim. Further, the applicants make a quantum leap, without evidence, to say that in response to the lawyer’s letter the EPA issued the modified EP. The letter, which was exhibited, cannot be considered as evidence of flaring, whether routine or not.

[32] Indeed, the original EP is open ended regarding both routine and non-routine flaring while the modified EP fixes a timeframe for flaring beyond which there would be a fee charged. As such, there has to be a comparison of the original permit and the modified permit in relation to the provisions for flaring. It does appear that, on this issue, the applicants have not correctly interpreted the original permit. The original permit does not prohibit flaring as the applicants want to suggest. In fact, the modified permit states that but for the exceptions stated therein, routine flaring is not just prohibited, but is strictly prohibited.

[33] The original clause 3.6 states that “Routine Flaring and Venting are prohibited on the FPSO (excludes tank flashing emission, standing/working/breathing losses). Routine flaring does not include flaring related to the FPSO startup, emergencies/process upsets or maintenance events.”

[34] The amended clause 3.6 provides as follows: “Routine Flaring and Venting is strictly prohibited (excludes tank flashing emission, standing/working/breathing losses, low pressure streams) during any developmental drilling or production activities without EPA approval. Flaring is only permissible under the following conditions:

commissioning, start up, or special circumstances as defined below.” The applicants substituted the word ‘environmental’ for the word ‘developmental’ as regards drilling or production activities, though it is noted that as referred to earlier, the applicants acknowledged that this was stated in error. Special circumstances are defined to be emergencies, maintenance, and re-start. Then it is specifically stated that “With the exception of the pilot flare, where any of the abovementioned special circumstances conditions is expected to exceed fourteen (14) calendar days, the Permit Holder shall seek an approval from the EPA for flaring within the first forty-eight (48) hours of the commencement of flaring.” Then provision is made for what Esso would have to provide in terms of information so that the EPA could consider their application for approval to flare.

[35] Clause 3:12 provides that “In the event of an emergency or equipment breakdown on the FPSO, or when facility upset conditions arise, excess gas should not be vented but rather should be sent to an efficient flare gas system.”

[36] The original permit did not have parameters for flaring while the amended EP includes such parameters, that is, timeframes within which flaring could be conducted and thereafter only with the express permission of the EPA.

[37] Regulation 14 permits the modification of permits. No evidence has been produced to show that the EPA’s decision to issue the modified EP to Esso pursuant to the EP Act and the Regulations has given or would give rise to an additional adverse effect on the environment by permitting unregulated flaring.

[38] **(2) (j)** Instead of the mandamus: *a declaration that the EPA publish a statement setting out (i) the total amount of greenhouse gas emissions from the gas that Esso has flared from 1<sup>st</sup> June 2017 to 15 May 2021; (2) the total amount of greenhouse gas emissions from gas that Esso has vented from 1<sup>st</sup> June 2017 to the 15<sup>th</sup> May 2021; and (3) the methodologies used to calculate all such greenhouse emissions.*

[39] The applicants produced no evidence, nor did they cite any specific provision of the EP Act or any law in support of the grant of this relief. As such, this declaration cannot be granted.

[40] (3) (n) Instead of the mandamus: *A declaration that the EPA enforce section 13(1)(d) of the Act and that the EPA be required to restore and rehabilitate the environment by removing the greenhouse gases emitted by Esso's flaring.*

[41] Section 13 (1)(d) does not require the EPA to restore or rehabilitate the environment. Section 13 requires that an EP shall include specific conditions "which are reasonably necessary to protect human health and the environment" and also include implied conditions one of which is that "the developer shall have an obligation to restore and rehabilitate the environment." The provision does not specify how and when this is to be done. The applicants have produced no evidence that the EPA has not enforced or been enforcing s 13(1)(d) or that there has been a breach of any specific or implied conditions. Thus, this declaration cannot be granted.

[42] (4) (o) Instead of the mandamus: *A declaration that the EPA apply the 'polluter pays principle' as set out in section 4 (4)(a) of the Act and in the application thereof to issue an order to Esso directing Esso to ensure that the environment is restored to an acceptable state by removing the greenhouse gases emitted by Esso's flaring and requiring Esso to bear the cost of such measures.*

[43] The applicants do not specifically identify what they would like the EPA to do to enforce the polluter pays principle though the August 7, 2020 letter by Ms. Janki, attorney-at-law to the EPA suggests that the agency require Esso to plant mangrove trees so as to "remove from the atmosphere all the greenhouse gases it has emitted as a result of flaring the worthless associated natural gas."

