IN THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2022] NZEnvC 127

IN THE MATTER OF	an appeal under clause 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	CLIMATE JUSTICE TARANAKI INCORPORATED
	ENV-2019-AKL-000300
	Appellant
AND	TARANAKI REGIONAL COUNCIL
	Respondent
AND	ENERGY RESOURCES AOTEAROA INCORPORATED
	PORT TARANAKI LIMITED
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
	TARANAKI ENERGY WATCH
	Section 274 parties

Court:	Environment Judge MJL Dickey
Hearing:	On the papers
Last Case Event:	8 March 2022
Counsel:	R Enright and R Haazen for Climate Justice Taranaki Incorporated M Conway and O Rego for Taranaki Regional Council V Morrison-Shaw for Energy Resources Aotearoa Incorporated (s 274 party)

Date of Decision: 14 July 2022

Date of Issue: 14 July 2022

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY ISSUES – TOPIC 4 (OIL AND GAS) – TARANAKI PROPOSED COASTAL PLAN

REASONS

Introduction

[1] This decision determines matters of scope which have been raised by Climate Justice Taranaki Incorporated (**CJT**).

[2] The Court has indicated its willingness to determine, as a preliminary issue, the relevance of climate change to the assessment of the proposed rules and the proposed coastal plan (**PCP**) for Taranaki.[1]

[3] The questions for determination were then framed by the parties as:[2]

> When resolving the appeals of CJT […] against TRC's decisions on Rules 26 to 30 of the PCP:
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> (a) Are the following matters within the scope of the appeal filed on 18 November 2019:
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> […]
>
> (ii) any challenge to the objectives, policies or methods related to Rules 26 to 30 of the PCP;

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[1] Minute of the Environment Court, 24 November 2021 at [5].

[2] CJT submissions, dated 28 January 2022 at [10]. [Note that this question has been reframed so as to remove questions arising from the appeal of Taranaki Energy Watch Inc, which following that memorandum were resolved.]

(iii) national or international instruments, other than the New Zealand Coastal Policy Statement;

(iv) the effects of climate change; …

(b) To what extent, if any, can ocean acidification or climate change be considered?

[4] Before addressing the questions, I note that the Court's minute of 24 November 2021 made it clear that the only preliminary issue that Court was prepared to consider was the relevance of climate change to the assessment of the proposed rules.[3] I am not prepared to entertain the other questions raised about jurisdiction or scope as I would need evidence in order to finally determine those issues.

Emergence of preliminary issue

[5] Questions arose at the conferencing of planners as to the relevance of international and domestic climate instruments raised in statements and claimed by Taranaki Regional Council (**the Council**) and Energy Resources Aotearoa Incorporated (**Energy Resources**) to be out of scope. Further, the Council and Energy Resources claim that consideration of the effects of activities on climate change is barred by s 70A of the Resource Management Act 1991 (**RMA**).

[6] In response, CJT[4] advised it did not seek to rely on unsworn statements to provide scope. It was agreed that there might be some benefit to evidence exchange if issues of scope and the relevance of climate change and ocean acidification could be addressed as preliminary issues.

[7] In its challenge to Rules 26 to 30 of the PCP, CJT wishes to call evidence

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[3] See Minute of the Environment Court, dated 24 November 2021 at [5].
[4] And Taranaki Energy Utilities Inc, who has since settled its appeal.

referring to or relying on various national or international instruments addressing the effects of climate change. It also wants to raise issues relating to ocean acidification. The Council relies on the words of s 70A and case authority that has provided some interpretation of that section. It says that the effects that CJT say should be considered (economic effects) are not effects of climate change, but rather are effects resulting from regulatory responses to climate change. Therefore, they are not relevant to PCP Rules 26 to 30 that regulate the effects of oil drilling activities. It seeks the Court's confirmation that these matters are excluded from consideration in the appeal, therefore avoiding any need for the parties to engage experts in climate change or ocean acidification.

Statutory provisions

Proposed rules

[8] The relevant proposed Rules 26 to 30 address:

- Drilling of an exploration or appraisal well, or directional drilling, and placement of a well structure in, on, under or over the foreshore or seabed, and any associated activities in the following Coastal Management areas: Open Coastal Port and Outstanding Value Fisheries Unmodified and Estuaries Modified (Rules 26-28); and

- Placement or erecting of a petroleum production installation, including drilling of any production wells and placement of any associated pipelines in, on, under or over the foreshore or seabed, and any associated activities in the same Coastal Management areas as for Rules 26-28 (Rules 29 and 30).

