IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-9572
[2013] NZHC 3482

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of an application for judicial review
BETWEEN	GREENPEACE OF NEW ZEALAND INCORPORATED Plaintiff
AND	THE ENVIRONMENTAL PROTECTION AUTHORITY First Respondent
	ANADARKO NZ TARANAKI COMPANY Second Respondent

Hearing:	9 December 2013
Counsel:	I T F Hikaka & D E Currie for Plaintiff P J Radich and J M Bowe for First Respondent M G Colson, A J L Beatson & K J Dobbs for Second Respondent
Judgment:	19 December 2013

RESERVED JUDGMENT OF MACKENZIE J

I direct that the delivery time of this judgment is 4 pm on the 19th day of December 2013.

Solicitors:	Lee Salmon Long, Auckland, for plaintiff Environmental Risk Management Authority, Wellington, for first respondent Bell Gully, Wellington, for second respondent

Introduction

[1] In this application for judicial review, the plaintiff (Greenpeace) seeks review of a decision of the first respondent (EPA) in respect of an impact assessment submitted by the second respondent (Anadarko) to EPA under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the Act) in relation to Anadarko's exploration drilling in the Taranaki Basin.

[2] Anadarko holds a 54 per cent participating interest in PEP38451, a petroleum exploration permit for an area in the Taranaki Basin off the west coast of the North Island. It is, on behalf of itself and the other permit participants, the operator, responsible for day-to-day management of the activities under that permit. Anadarko is currently drilling an exploration well within the permit area. It began drilling on 26 November 2013. It must, to comply with the permit conditions, complete the well by 31 May 2014.

[3] The Act came into force on 28 June 2013. It imposes restrictions on certain activities in the exclusive economic zone or in or on the continental shelf. A marine consent is required before petroleum exploration activity may be undertaken.

[4] Because Anadarko's permit had been granted, but drilling had not started, before the Act came into force, transitional provisions apply. Anadarko does not need a marine consent under the Act. It must, under the transitional provisions, take what would be the first step in the process of obtaining a marine consent, the submission to EPA of an impact assessment.

[5] Anadarko submitted its impact assessment to EPA in September 2013. The issue on this proceeding is whether EPA was correct to accept Anadarko's impact assessment as meeting that transitional obligation.

The legislation

[6] The purpose of the Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.[1] It

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1 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10(1).

continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment.[2]

[7] I describe very briefly the process which will apply when the Act is fully in force to an activity such as that being carried out by Anadarko, under a permit issued after June 2013. The permit holder will apply to EPA for a marine consent to undertake the activity. The application must fully describe the proposal, and it must include an impact assessment prepared in accordance with s 39.[3] EPA must deal with the application as promptly as is reasonable in the circumstances.[4] If it decides that the application does not include an impact assessment that complies with s 39 or any information required by the Act, it may return the application to the applicant as incomplete.[5] If it does this, it must return the incomplete application and give the applicant a written explanation for its finding that the application is incomplete within 10 working days after receipt of the application.[6]

[8] If EPA is satisfied that the application is complete, it must give public notice of the application and serve a copy of the notice on certain specified parties.[7] Any person may make a submission to EPA about the application.[8] Submissions must be made not later than 20 working days after public notification.[9] EPA may request the applicant and any submitters to meet and discuss, or to mediate, any dispute.[10] EPA may hold a hearing if it considers it necessary or desirable and must do so if the applicant or a submitter requests a hearing.[11] The hearing must begin no later than 40 working days after the closing date for submissions on the application.[12] It must be completed within a further 40 working days.[13] The hearing must be in public.[14] EPA must establish a procedure that is appropriate and fair in the circumstances,

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2 Section 11.
3 Section 38.
4 Section 40.
5 Section 41(1).
6 Section 41(3).
7 Section 45.
8 Section 46.
9 Section 47.
10 Section 49.
11 Section 50.
12 Section 51(2).
13 Section 52.
14 Section 53(1).

avoiding unnecessary formality.[15] At the hearing the applicant and every submitter wishing to be heard may speak and call evidence.[16]

[9] In considering the application, EPA must take into account a number of prescribed matters.[17] It may grant the application, in whole or in part, and subject to conditions, or refuse the application.[18]

[10] Against that broad background, I turn to the transitional provisions applicable in this case. Section 166 applies. Anadarko's exploration well is a "planned petroleum activity" as defined in s 166(8). Subsections (1)-(4) of s 166 provide:

> **Planned petroleum activities that become discretionary**
>
> (1) This section applies to a planned petroleum activity if the activity requires a marine consent as a result of this Act coming into force.
>
> (2) The activity may commence without a marine consent after the Act comes into force.
>
> (3) However, before the activity may commence, the person intending to undertake the activity must—
>
> (a) prepare an impact assessment for the activity; and
>
> (b) provide the impact assessment to the EPA.
>
> (4) Section 41 applies to the impact assessment as if it were an application for a marine consent.

