Climate change and resource consent decisions

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Last year, the Environment Court had to grapple directly with the issue of climate change for the first time and decide whether the contribution of an activity to global warming should be considered in the resource consent context when for all practical purposes the effect is relevant only in the global sense, in combination with activities occurring outside New Zealand. The Government has since announced an intention to amend the RMA to remove climate change considerations from resource consent decisions. The Court's decisions show that, even in the absence of legislative change, the Court has recognised the problems of dealing, in the context of individual consent applications, with what is essentially an issue of national policy.

Background

The issue arose in two cases with essentially similar facts, *Environmental Defence Society (Inc) v Auckland Regional Council [2002]* NZRMA 492 and *Environmental Defence Society (Inc) v Taranaki Regional Council* (A/84 / 2002).

Contact Energy and Stratford Power had obtained consents to build gas fired power stations, one in Otahuhu (Contact) and one in Stratford. Unavoidably, the stations would release significant quantities (over 1 million tonnes per year) of carbon dioxide (CO2), the principal greenhouse gas. However, in granting discharge consents for the release, neither the Auckland Regional Council (ARC) nor the Taranaki Regional Council (TRC) imposed conditions requiring mitigation of the discharge.

The Environmental Defence Society (EDS) appealed both decisions, seeking the imposition of conditions requiring the applicants to offset the CO2 discharges fully by a programme of forestry sequestration (i.e. tree planting). Taranaki Energy Watch (TEW) also appealed the Stratford Power decision. EDS was, in effect, asking the Environment Court to impose conditions similar to those recommended in 1995 by the Board of Inquiry into the application for consent to discharge CO2 from the then proposed Taranaki Combined Cycle station (TCC). In the event, the Minister had not followed the Board's recommendation that the applicant should be required to establish a carbon sink to offset the predicted discharge, but imposed a more general mitigation obligation on the consent holder that could lead to a requirement to establish a carbon sink depending on the total amount of CO2 discharged as a result of the consent as compared with emissions from the electricity generating sector as a whole.

Three further discharge consents for gas fired stations were granted between the TCC consent and the EDS appeals against the Contact and Stratford Power consents (Southdown, Otahuhu B, and Huntly) but in none of those cases – which were all settled without substantive argument before the Court - had the applicants been required to implement planting programmes of the kind proposed by EDS in the Contact and Stratford Power appeals.

The Contact and Stratford Power decisions

Judge Whiting presided over both appeals and Deputy Environment Commissioner Kierney also sat in both cases. Much of the evidence was similar in both cases. As a consequence, the two decisions adopt the same reasoning and reach the same outcome, which was to dismiss the appeals.

Rationale for decisions

The Court was spared any real dispute over factual issues. Thus, the applicants did not put the appellants to the proof on whether the discharge of CO2 is a significant contributor to climate change climate or, indeed, on whether climate change is a real phenomenon.

The Contact justification for resisting the proposed condition was that:

- The proposed station would make a negligible impact to global climate change and would not cause any effect that could be detected at the local or even national level.
- Operation of the station would displace less efficient thermal generation which would mean a lower level of CO2 emissions than if the station was not built.
- In any event, more trees had been planted and would continue to be planted in New Zealand than would be required to absorb any expected national increase in CO2 emissions.
- There was no requirement for additional planting or any other measure to offset the discharge in order to enable New Zealand to meet its obligations under the international climate change treaties, namely the Framework Convention on Climate Change (FCCC) and, more particularly, the Kyoto Protocol to the FCCC.
- Policy announcements from the Government made it clear that the Government was intending to deal with the climate change effects of industrial emissions by means other than the RMA.

Similar arguments were made by Stratford Power which also argued that, as a matter of economic analysis, greenhouse gases required a consistent global response across countries which could be implemented only through national measures adopted by national governments.

The essential counter arguments by EDS were that:

- Climate change effects had to be dealt with under the RMA, even if their manifestation was at the global, rather than regional or local level.
- Regardless of planting by others or of New Zealand's obligations under the FCCC and the Kyoto Protocol, persons discharging greenhouse gases had an obligation to mitigate the effects of those discharges and could not claim credit from the actions of others or from international agreements on the extent of New Zealand's international obligations.
- The fact that Government policy suggested that climate change effects would be dealt with outside the RMA was irrelevant.

Underlying these arguments were some fundamental questions:

- What is the "environment" for the purposes of the RMA?
- What is the relevance of international agreements, including agreements such as the Kyoto Protocol that, at the time of the hearing, New Zealand had signed but not ratified?
- To what extent should the Environment Court take account of Government policy that has not been implemented in legislation?

What is the "environment"?