[44] In response to an email dated July 21, 2021 sent by Ms. Janki requesting information on flaring, Mr. Kemraj Parsram, Executive Director of the EPA responded on August 24, 2021 stating that "1. EEPGL has flared a total of 15.089 Billion Standard Cubic Feet of Gas as of July 26, 2021. 2. 81.2 million Standard Cubic Feet of gas was the highest volume of gas flared in 1 day, whereas 0.002 Million Standard Cubic Feet of gas was the lowest volume of gas flared in 1 day." There is no evidence about the category of flaring, that is, whether routine or non-routine, though the applicants seem to have concluded that it was routine without evidence to so prove. And the applicants cannot utilize this volume of gas to contend that there will be additional adverse effects given that the modified EP would have come into force on May 12, 2021.

[45] As regards the polluter pays principle, Mr. Routledge contended that this principle “is a broad, international economic concept” “rather than a legal principle” which states that “the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.” (para 33) He contended that the Act provides for this principle with the modified EP including related provisions in clauses 3.7, 3.8 and 3.9. He advanced that these clauses permit the EPA to exercise authority by requiring Esso to pay for carbon equivalent emissions resulting from approved non-routine flaring beyond the base permitted time periods. The payments were contended to be “an expression of the polluter pays principle insofar as they create an economic incentive for [Esso] to minimize flaring.”

[46] It was submitted that by introducing a fee, the modified permit introduced a financial disincentive to flare. (para 40) Further, p 29 of the EIA as exhibited and relied on by the applicants contemplates flaring since it states: “The FPSO will be designed to re-inject the produced gas back into the reservoir, except during times of injection system unavailability, which will require temporary, non-routine flaring.” Then para 2.5.3.2 headed “Gas Processing” also contemplates flaring where it is stated: “Flaring will be temporary and non-routine. Flaring is discussed in more detail in Section 2.5.4.3 below.” However, this para was not highlighted in the applicants’ affidavit.

[47] Section 4 (4) is quoted earlier. It specifically provides that the EPA is to make use of the ‘polluter pays’ principle as a principle of environmental management so as to ensure that the polluter should bear the cost of measures to reduce pollution and ensure the environment is in an acceptable state as well as compensate citizens for the harm they suffer from pollution. Thus, whether it is to be classified as a legal or economic principle is of no moment since it is provided for in the EP Act.

[48] The fact is that the EP Act provides for the polluter pays principle. This indicates that there is a recognition that there will be some adverse environmental effects which must be paid for.

[49] It is to be noted that the applicants contended that the EPA “purported inter alia to allow [Esso] to flare gas and to apply the polluter pays principle.” But this would be disingenuous since the original permit as exhibited by the applicants also provided for flaring of gas and the polluter pays principle.

[50] Further, the polluter pays principle is provided for in the modified EP. Condition 3.7 of the modified EP which “seeks to ensure that the cost of pollution control, cleanup efforts to put the environment in an acceptable state, as well as compensation to citizens for pollution damage, is accounted for, as required by s 4 (4)(a) of the [Act].” Provision is made in clause 3 for conditions that should be complied with when flaring from the FPSO is necessary, especially under emergency and/or upset conditions. That said, Part 12 also provides for Liability for Pollution Damage. Making the permit holder liable for “any loss or damage to the environment ... through the adverse effect of any discharge or release ... .”

[51] So the EP permit accords with the Act albeit the applicants exhibit a letter dated August 7, 2020 by Ms Janki, counsel for the applicant, to Dr. Vincent Adams, the then Executive Director of the EPA, requesting that the original permit which they are relying on be cancelled because in her view the agency was allowing Esso to pollute the atmosphere in breach of the Act and Guyana’s international obligations regarding the environment.

[52] It is unclear from the first applicant’s affidavit what the evidence is to support this claim for relief. The first applicant said that Esso engaged in flaring despite restrictions in this regard. She merely referred to and expressed her concern at “numerous reports in the press which claimed that [Esso] was flaring on a daily basis.” The press reports were not exhibited for the court to assess their content as distinct from the applicant’s interpretation of what they stated. Then the applicant had a confused narrative about routine and non-routine flaring, at one point deposing that routine flaring was permitted and at another saying that it was not. The first applicant also expressed opinions in her reply in relation to flaring in circumstances where she has not advanced herself as an expert. Thus, the court cannot rely on her opinions.

[53] Considering the applicants’ case in totality, there is no evidence that the polluter pays principle is not being applied. The evidence of the email from the EPA that disclosed that 15+ billion cu ft of gas was flared up to July 26, 2021 does not support a conclusion that the principle is not being applied.