[11] Section 39 applies to the impact assessment under s 166(3). It provides:

> **Impact assessment**
>
> (1) An impact assessment must—
>
> (a) describe the activity for which consent is sought; and
>
> (b) describe the current state of the area where it is proposed that the activity will be undertaken and the environment surrounding the area; and
>
> (c) identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in New Zealand or in the sea above or

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15 Section 53(2) and (3).
16 Section 54(1).
17 Sections 59, 60 and 61.
18 Section 62.

beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(d) identify persons whose existing interests are likely to be adversely affected by the activity; and

(e) describe any consultation undertaken with persons described in paragraph (d) and specify those who have given written approval to the activity; and

(f) include copies of any written approvals to the activity; and

(g) specify any possible alternative locations for, or methods for undertaking, the activity that may avoid, remedy, or mitigate any adverse effects; and

(h) specify the measures that the applicant intends to take to avoid, remedy, or mitigate the adverse effects identified.

(2) An impact assessment must contain the information required by subsection (1) in—

(a) such detail as corresponds to the scale and significance of the effects that the activity may have on the environment and existing interests; and

(b) sufficient detail to enable the Environmental Protection Authority and persons whose existing interests are or may be affected to understand the nature of the activity and its effects on the environment and existing interests.

(3) The impact assessment complies with subsection (1)(c) and (d) if the Environmental Protection Authority is satisfied that the applicant has made a reasonable effort to identify the matters described in those paragraphs.

(4) The measures that must be specified under subsection (1)(h) include any measures required by another marine management regime and any measures required by or under the Health and Safety in Employment Act 1992 that may have the effect of avoiding, remedying, or mitigating the adverse effects of the activity on the environment or existing interests.

[12] Section 41 provides:

Environmental Protection Authority may return incomplete application

(1) If the Environmental Protection Authority decides that an application does not include an impact assessment that complies with section 39 or any information required by this Act, it may return the application to the applicant as incomplete.

(2) The EPA may seek advice under section 44 to assist it in determining whether an impact assessment complies with section 39.

(3) The EPA must return an incomplete application and give the applicant a written explanation for its finding that the application is incomplete within 10 working days after the application is received by the EPA.

(4) If, after the EPA returns an application as incomplete, the application is sent to the EPA again, the application is to be treated as a new application.

(5) The applicant may object under section 101 to a decision under subsection (1).

The s 41 assessment process

[13] Anadarko had been in discussions with EPA about its exploration programme for some months. That programme included exploratory drilling in both the Taranaki Basin and the Canterbury Basin, where Anadarko also holds a permit. The first impact assessment submitted was for the Canterbury Basin, in July 2013. EPA commissioned Sinclair Knight Merz (SKM) to review the assessment for compliance with s 39. Following that review, EPA returned the impact assessment as incomplete. There were further discussions between EPA and Anadarko about what further material was needed.

[14] On 13 September 2013, Anadarko submitted an impact assessment for the Taranaki Basin drilling. EPA again commissioned SKM to conduct a review of compliance with s 39. That review was provided on 23 September 2013. It concluded that the impact assessment did not contain all the information required by s 39. EPA staff also reviewed the impact assessment. Mr Roof, an EPA advisor, collated all staff comments. A schedule was prepared collating the SKM comments and the EPA staff comments, by reference to the paragraphs in s 39(1). In essence, the EPA staff comments did not agree with the SKM view that the impact assessment was incomplete. Mr Roof discussed the staff and SKM comments with Ms Millward, at the time the Acting Applications Manager, Exclusive Economic Zone at EPA. Ms Millward asked Mr Roof to contact Anadarko and seek clarification on a number of matters. Anadarko supplied a revised impact assessment addressing these matters on 26 September 2013. That was reviewed by the EPA staff and their further comments added to the schedule of comments.

[15] The statutory timeframe under s 41(3) ended on 27 September 2013. On 26 September 2013 Mr Roof prepared a "completeness memo" for Ms Millward. She reviewed the material and was satisfied that it was appropriate to not return the impact assessment as incomplete. She wrote to Anadarko advising that outcome.