There were two aspects to this question. The first was whether a regional council or the Environment Court should take account of effects that arise outside its region or New Zealand when the discharge is relevant only in combination with effects from activities outside New Zealand over which neither a council not the Court has any control.

Not surprisingly, the Court was not prepared to hold that the wording of the RMA limits a regional council to consideration of the effects of an activity within its region. The Court

thus declined to limit the territorial scope of the definition of "environment" and also observed that it would be artificial in the overall context of the enhanced greenhouse effect to confine the environment to New Zealand. However, the fact that conditions imposed by the regional council / Court could be rendered meaningless by activities taking place in other countries seems to have strongly influenced the Court's ultimate decision.

Persons undertaking activities had to be responsible for their own actions

The second, related, aspect was whether the applicants were entitled to claim the benefit of the actions of others (tree planting) which, at least within New Zealand, were more than enough to offset the projected CO2 emissions for most of the duration of the consents. The applicants argued that since they must take into account the cumulative effects of their activities in combination with the adverse effects of the activities of others, there was no basis for excluding the beneficial effects of the activities of others. EDS on the other hand argued that persons undertaking activities had to be responsible for their own actions.

The Court did not rule on the underlying issue of principle between the two arguments, but by inference accepted that it was legitimate to take into account the beneficial consequences of the activities of others. However, the Court was uncomfortable with the argument that the balancing of adverse and mitigating effects should be confined to a national accounting in the context of a global phenomenon such as the enhanced greenhouse effect.

Relevance of international instruments

The applicants argued that the Kyoto Protocol represented the only international agreement on how climate change was to be measured and remedied. Thus, they argued that the Court should accept the Kyoto accounting, which measures emissions generated by human activities since 1990, and said that it would be inappropriate and unrealistic to try to take into account emissions from activities prior to that date or caused by natural events. By contrast, EDS argued that the Kyoto targets were essentially irrelevant and that the Court should consider actual effects on the environment of all CO2 emissions, however caused.

The Court held, by reference to established principles of international and domestic law, that the FCCC and Kyoto Protocol were both relevant considerations to be taken into account pursuant to s104(1)(i), their weight to be dependent on the nature of New Zealand's obligations under them, and the extent to which the Government policy had crystallised so as to indicate how New Zealand's obligations would be given effect in domestic New Zealand law.

Relevance of Government policy

The hearings of these appeals took place against the background of an active policy making process which led – after the hearings had been completed and the decisions handed down – to the announcement of detailed policy measures and the enactment of the Climate Change Response Act 2002. However, by the time of the hearings, the Government had released detailed statements and policy papers which made clear its intention to ratify the Kyoto Protocol and the measures by which it was intending to give effect to its obligations under the Protocol. The announced policy included statements that climate change was an international issue that should be dealt with consistently at the national level and that the RMA consenting process was an unsatisfactory method of dealing with the issue given the risks of inconsistent treatment.

The Court took note of those statements and observed that the issue it had to decide – namely whether to impose a condition of the kind proposed by EDS - was quintessentially a public policy

decision, although it went on to observe that it was still required to approach the matter on the basis of the RMA and applicable common law principles. The Court, however, had no hesitation in taking account of Government policy even in the absence of specific legislative endorsement.

The decisions

Ultimately, the Court based its decision on its discretion under s108. It took note of the developing Government policy on climate change, including the policy that consistency of approach was necessary to guarantee efficiency compatible with achieving best environmental, social and economic outcomes. It said it was unable on the evidence to assess adequately either the national and international implications or the social and economic consequences of imposing the proposed conditions. It accepted the scientific consensus on the contributions of greenhouse gas emissions to climate change, and acknowledged that the proposed emissions from the two stations would result in a cumulative way to an impact of some consequence. But it admitted to considerable disquiet about the efficacy of imposing such conditions in the global context. It therefore dismissed the appeals.

While the decisions were based on the circumstances of the two cases, the Court's reasoning indicates that, even in the absence of legislative change, it is unlikely that the Courts will, in the context of resource consent applications, impose conditions requiring mitigation of climate change effects. Since these cases each concerned the discharge of over a million tonnes of CO2 per annum, it is unlikely that the facts of other cases will dictate a different outcome. This suggests that it will rarely, if ever, be appropriate for a consent authority to require as a condition of a resource consent measures to mitigate climate change effects which manifest globally and which have no real local or even regional effect. This should be a considerable relief to regional councils which, even before these decisions, had reached much the same conclusion.

Postscript

Since these decisions, the Minister for the Environment has agreed to vary the conditions for the TCC so as to remove the potential obligation to establish a carbon sink to absorb increased emissions attributable to that station. That decision is presently subject to appeal.

Disclosure: The author was one of counsel appearing for Contact in one of the decisions under review.