GREENPEACE | Briefing

Climate, New Zealand, June 2007

History of climate change litigation

Introduction

A series of recent cases signal the rise of climate change litigation around the world.

Most of the cases have cropped up in the United States, due to perceived inaction by national political authorities over issues of global warming. A recent article in *The New Jersey Law Journal* says more than a dozen lawsuits involving global warming issues have been brought in the US state and federal courts, and more are anticipated. ("*Global warming litigation brought thus far has demonstrated at least four pathways to potential legal recourse against public and private defendants" (1).*

In one large case, plaintiffs whose properties were damaged by Hurricane Katrina are seeking to sue dozens of oil and coal companies and chemical manufacturers, saying their businesses contributed to global warming, which intensified the effects of the hurricane. Those bringing the action have been given leave to submit an amended complaint.

There are positive indications that courts worldwide are prepared to embrace arguments around climate change. Some have suggested it could be a "*hot new litigation frontier*" (1).

CASES COUNTRY BY COUNTRY

NEW ZEALAND

1) Marsden B coal-fired power station: Greenpeace New Zealand Incorporated v Northland Regional Council and Mighty River Power Limited

In October 2006 the High Court ruled in favour of Greenpeace that climate change was a relevant consideration in their appeal against Mighty River Power's proposed Marsden B coal-fired power station.

The decision means that any company applying for resource consent for a climate polluting project can no longer ignore climate change and that renewable energy projects are now easier to get through the RMA process than coal or other fossil fuel projects.

It overturned a previous Environment Court ruling (July 2006), which Greenpeace challenged in the High Court.

In the latest twist, Genesis Energy filed new legal proceedings against Greenpeace in May 2007 in an attempt to have the effect of the High Court ruling protecting the climate reversed.

2) Awhitu wind farm: Genesis power Limited v Franklin District Council

On 7th September 2005 the New Zealand Environment Court allowed an appeal brought by the Energy Efficiency and Conservation Authority against the refusal of permission to build a wind farm, under the Resource Management Act 1991, citing reduction of emissions of greenhouse gases and climate change as factors supporting the case.

This was the first case of a wind farm appeal being heard in the Environment Court in New Zealand.

Greenpeace joined the appeal in support of the wind farm together with the New Zealand Wind Energy Association, Mighty River Power, the Environmental Defence Society and the Auckland Regional Council.

The Court rejected the de minimize argument (ie. because the wind farm was a relatively small one (63 MW), its climate benefits were not relevant.) Consent was subsequently granted for the wind farm.

The court relied in part on the September 2002 case, Environmental Defence Society v. Auckland Regional Council and Contact Energy Limited, which was one of the first cases in the world of judicial acceptance of climate change science and human influence.

3)* Stratford gas power station: *Environmental Defence Society v Auckland Regional Council and Contact Energy Limited

In 1995, the National Board of Inquiry recommended that an application by ECNZ for a natural gas fired power station at Stratford be granted subject to a condition to mitigate the effects of the CO_2 emissions, being the planting of trees, and that a national policy statement on CO_2 be issued. The Board rejected a 'de minimis' argument, saying that without the UNFCCC, and united efforts toward compliance, the situation becomes another example of what the economist Garrett Hardin called the 'tragedy of the Commons'. *Stratford: Report and Recommendation of the Board of Inquiry pursuant to Section 148 of the Resource Management Act 1991: Chairman David A.R Williams QC, February 1995.*

A related case, Environmental Defence Society (Incorporated) v Taranaki Regional Council A184/02 (2002) (also regarding the Stratford power station which had been acquired by Contact Energy), found that the greenhouse effect and the possibility of climate change is a matter of serious concern. The threat posed is sufficiently significant to conclude that the greenhouse effect is likely to result in significant changes to the global environment. Given the stable nature of carbon dioxide and the fact that each small contribution is spread around the globe to combine and create the greenhouse effect, the Court found that the effect of the proposed plant would be more than de minimis.

In the same year, Environmental Defence Society v Auckland Regional Council and Contact Energy Limited [2002] 11 NZRMA 492, involved an application for resource consent to construct and operate a 400 megawatt gas fired combined cycle power station at Otahuhu C in south Auckland. The Environment Court accepted as a matter of evidence that the greenhouse effect and the possibility of climate change were a matter of serious concern.