RMA

[9] Section 70A RMA provides:

> Despite s 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either –
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

[10] Section 70A was due to be repealed on 21 December 2021 by s 19 of the Resource Management Amendment Act 2020. The repeal of s 70A, however, was delayed to 30 November 2022 by Order in Council on 20 December 2021.[5]

[11] It is accepted by the parties that, as the PCP was notified before 31 December 2021, it must be determined as if s 70A has not been repealed, regardless of the fact that this repeal has been delayed.[6]

[12] Climate change is defined under s 2 of the RMA as meaning:

> a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

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[5] Resource Management Amendment Act 2020 Commencement Order 2021.
[6] Refer to RMA, Schedule 12, cl 26.

Jurisdiction to consider effects of climate change and ocean acidification

[13] Both parties refer to two Supreme Court decisions that addressed s 70A: *Genesis Power Ltd v Greenpeace New Zealand Inc*[7] (***Genesis***) and *West Coast ENT Inc v Buller Coal Ltd* (***Buller Coal***).[8]

[14] In *Genesis*, the Court concluded that the policy of the statute was that:[9]

> Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so in making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.

[15] In the *Buller Coal* case, a majority in the Supreme Court dismissed an appeal against a decision of the High Court. The High Court had dismissed an appeal against a declaration made by the Environment Court that climate change could not be considered in assessing the effects of resource consent applications due to the statutory changes introduced by the Resource Management (Energy and Climate Change) Amendment Act 2004 (**Amendment Act**)) Amendment Act. The Supreme Court endorsed the earlier Supreme Court decision in *Genesis* as to the policy of the Act I set out above.

[16] The Court was asked to determine how to interpret s 104E (which was added to the RMA alongside s 70A by the Amendment Act in the context of an application for a resource consent for an open-cast coal mine that the Buller District planned. Buller Coal sought a declaration that, in considering applications for resource consent to extract coal, the decision maker could not consider the effects of greenhouse gas emissions on climate change that

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[7] *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730.
[8] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.
[9] *Genesis* at [62].

would result from the eventual combustion of the coal extracted. West Coast ENT and Forest and Bird argued that s 104E only prohibited the consideration of climate change effects for activities that directly discharged greenhouse gases. They argued that, given coal mining indirectly leads to greenhouse gas emissions, the decision maker was required to consider the effects of the activity on climate change under s 104(1)(a).

[17] The Court considered that, with the Amendment Act, Parliament had made clear comments about the legislative scheme for managing climate change. It considered that the drafters of the Amendment Act had not envisaged climate change arguments being made for rules and consents relating to activities that indirectly result in the discharge of greenhouse gases.[10] The majority noted that they considered this to be the reason why ss 70A and 104E refer only to activities that resulted in direct discharges.

[18] Relevant to the issues raised in this case, the Court considered two examples of where rules dealt with indirect discharges, and where, therefore, on a literal interpretation s 70A would not apply.

[19] With regard to the Councils' rule making, the majority stated:[11]

> *Regional rules as to activities incidental to coal mining addressed to climate change effects ("example four")*
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> [163] As we have noted, s 68(3) provides that:
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> > In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect… .
>
> Would it be possible for a regional council in making a rule which bears

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[10] *Buller Coal*, at [168] and [174].
[11] *Buller Coal*, at [163].

> on activities which are incidental to coal mining (for instance, as to the diversion of natural water) to take into account climate change effects of the burning of coal (for instance, by prohibiting such diversions if associated with coal mining)? Such an exercise would not be directly precluded by s 70A of the RMA. It might, however, be thought to fall foul of an implied and more general limitation on its competence in relation to climate change underlying the 2004 Amendment Act. If so, such a rule would be ultra vires a regional council. The alternative – that regional councils must address climate change when making such rules – would be directly contrary to the legislative purpose that regulatory control of climate change associated with discharges is to be addressed at the national level.

