

# A tidal power project

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reviews how innovative technology was dealt with

**C**rest Energy Kaipara Ltd applied to Northland Regional Council for a range of consents under the Resource Management Act 1991 to establish an array of 200 turbines on the seabed of the Kaipara Harbour. The array would be connected to an electricity sub-station via two undersea cables and would have a nameplate capacity of 200 Megawatts (*Re Crest Energy Kaipara Ltd* [2009] NZEnvC A132 (Interim Decision) at [1]).

## ENVIRONMENT COURT

The Environment Court issued an Interim Decision on 22 December 2009, and its Final Decision ([2011] NZEnvC 26) in March 2011 following court-sponsored mediation between the parties. The main parties were: Crest; Environs Holdings Ltd, representing Maori interests; the Director General of Conservation; and Northland Regional Council (NRC), to whom the resource consent application was made.

The Court was unable to grant all the consents applied for as the *New Zealand Coastal Policy Statement 1994* (NZCPS 1994) provided that certain coastal activities must be approved by the Minister of Conservation. Between the Interim Decision and the Final Decision, the NZCPS 2010 was promulgated. Clause 9 of NZCPS 2010 states, “[t]he Minister of Conservation does not require any activity to be specified as a restricted coastal activity in a regional coastal plan”, and cl 29 requires local authorities to give effect to this policy. However, NZCPS 1994 continued to apply to Crest’s Project (Final Decision at [3]).

## Interim decision

The Court noted that the planning provisions themselves were not the subject of significant debate (at [17]–[19]). The issues that the Court considered to be within its jurisdiction were: sustainable management; navigation; coastal planning processes; Maori cultural issues; marine life, fish and fisheries; and monitoring and adaptive management (at [34]).

The Court considered that the project constituted the “efficient use and development of natural and physical resources” under s 7(b) (at [46]) and that the reduction in carbon dioxide emissions addressed s 7(j) (at [53]), which requires that the “benefits to be derived from the use and development of renewable energy” be considered when assessing a consent application. The Court also adopted a number of other conclusions regarding sustainable management relating to avoidance of future energy shortages and reduced transmission losses.

Crest had not applied for exclusive occupation of the harbour. However, the Court noted that the Harbour Master had the power under the Local Government Act 2002 to implement a navigation exclusion zone, and decided that the

potential effects of the project on navigation should be addressed (at [77]) but that they would be minimal, given the “very limited boating use of this remote and often wild part of the harbour” (at [87]).

The effect of the project on marine fauna and fisheries was a “particularly important feature” (at [92]). Despite Crest’s research regarding fisheries, the Court said it was “less than satisfied” with the evidence offered. Given that the area supports a lucrative fishing industry, the Court reiterated the importance of understanding the potential impacts of the project on marine life (at [93]). In particular, while evidence was available regarding the fisheries in the harbour, little work had been done on fisheries outside the harbour (at [95]). The harbour entrance was heard to be “an essential conduit for species migrating [into] the open sea” (at [106]), yet no information was available on this migration.

The Court decided that the issue was too important for it to attempt to resolve the ambiguities in the evidence, and requested further expert evidence (at [118]).

As to the noise impacts, the Court noted that the science is “very much in its infancy” and is location specific (at [124]–[126]). The Court concluded that noise monitoring must take place as the project progresses (at [146]).

The Court looked at the effect of the project on the Maui’s Dolphin and other marine mammals. Maui’s Dolphin is particularly important because, due to its vanishingly small population of about 100, the death of one dolphin could threaten the survival of the entire species (at [165]). The Court noted that the number of Maui’s dolphin likely to enter the harbour would “at most be very low”, but decided that a monitoring regime should be instituted and “fine tuned” (at [168], [169]).

Another issue was the treatment of Maori cultural issues. Environs Holdings was a party to the case, as its owner, Te Uri o Hau Settlement Trust (TUOH), asserts a customary proprietary right to the seabed. TUOH argued that granting resource consents for the project would prejudice the claim it had lodged in the High Court asserting their rights. Environs also shared the concerns of the Court relating to navigation, fishing, and other issues.

Given s 59 of the Te Uri o Hau Claims Settlement Act 2002, by which the Crown acknowledged “the particular cultural, spiritual, historic, and traditional association of Te Uri o Hau” with the land, the Court accepted the strength of the claim to Maori cultural significance (at [181]). The Court found that, while Maori issues were “strongly in the mix”, Crest had “adequately and appropriately addressed” these issues through “extensive, considerable and meaningful” consultation and modification of its proposal (at [198]). The Court noted that TUOH was still unhappy and that Crest had “essentially stepped into the middle of this situation”, accidentally increasing tensions (at [175]).

In making its overall assessment, the Court proceeded tentatively, recognising the uncertainties identified and the need for further evidence. The Court stated that there were indicators "pointing powerfully in the direction of consent being granted", but cautioned that the issue of potential impacts on fisheries could result in rejection if not addressed to the Court's satisfaction (at [206], [211]).