The alleged deficiencies in the impact assessment

[16] The impact assessment is a 150 page document. Appended to it as an appendix is a further 73 page discharge management plan (DMP) submitted to Maritime New Zealand (MNZ). As submitted to MNZ, the DMP had a number of annexes. The existence of those annexes is listed in the copy supplied to EPA, but the full annexes were not included as part of the impact assessment.

[17] The DMP was prepared as part of Anadarko's obligations under the Marine Protection Rules Part 200, made under the Maritime Transport Act 1994, and administered by MNZ. MNZ is, through the Marine Pollution Response Service (MPRS), responsible for maintaining a nationwide capability to respond to marine oil spills. It maintains the New Zealand Marine Oil Spill Response Strategy and National Marine Oil Spill Contingency Plan. The objective of Part 200 is to prevent pollution of the marine environment from discharge of harmful substances associated with the operation of offshore installations used in mineral exploration and exploitation. Rule 200.4 prohibits the operation of an offshore installation without a discharge management plan approved by MNZ. The plan must include information about managing and avoiding the discharge of any potential pollutants and must contain emergency spill response procedures for oil.

[18] For present purposes, the most important annexes to the DMP are oil spill modelling reports, the emergency response plan/oil spill contingency and well control contingency plan. Those are relevant to section 6.5 of the impact assessment, which deals with impacts from accidental events. The oil spill modelling reports are referred to in section 6.5.5, headed "Loss of Well Control". That says "a loss of well control resulting from this drilling campaign, although extremely unlikely, … is an

event which has the potential to have significant impacts on the environment and existing interests". The impact assessment goes on to says:[19]

> In assessing the potential impacts from a loss of well control, there is a need to consider the baseline environment and sensitive species highlighted above as well as the potential trajectory of any oil spill that may occur. MetOcean Solutions Limited was contracted to undertake an oil spill trajectory model study to determine the fate, timing and potential of coastal beaching in the unlikely event of a loss of well control. This oil spill trajectory study was undertaken as part of the DMP required under Part 200 which Anadarko has submitted to MNZ for approval. (see DMP Annex D).

[19] The impact assessment describes the results of modelling from the oil spill trajectory study. It contains a diagram showing the relative chances of beaching on the shoreline of the west coast of the North Island and the north coast of the South Island. The impact assessment also refers to the likely effects of a catastrophic oil spill on a number of species of fauna which are identified as actually or potentially present in the seas around the drilling site.

[20] Greenpeace contends that the DMP itself deals only with the trajectory of a possible catastrophic spill resulting from loss of well control towards the coast, and does not include trajectory information for the effects of a spill seawards, to the edge of and beyond the exclusive economic zone and continental shelf. That information would be available from the Oil Spill Modelling Report in Annex D.

[21] The essence of Greenpeace's case is that EPA was wrong to have accepted the impact assessment provided by Anadarko as complete, and that it should have exercised its power under s 41 to return the assessment as incomplete. It submits that in accepting the impact assessment provided by Anadarko without the annexes to the DMP, EPA erred in law by accepting as an "impact assessment" a document that did not meet the statutory requirements in s 39 of the Act.

[22] Greenpeace submits that EPA erred in law in four respects in accepting the impact assessment as complete, without the annexes to the DMP:

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[19] Environmental Resources Management "Deepwater Taranaki Basin Single Exploration Well Environmental Impact Assessment: New Zealand Block Petroleum Exploration Permit 38451" (September 2013) at 117.

(a) It failed to take into account a mandatory relevant consideration, namely the effects of exploratory drilling on the sea to the edge of an beyond the outer limits of the exclusive economic zone.

(b) It erred in accepting the impact assessment as meeting the requirements of ss 39(1)(h) and 39(4), in that the impact assessment was required to include measures required by Part 200 of the Marine Protection Rules, and to specify all the matters in sch 1 to r 200.4 of the Rules.

(c) EPA erred in law in accepting the impact assessment as containing sufficient details to enable EPA and persons whose interests may be affected to understand the nature of the exploratory drilling and its effects on the environment and existing interests, in that in failing to include the missing annexes, the impact assessment did not include sufficient detail to meet the requirements of s 39(2)(b).

(d) EPA erred in considering the impact assessment complete, in that it did not contain sufficient detail on the potential effects, including a tier three oil spill to comply with s 39(2)(a).

[23] Greenpeace submits in essence that EPA and MNZ each have a role in the assessment of the risk of a catastrophic spill resulting from loss of well control. MNZ's role is predominantly directed towards the measures necessary to prevent or minimise the extent of spillage resulting from a loss of well control should it occur. EPA's role is concerned with assessing the extent of the risk of a loss of well control occurring and weighing the possible environmental effects.