[20] The Court then concluded that a literal interpretation of ss 104(1)(a) and 70A would subvert the scheme and purpose of the Amendment Act by creating inconsistencies between activities which directly created greenhouse gas emissions, and activities which indirectly created greenhouse gas emissions.[12]

[21] The majority in the Supreme Court also emphasised that limiting effects on climate change is not a responsibility that lies with local authorities. It stated:[13]

> [172] In light of the examples just discussed in our discussion of the scheme and purpose of the relevant provisions of the RMA and their legislative history, we are satisfied that in s 104(1)(a), the words "actual or potential effects on the environment" in relation to an activity which is under consideration by a local authority do not extend to the impact on climate change of the discharge into air of greenhouse gases that result indirectly from that activity.

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[12] *Buller Coal*, at [168] to [170].
[13] *Buller Coal*, at [172] and [173].

> [173] Such limitation seems to us to be justified as a matter of necessary implication, essentially on the basis that, when the amended RMA is looked at as a whole, the limitation is so obvious that it goes without saying. We also see this limitation as consistent with the clear legislative policy that addressing effects of activities on climate change lie outside the functions of regional council and, *a fortiori*, territorial authorities.

[22] It seems clear that CJT accepts the findings of *Genesis* and *Buller Coal* as they relate to the prohibition on taking into account the effects of activities on climate change.

Effects of climate change

CJT arguments on climate change

[23] CJT encapsulates its arguments as follows:[14]

> In this case climate change arguments are not being advanced in relation to effects to climate change (from activities that involve s 15 discharges to air) but in regard to the duty on council to plan for the "anticipated effects of climate change" and prepare a resilient plan for the region. The plan as proposed will result in the Taranaki region being shackled to investments and costs of a sunset industry with increasing liabilities (such as regulatory, economic and exposure to loss of asset investment recovery). The second limb is in relation to ocean acidification, which CJT says is not excluded by s 70A RMA.
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> (footnote omitted)

[24] In its reply submissions, CJT accepted that:[15]

> Effects to climate change by air discharge activities is excluded by s 70A

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[14] Submissions from CJT, dated 28 January 2022 at [46].
[15] Reply submissions from CJT dated 8 March 2022 at [15].

of the RMA.

[25] CJT submits that, when considering whether there is jurisdiction to consider the effects of ocean acidification and climate change within the plan review, relevant provisions of the RMA include regional council functions under s 30, and what can be included in the Regional Plan under ss 66 to 68(3); and matters to be considered when undertaking resource consent assessment under s 104(1)(a) as limited by the Amendment Act in s 70A and s 70B.

[26] It submits that the RMA has broad application: all resource use is captured unless expressly excluded.[16]

[27] In addition to breadth of subject matter is breadth of purpose. Resources can be protected because they have intrinsic value, or are spiritually important, or just because they are appreciated and therefore contribute to the wellbeing of people and their communities. It says that the definition of environment is wide and not specifically limited to the environment of New Zealand or only its territorial waters; it includes people and communities.

[28] CJT refers further to s 5 and the core purpose of the RMA and the further matters contained in ss 6, 7 and 8. Relevant to this case is s 7(i) RMA that "all persons exercising functions and powers under [the RMA], in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to the effects of climate change".

[29] CJT submits that the broad definition of environment and effects captures effects to climate change, effects of climate change and ocean acidification.

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[16] *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178 at [23].

The Council's arguments on climate change

[30] Both parties agree that the effects of climate change can be considered by local authorities. According to the Council, CJT appears to be arguing that the effects of climate change can be regulated through Rules 26 to 30 of the PCP, or supporting objectives, policies or methods. The Council maintains that the effects regulated by Rules 26 to 30 are not effects of climate change; rather, the rules expressly seek to regulate the effects of drilling and placement of structures. The effects of climate change are far removed from, and are not regulated by, those rules.

[31] Further, the adverse economic effects that CJT raised, such as stranded assets, are not, the Council says, effects of climate change such as sea level rise and related coastal hazards. Rather, should they occur, they would be results of regulatory and policy action (including inaction) in response to climate change. The Council emphasised that Parliament and the Courts have clearly delineated such action to be the responsibility of central government within s 70A, being a provision enacted to avoid local government taking such action itself.[17]

[32] Further, CJT stated that greenhouse gas discharges are ancillary to the activities covered by Rules 26 to 30 – to a large extent the activities do not involve discharges to air and are not subject to s 70A. The Council says that, given CJT's acknowledgement that the emissions that cause climate change are ancillary to the activities being regulated, any downstream effects of climate change are even further removed, and regulatory responses and resulting economic consequences (such as stranded assets) are more distantly affected again. It says that even if these could be described as effects of climate change, such economic outcomes are not effects of drilling activities or, even if they were, they would be too remote to be regulated. It also notes

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[17] Council submissions, dated 28 February 2022 at [104].

that the Supreme Court (in *Buller Coal*) found that allowing climate change to be considered in relation to ancillary consents would subvert the purpose of the Amendment Act. Allowing climate change effects to be considered in relation to ancillary discharges would also undermine the intent of the legislation.