4) West Wind: *Meridian Energy Ltd and others v Wellington City Council and others* W031/2007 (14 May 2007)

The Environment Court held that climate change and renewable energy considerations are very powerful and represent key issues to be weighed against the adverse effects on the local environment. The Court accepted evidence on the effects of climate change on New Zealand and the world, and found that a windfarm enabling the generation of electricity from a perpetually renewable source which emits, effectively, no greenhouse gases, is relevant to whether the windfarm is considered *appropriate* in terms of the legislation. The Court granted the resource consents with the exception of four turbines of the 70 proposed. Greenpeace joined the appeal in support of the proposal.

AUSTRALIA

1) Hazelwood coal fired power station: (*Re Australian Conservation Foundation v Latrobe City Council (*2004) 140 LGERA 100)

The Hazelwood coal fired power station is one of Victoria's largest and a significant contributor to the State's overall greenhouse gas emissions. The station's reserves were due to run out in 2009, so the owner applied to develop an alternative coal field which would prolong the plant's operation until 2031. A panel set up under the Victorian Planning and Environment Act 1987 (P&E Act) and the Environment Effects Act 1978 to consider the extension of the station was instructed "not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station".

Four environmental groups, including the Climate Action Network Australia, brought an action in the Victorian Civil and Administrative Tribunal alleging that the panel had breached s 24 of the P&E Act, which provides that the panel must consider all submissions referred to it. The question was really whether the panel should have considered the environmental impacts of the greenhouse gas emissions generated by the power plant's continuation. The Tribunal answered in the affirmative.

For environmental groups, the Hazelwood decision represented a significant victory in their effort to ensure the climate change impacts of industrial activities are factored into the environmental decision-making process.

2) Anvil Hill coal mine: (Gray *v The Minister for Planning* [2006] NSWLEC 720)

In 2006, activist Peter Gray brought a successful action in the NSW Land and Environment Court requiring the climate change impacts of coal burning to be taken into account in the environmental assessment of coal mines.

In the case, Gray argued that greenhouse gas emissions from the combustion of coal bought from the project by *third parties* should lawfully have been included in the detailed greenhouse gas assessment for the coal mine.

In her decision, Justice Pain found for Gray on the ground that the principles of "environmentally sustainable development" (ESD) had not been considered. The failure to take into account the cumulative impacts of coal burning in contributing to climate change/global warming violated the fundamental ESD principles of intergenerational equity and the precautionary principle.

In contrast to actions in the past, that had failed to clear the hurdle of causation, Justice Pain found that there *was* a sufficiently proximate link between the mining of coal and the emission of greenhouse gases which contribute to climate change. This link hinged on the large scale of the project and the fact that the coal mined would be used solely for providing fuel for power stations, both in Australia and abroad. The decision also turned on the increasing scientific consensus that climate change *is* happening and is impacting adversely on the NSW environment.

UNITED STATES

1) “Carbon dioxide as a pollutant”: Mass.v.EPA.USSC (Massachusetts, et al. v. Environmental Protection Agency, et al)

In the most significant court decision on climate change so far, the US Supreme Court ruled in April 2007 that carbon dioxide is an air pollutant under the Clean Air Act, in a ruling in a case brought by 12 US States, 4 local authorities and 13 non-government organizations (NGOs) against the Environmental Protection Agency (EPA).

Giving the majority judgment, Justice Stevens noted that "[t]he harms associated with climate change are serious and well recognized", that the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming" and that the "EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change". Matthew Skinner, a partner at Australian law form Allens Arthur Robinson said of the case “it has the potential to embolden climate change litigants” (ref Focus “Climate change litigation” document). The US Supreme Court said that science shows that global warming is not just a future threat, it’s a present one.

Following the ruling, California governor Arnold Schwarzenegger gave the US Environmental Protection Agency's administrator Stephen Johnson six months to approve the state's request to be allowed to regulate the carbon dioxide emitted by cars and trucks, or he'll sue. California must get permission to regulate from the agency under the Clean Air Act.

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2) Export-Import Bank: Friends of the Earth, Inc. v. Watson, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. 2005)

In another groundbreaking global warming lawsuit, Friends of the Earth, Greenpeace, and four cities are charging that the Export-Import Bank (Ex-Im) and the Oversees Private Investment Corporation (OPIC) have provided financial assistance to oil and other fossil fuel projects without first evaluating the projects' global warming impacts. The cities of Oakland, Arcata and Santa Monica, California and Boulder, Colorado are parties to the suit.