[24] Mr Hikaka for Greenpeace submits that the source of the issues in this case is a fundamental difference between Greenpeace and EPA as to the role of EPA under the Act in relation to the interaction between EPA and other marine management regimes. Greenpeace's view is that the role of EPA is to receive information about all environmental effects of a proposed activity and the measures to be taken to mitigate those effects, including those in areas where other authorities have

responsibility. Mr Hikaka submits that EPA appears to take the view that it is not required to consider or receive information on aspects of a proposed activity when other maritime regimes are in place to address the adverse effects of the activity.

[25] Greenpeace relies on SKM's review in which it states:

> The Impact Assessment also has fundamental deficiencies in relation to the descriptions of the activities and potential mitigation measures associated with a loss of well control; the risk factor with the most significant consequences to the receiving environment and existing interests.

[26] Greenpeace also refers to EPA staff comments such as:

> ...
>
> The measures taken to respond to an oil spill are regulated by MNZ and therefore out of scope of this evaluation. ...
>
> ... It is noted however that an [impact assessment] for a marine consent application may require a greater level of detail given the potential difference in scale/significance of the activity.
>
> These strategies are regulated by MNZ and out of scope of this evaluation.
>
> ... Note however that if this [impact assessment] was submitted as part of a marine consent application, a greater level of detail would be expected to comply with this requirement given the potential difference in the scale/significance of the activity.
>
> Note however that a greater level of detail on what "best practice" entails would be required for a marine consent application given the potential difference in the scale/significance of the activity.
>
> The response to a loss of well control is regulated by Maritime New Zealand and is outside the scope of this completeness assessment.
>
> This document (while useful) is reviewed by MNZ and therefore not the responsibility of the EPA.

Discussion

[27] It is not necessary, in deciding this case, to address directly Greenpeace's contention that there is a difference of view between it and EPA as to EPA's role, or to discuss EPA's role in general terms. The issue before the Court is a much narrower one. It is whether EPA erred in law in accepting the impact assessment as complying with s 39. EPA's role under s 41, not its wider role in considering an application under the Act when it is in force, is in issue here.

[28] EPA's role under s 41 does not involve any assessment of the merits of the content of the impact assessment. Its role is limited to assessing whether the application contains information about the required matters. The purpose of that preliminary evaluation of the content is to ensure that, when (in a case when the Act is fully operational) the next stage of public notification and consideration of the application by EPA is reached, the public and EPA will have sufficient information to ensure meaningful participation in the hearing and evaluation processes.

[29] The nature of the decision under review is an important factor in determining the intensity of the review by the Court. The decision under s 41 is essentially administrative. Counsel for EPA and for Anadarko referred to a number of cases where the relevant decision was as to the completeness of an application under a statutory procedure. Section 88(3) of the Resource Management Act 1991 provides that where an application for a resource consent does not include an adequate assessment of environmental effects or the information required by regulations, the consent authority may determine that the application is incomplete. A decision under that provision was described in *Wakatu Inc v Tasman District Council* as wholly administrative in nature and having no elements of a quasi judicial nature.[20]

[30] In *AgResearch Ltd v GE Free NZ in Food and the Environment Inc*,[21] the Court of Appeal considered s 40(2) of the Hazardous Substances and New Organisms Act 1996 (HSNO Act) which sets out the information required for an application for containment approval for new organisms under that Act.

[31] The Court of Appeal said:[22]

> We regard the decision of ERMA officials to register the AgResearch applications as essentially mechanical. We do not consider that decision to be of sufficient moment to be appropriately the focus of orders in judicial review proceedings. As we see it, the acceptance of an application for processing does not involve any kind of seal of approval by ERMA and does not preclude ERMA from ultimately dismissing the application because its generic nature does not make it capable of approval or, perhaps more likely, its generic nature means that the quantification of risks and benefits is so uncertain as to leave ERMA unsatisfied that the latter outweigh the former.

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20 *Wakatu Inc v Tasman District Council* [2008] NZRMA 187 at [24].
21 *AgResearch Ltd v GE Free NZ in Food and The Environment Inc* [2010] NZCA 89.
22 At [59].

[32] Unlike s 41 of the Act, s 40 of the HSNO Act does not impose a statutory obligation to vet each application and to reject it if Environmental Risk Management Authority is not satisfied the application complies strictly with the statutory requirements. However, the two provisions are sufficiently analogous to make those comments applicable to this case. The evaluation of the impact assessment for the purpose of determining whether it is complete is essentially mechanical, and does not involve any kind of seal of approval on the content of the impact assessment.