[33] The Council says that CJT's submission, that the contended economic and social effects can be broadly characterised as the effects of climate change and regulated by local government in the form of prohibiting oil and gas activities, would clearly subvert the distinction between policy decisions to mitigate climate change (to be made by central government) and local level decisions to adapt to the effects of climate change.

Energy Resources Aotearoa Incorporated (Energy Resources)

[34] Energy Resources filed a memorandum supporting and adopting the Council's submissions in all respects.

Ocean acidification

[35] Finally, submissions were made about ocean acidification. CJT argues that consideration of ocean acidification is not excluded by s 70A. It points to evidence to be called by Professor Abigail Smith, who has said:[18]

> [9] Ocean acidification has been called "the other climate change problem", but actually it is more like global warming's evil twin. The absorption of CO_2 by sea water reduces the greenhouse gas effect, and thus moderates warming, but with the consequence of changing sea water chemistry. The changing pH of sea water is not technically "climate change", because climate is defined as dominantly atmospheric, though the ocean is an important component of the

[18] A quote contained in CJT submissions, dated 28 January 2022 at [77].

whole-Earth climate system. The two are intimately linked, but distinct.

[36] The Council submits that ocean acidification and climate change are so linked that to seek to reduce ocean acidification by making a rule to reduce CO_2 emissions is, in essence, requesting consideration of effects on climate change. It submits that the logic in *Buller Coal* applies equally to arguments concerning ocean acidification.

Findings

[37] I find that s 70A prevents the Court from considering:

(a) the effects of discharges into air of greenhouse gases on climate change – in the context of CJT's appeal, which challenges proposed Rules 26 to 30 of the PCP;

(b) the effects of any activities incidental to those listed in Rules 26 to 30, insofar as they may have effects on climate change.

[38] I rely on the words of s 70A and the Supreme Court's findings in *Genesis*, which recognised that local authorities are prohibited from having regard to the effects on climate change of the discharge of greenhouse gases. For activities that are incidental to the activities listed in Rules 26 to 30 I rely on *Buller Coal*, where the Court acknowledged that while not directly precluded by s 70A, it might be thought to fall foul of an "implied and more general limitation" on its competence in relation to climate change underlying the 2004 Amendment Act.

[39] CJT has argued that the Council has a responsibility to anticipate the effects of climate change and prepare a resilient plan for the Region. It is concerned about the costs of a sunset industry and increasing liabilities. I note the Council's argument that the effects CJT seeks to address are not the effects

of climate change, but effects that may result from regulatory responses to climate change which are too remote to be regulated. Rules 26 to 30 seek to regulate the effects of oil exploration and drilling activities.

[40] CJT's argument is nuanced, and endeavours to walk a fine line between not addressing the effects of the activities described in Rules 26 to 30 on climate change while addressing the effects of climate change on those activities. In effect, it argues that part of addressing the effects of climate change is to look ahead to when certain assets may become redundant, to anticipate that redundancy and the costs of it, and limit or prohibit those activities which may rely on those assets.

[41] As the Council pointed out, those outcomes are not effects of drilling activities. I agree. At most, they are outcomes that may result from Government decisions as to what oil exploration and drilling activities may establish or continue.

[42] The effects CJT raises fall within the basket of activities that may be considered incidental to those described in Rules 26 to 30, and as such are precluded from consideration under s 70A.

[43] I cannot determine as a preliminary matter whether or not ocean acidification falls within the definition of climate change, as the evidence proposed to be called has not been tested. I do observe, however, that insofar as ocean acidification is entwined with climate change, it is unhelpful to rely on it as a means of seeking to amend the activity rules to address the effects of those activities on climate change. Parliament's policy is clear. It is for the Parliament to regulate the effects of activities on climate change, not this Court.

[44] Finally, I observe that a plan change or variation could occur in the event the legislative policy settings change.

MJL Dickey
Environment Judge