The Court stated that the question of whether to grant consent turned on whether an Environmental Management Plan (EMP) could be developed to address the outstanding uncertainties regarding environmental impacts. The Court stated that "adaptive management", a concept expounded by a number of previous cases, was at the heart of the issue (at [223], [224]). Adaptive management refers to the adaptation of projects over time as environmental impacts become clearer. Adaptive management involves: collecting baseline data; setting objectives; planning for management of the resource; monitoring results; and changing the EMP to reflect new knowledge about impacts (at [226]). The Court noted that the objectives for adaptive management must be "reasonably certain and enforceable" (at [227] and *Lower Waitaki River Management Society Inc v Canterbury Regional Council* [C80/2009]), but cannot require Crest to have carried out all research in advance (*Director General of Conservation v Marlborough District Council* [C113/2004]).

## Mediation

Following the Interim Decision, the parties worked throughout 2010 to resolve the outstanding issues, a process which "occupied a timeframe that normally would be uncomfortably long for the Court" (Final Decision at [11]). The parties reached agreement in a number of areas, but thirteen issues remained unresolved. Court-sponsored mediation reduced this number to seven. The parties agreed that they wished to finally resolve the application by filing one further statement of evidence (on behalf of NRC) and legal submissions before seeking the Court's determination (at [13]).

## Final decision

The first outstanding issue to be determined by in the Final Decision was the minimum timeframes for monitoring in between implementation of stages of the project. Crest accepted that three years initial monitoring was appropriate, but argued that the period should not be so long for the implementation of the latter stages of its project, as sufficient data would then be available to make a realistic evaluation of the likely impacts of the next stage.

The second issue was whether the EMP should state that effects of the Project should be "less than minor" or "no more than minor", the former being a phrase discussed by the Court in the Interim Decision as not being contained in the RMA and more conservative than the alternative (at [19.4]). Crest sought "no more than minor", but accepted that the more conservative test may be necessary in the early stages of the project. The Court agreed and chose to tie the test to the adaptive management requirements, holding that "less than minor" should be the test in the first stage and "no more than minor" in the later stages.

Crest had requested that the EMP contain a copyright statement to limit the use of the final EMP by other parties (at [19.3]). This is understandable given that Crest is the "first mover" in this emerging industry and has expended considerable time and resources in obtaining consents. Crest may

be concerned that other companies seeking similar consents would be able to make use of their efforts for their own projects. The Court nonetheless felt it inappropriate to limit access to consent documents, as many parties have access rights to such documentation. The availability of the EMP will undoubtedly provide some useful insights to future tidal and wave energy project proponents.

A final issue of disagreement was the consent period. Crest sought a term of 35 years, the maximum under s 123(c) of the RMA, whereas Environs argued for a 10 year consent. Crest expressed its concern that the project would not be commercially viable if a 35 year term was not granted. Environs cited *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193 at 217 as authority for the proposition that commercial viability is not relevant to the decision to grant a resource consent (at [19.10]).

The Court noted its disappointment that this case had been cited, given the more recent and authoritative statement in *Ngati Rangitiki Trust v Genesis Power Ltd* [2009] NZCA 222. In that case, the clear inference was that commercial viability is a consideration: William Young P stated, "I cannot see a credible basis for concluding that an appropriate duration for consent was only 10 years ... it is inconceivable that the Environment Court consider that the [power station in question] should cease operating at the expiry of 10 years" (Final Decision at [44]).

*PVL Proteins Ltd v Auckland Regional Council* [2001] NZEnvC A061 also discussed by the Court (at [19.10]), was perhaps more explicit, stating, "an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicates a longer term". Noting that no basis had been provided in the evidence for only granting a 10 year consent, and that investment security is "not unimportant", the Court granted Crest the maximum term of 35 years.

## CONCLUSION

The Environment Court concluded that a resource consent cannot be denied simply because a proposal is novel and there are no comparable projects in existence (Final Decision, at [21]). The Court acknowledged the "extensive and constructive input" on the part of Crest, NRC and the Director General of Conservation, and the "interesting and important" nature of Crest's project (at [24]). The Court granted consents and recommended to the Minister of Conservation that he grant those consents requiring his approval.

The case suggests that the Court will take a pragmatic view, mindful of scientific uncertainty and the need for adaptive management, while also sympathetic to the applicant's need for investment security and aware of the broader benefits that marine energy projects can bring to the community. The case also provides some lessons for future applicants, such as the need for genuine and comprehensive consultation, a detailed EMP, and a cooperative, rather than adversarial, approach to the application process.

With growing interest in wave and tidal energy projects in New Zealand, the question of how such novel resource consent applications are likely to be dealt with by the Environment Court will be of importance. *Crest Energy* provides an optimistic indication of the willingness of the Court to facilitate the granting of consents for marine energy projects and some insight for marine energy companies into how best to approach the resource consent process. □