In a landmark court decision in August 2005, the plaintiffs were granted legal standing to proceed with the case The judge said that "*it would be difficult for the Court to conclude that Defendants have created a genuine dispute that [greenhouse gases] do not contribute to global warming*." On April 14, 2006, the merits of the lawsuit were heard in U.S. District Court for the Northern District of California, and the parties are awaiting a decision. The case shows a certain judicial acceptance of climate change science.

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3) Hurricane Katrina

In this large case plaintiffs whose properties were damaged by Hurricane Katrina are seeking to sue dozens of oil and coal companies and chemical manufacturers, saying their businesses contributed to global warming which intensified the effects of the hurricane. Those bringing the action have been given leave to submit an amended complaint.

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4) Manhattan Claim

On 21 July 2004, an unprecedented public nuisance lawsuit was filed in Manhattan Federal District Court by State authorities against eight US companies, namely American Electric Power Company, Southern Company, the federal Tennessee Valley Authority, Xcel Energy Inc and Cinergy Corporation ("**the Manhattan Claim**").

The States argued that the huge emissions from the defendant's power plants should be reduced. They sought an order to force the defendants to cap and reduce their CO2 emissions. The plaintiffs contended that carbon dioxide emissions can be reduced by increasing efficiency at coal-burning plants, switching from coal to cleaner-burning fuels, investing in energy conservation, and using clean energy sources such as wind and solar power.

The plaintiffs claimed that the defendants, by failing to cap and reduce their CO2 emissions, are contributing to climate change, which leads to: increased heat-related deaths due to more frequent heat-waves; increased respiratory illnesses due to increased smog; damage to property from coastal erosion, droughts and floods; and widespread loss of species and biodiversity.

The plaintiffs did not seek damages in this action. Instead, the remedy sought was that the defendants would cap CO2 emissions and then reduce emissions by 3% per annum over a 10 year period.

In October 2005 the case was dismissed by Judge Lorett A. Preska who found that although the action was framed as a public nuisance action, the fundamental issue was a political rather than a judicial one.

An appeal against this decision was heard in June 2006 and a decision is pending.

CANADA

Friends of the Earth Canada has launched a landmark lawsuit against the Government of Canada for abandoning its international commitments under the Kyoto Protocol. Filed in Federal Court in Ottawa by Canada 's foremost environmental law organisation, Sierra Legal, the lawsuit alleges that the federal government is violating Canadian law by failing to meet its binding international commitments to reduce greenhouse gas emissions.

Canada is second only to Austria, worldwide, in the staggering size of its failure to meet its Kyoto target, with its greenhouse gas emissions more than 34% above its 6% reduction target. Last month, the Canadian Government set greenhouse reduction targets of 20% below 2006 levels by 2020, which would leave Canada about 39% above the Kyoto target for 2008-2012.

ARGENTINA

After the 2003 Santa Fe floods in Argentina which killed many people and caused millions of dollars of damage, citizens have successfully used Article 6 of the UN Framework Convention on Climate Change[1] alongside the "Acción Informativa" mechanism to reveal official failure to adapt to climate change. The legal action has so far revealed that infrastructure changes needed to protect people had been drawn up but not acted upon by the authorities.

NIGERIA

Communities in the Niger Delta region of Nigeria are suing the Nigerian Government and multinational oil companies (Shell, Exxon, Agip, Chevron and Total) over the continuous flaring of gas for over 40 years.

Communities involved in the suit are: Imiringi and Gbarain (Bayelsa State) Rumuekpe, Erama, Idama and Akala-Olu all in Rivers State; Ewherekan in Delta and Eket in Akwa Ibom States. The communities are supported by Environmental Rights Action-Friends of the Earth Nigeria based in Port Harcourt and Benin.

In November 2005, the Federal High Court of Nigeria found in favour of the Applicant, Mr Jonah Gbemre. The Court found that the flaring in the course of oil exploration and production activities in the Applicant's community was a gross violation of their fundamental right to life (including a healthy environment) and dignity of human person as enshrined in the *Constitution of the Federal Republic of Nigeria 1999*. The Court also found the failure to carry out an Environmental Impact Assessment of the effects of the gas flaring activities was a clear violation of the *Environmental Impact Assessment Act 2004.* The Court also found that the laws that allowed continued flaring of gas were inconsistent with the Constitution, and were therefore unconstitutional.

http://www.climatelaw.org/media/gas.flaring.suit

(1) Stuart M. Feinblatt and Monique Cofer, New Jersey Law Journal, March 13, 2007

[1] UNFCCC Art. 6: "In carrying out their commitments under Article 4, paragraph 1(i), the Parties shall: (a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:….(ii) Public access to information on climate change and its effects"