[33] A decision which is "wholly administrative in nature" and "essentially mechanical" is not readily susceptible to the sort of error which may justify judicial review. To succeed on the present application, Greenpeace must demonstrate an error of law by EPA.

[34] The comments by EPA staff upon which reliance is placed do not indicate that EPA erred in its approach to the s 41 assessment. As I have said, considerations of EPA's role in considering an application under ss 59 to 61 are not in issue here. To the extent that role is relevant to the s 41 assessment, I do not consider that the EPA staff comments establish that the staff had an erroneous view of EPA's role.

[35] EPA's decision not to return the application as incomplete does not show an error of law of the sort described in *Edwards (Inspector of Taxes) v Bairstow*.[23] The evidence as to the process undertaken by EPA which I have briefly described at [13]-[15] is indicative of a careful and proper consideration of the completeness of the impact assessment under s 41. The impact assessment was independently reviewed by SKM. It was also reviewed internally by EPA staff. There is no basis upon which the Court could, on this application, venture into a consideration of the competing views of SKM and EPA staff on its completeness. The decision was one for EPA, and it was properly taken. The comments by the EPA staff which go to the respective roles of EPA and MNZ do not indicate an error of law which could affect the validity of the decision.

[36] In any event, the decision was not made by staff, but by Ms Millward. Her evidence does not indicate any error on her part. She describes in her affidavit the

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[23] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

circumstances which led to Anadarko submitting the DMP without the annexes. Anadarko discussed with EPA whether it was necessary to supply the full document, of several hundred pages, to EPA. The outcome of that discussion was that EPA said it was up to Anadarko to decide what information they provided to EPA, including in relation to the adverse effects of both planned discharges and potential oil spills. EPA explained that it needed sufficient information to understand what the effects on the environment and existing interests would be, and the document would need to indicate the information sources Anadarko had drawn on. EPA noted that the DMP contained information put together for a different regulatory regime, and the information would need to be provided in a manner relevant to the regulatory regime in the Act.

[37] Ms Millward also describes her consideration of the impact assessment and the comments on it. Her view was that the impact assessment addressed effects beyond the outer limits of the exclusive economic zone by providing information in relation to the effects on species, habitats, fisheries and existing interests. In her view that information was sufficient. She also considered that the information as to the measures to be taken to avoid remedy or mitigate the adverse effects identified was sufficient, and EPA did not need to see the annexes. EPA has a good understanding of the purposes of, and the measures required by, other marine management regimes, and of MNZ's role in determining whether the DMP complied with the Marine Protection Rules Part 200.

[38] The application for judicial review must fail.

Relief

[39] If I had concluded that an error had been shown in EPA decision, I would in any event have refused relief. The relief sought is a decision quashing the decision to accept the impact assessment as complete, declaring the impact assessment did not comply and directing that a compliant impact assessment be submitted.

[40] The first difficulty with the relief sought is that there was no decision to accept the impact assessment as complete. EPA did not make a decision to return it

as incomplete. There is no decision made in exercise of a statutory power capable of being set aside.

[41] The second difficulty relates to the declaration which is sought. That declaration would require the Court to make a decision which is one for EPA under s 41. Relief which has that effect would not be appropriate. Also, the time for a decision under s 41 has expired. The Court does not have power to direct a decision on this issue outside the statutory timeframe.

[42] I therefore see possibly insuperable difficulties in formulating relief in circumstances where Anadarko has submitted an impact assessment which is in essence deemed to be complete because EPA has not returned it as incomplete under s 41(1).

[43] Even if those difficulties could be overcome, I would have refused relief in the exercise of the Court's discretion. Greenpeace's case is based upon the proposition that the annexes omitted from the DMP should have been duplicated in the impact assessment. It would be a triumph of form over substance to direct that the impact assessment be resubmitted in a form which duplicates the material which has been supplied to MNZ in the DMP. There is no evidence that would achieve any meaningful objective. Because the case is within the transitional provisions and will not proceed to a consent application, the duplication of the annexes is not necessary to ensure that persons who may become part of the consent process have the necessary material available to them. If the inclusion of the annexes in the impact assessment would mean that they were more readily available to the public, that might be a material consideration. But there is no evidence of that. The Act does not prescribe what is to become of an impact assessment provided under s 166(3). There is nothing in the material before me which indicates that availability to the public of the annexes would be enhanced by their being duplicated to EPA.

[44] For these reasons, even if the grounds for review had been made out, I would have declined relief.

Result

[45] The application for judicial review is dismissed.

[46] Costs are reserved. The parties may submit memoranda.

"A D MacKenzie J"