[54] (5) (p) *A declaration that the charge of US\$30.00 per ton of carbon dioxide equivalents as set out in Article 3.7 of the purportedly modified permit is a breach of the 'polluter pays principle' as set out in section 4 (4)(a) of the Act.*

[55] There is no evidence that the EPA has contravened s 4(4)(a) of the EP Act. Thus, while the applicants contend that there would be no need to impose a charge if it is that there would be no adverse effect, the fact is the Act makes provision for the polluter pays principle. So, while relying on this section, the applicants seem to be suggesting that the application of the section amounts to an admission that the emission of CO<sup>2</sup> from flaring will give rise to an additional adverse effect.

[56] The EPA did not respond to the allegation regarding the pollution fee. Mr. Routledge in producing evidence of comparative flaring fees for other territories including in Europe Union and Central and South American countries, said that the \$30.00 fee is in the mid range of fees charged internationally. It is not for this court to pronounce on the adequacy of the fee or whether it should be paid from the inception that flaring commences or after a period of time as provided for in the modified EP.

[57] While Mr. Routledge stated that the question whether the modified EP creates an additional adverse effect should be left to the EPA as the professional entity entrusted by Parliament to make decisions in this regard, it does appear that the applicants are concerned that the EPA does not have the capacity to do so. That is not an issue that the court can determine.

[58] In my view, the provision of a specified sum per tonne of carbon equivalents over and above the timelines for flaring as stipulated, which periods in any event would have to be approved by the EPA, does not denude the provision of its stated purpose and efficacy. One may argue whether the sum per tonne is an adequate fee or penalty, but the provision of the fee merely amplifies the statutory provision. The applicants seem to have interpreted the provision rather narrowly, omitting to focus on the language which speaks to the payment of the penalty once flaring is over the specified limit. The applicants seem to suggest that the modified permit gives Esso carte blanche to flare when the language of the permit does not so allow.

[59] Thus, as regards this claim, the issue in contention seems to be in relation to the quantum that has been fixed to satisfy the polluter pays principle and the statutory

safeguards as outlined in the EP Act. It is not for the court to decide if the quantum of \$30 US per CO<sup>2</sup> is adequate. That would be a function of the regulatory body i.e. the EPA or for Parliament.

## **Conclusion**

[60] The authorities cited by counsel are acknowledged. However, this case ultimately turns on the evidence presented. The evidence proffered in support of this application was confusingly expressed and difficult to follow. As stated earlier, it consisted of a lot of opinions, either advanced by the applicants, or as stated to have been advised by their lawyers.

[61] I got the distinct impression that the applicants were cherry-picking what they wanted to rely on to support their case, identifying and relying on clauses or parts in isolation. The documents have to read holistically and not by focusing on paragraphs that were considered to be favourable to the applicants when there were other paragraphs that either modified or explained what was meant to be the standard. Thus, while there are many references to re-injection of gas, flaring is not totally prohibited as the applicants were wont to contend. And importantly, as regards the issues raised, there is no fundamental difference between the original EP relied on and the modified EP sought to be impugned.

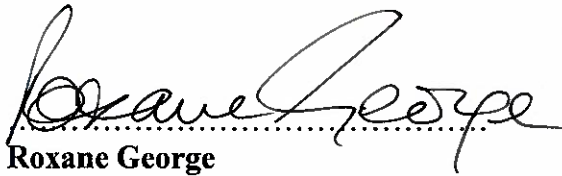
[62] **Thus, it is decided as follows:**

- 1) The EPA's act of issuing the modified EP to Esso has not breached the EP Act and the Regulations. Nor has it been proven that the issuance of the said modified EP gave rise or has given rise to an additional adverse effect on the environment. There is nothing in the law that prevents the issuance of a modified EP; and in this case, nothing on the facts rendered the issuance of the modified EP unlawful.
- 2) The EPA's implementation of the polluter pays principle in the modified EP is in compliance with section 4 (4) (a) of the EP Act.
- 3) As such the application is dismissed with costs to the EPA in the nominal sum of \$150,000 to be paid on or before November 3, 2023. There will be no order



as to costs in favour of Esso as provided for in the terms of the order that permitted them to be added as a party.

[64] Given my conclusions, in hindsight, the application should have been dismissed when it became clear that the applicants were not pursuing most of their claims, and or had no evidential basis to support them all in relation to a purely academic point.



**Roxane George**  
**Chief Justice (ag)**  
**October 3, 2023**

