

What stinks and why

Air Quality Case Law Review

Oct 2016



Presentation Overview

1. Air Quality Good Practice Guides
2. Key principles
 - Internalising effects
 - Term of consent
 - Causation
3. Case studies



Good Practice Guides

- Assessing and Managing Odour
- Assessing and Managing Dust
- Assessing Discharges to Air from Industry

Ministry for the Environment (in press)



Air Quality Case Law

All about odour



Recommended consent condition

*There shall be no **noxious, dangerous,** objectionable or offensive [odour/dust] to the extent that it causes an adverse effect at or beyond the boundary of the site.*

Reasonable Person Test

- Offensiveness or objectionability cannot be measured by a machine...



Zdrahal v Wellington CC [1995]

Reasonable Person Test (2)

- If it is objectively offensive or objectionable, that is if reasonable ordinary persons would be offended or find it objectionable...

Offensive or objectionable

“unreasonable” odour beyond the boundary
= offensive and objectionable
= significant adverse effect

NZ Mushrooms v WRC [2007]

Good Practice Odour Assessment

Frequency

Intensity

Duration

Offensiveness/Character

Location



Courts like FIDOL

- *NZ Mushrooms v WRC [2007]*
- *Brooks v Western BOPDC [2011]*
 - adopts FIDOL methodology to assess noise
- *Crown v Interclean [2012]*
- *Waste Management v AC & Ors [2015]*

NZEnvC [001]

Waikato Env Protection Society & Gray v WRC & Matamata Piako DC & NZ Mushrooms

- Fertiliser for mushroom production
- Long running dispute, many appeals
- Concludes that there is a bottom line that the facility may not (continue to) discharge offensive or objectionable odours.



Internalising Effects: Six Principles

Identifies **six general principles** re odour:

1. Activities should internalise effects.
2. Greater expectation of internalisation for newly established activities.
3. Having done all that is reasonably achievable, total internalisation not feasible in all cases and no requirement in the RMA that it must be achieved.

Internalising effects (2)

4. The test for effect is a reasonable person
5. Odours beyond the boundary should not be offensive or objectionable
6. **Assessment must consider context** of environment as well as planning and other provisions

Term of Consent

- ARC granted consent for 10 years
- PVL Proteins appealed and asked for 35 years
- Court granted 15 years



Term of Consent (2)

Court accepted [32]:

*...**an activity** that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one **which generates fluctuating or variable effects, or which depends on human intervention or management** for maintaining satisfactory performance, **or relies on standards that** have altered in the past and may be expected to **change** again in future **should generally be granted for a shorter term.***

Term of Consent (3)

- Court held that review not sufficient where financial viability constrains ability to avoid, remedy or mitigate
- Term of a consent, and the ability of a consent authority to review conditions of the consent, provide different safeguards
- Noted lack of public participation in review process

Term of Consent (4)

Waste Mgmnt v AC & Ors [2015]

- Auckland Council granted land use consent to continue operating Redvale landfill
- Everybody appealed
- Env Court reaffirmed principles in *PVL Proteins v ARC [2001]*

Term of Consent (5)

- Explicitly considers operational performance as a relevant factor for decision on duration,
- Supported alignment (duration and performance criteria) with air discharge permit to improve certainty
- Considers 13 years is a significant period of time.

Causation



URS & Ors v ARC
[2009]

8 Principles of Causation

1. Does the evidence establish that the defendant contributed sufficiently to the **chain of causation** of discharge to justify a finding of guilt
2. Can be **more than one cause** of discharge **and** more than one **liable party**.
3. Unjust to prosecute only those at the final stage (of the chain of causation).

Causation (2)

- 4. Discharge may be unintentional
- 5. Statutory meaning of discharge is **engaging in activity which results in the emission of a discharge of a contaminant**
- 6. 'Causing to discharge' includes acts, **or omissions**, that are operative or effective factor in chain of causation

Causation (3)

7. Was person in a **position of control** (to cause discharge); not related to site at point or time of discharge but rather control of causative act or omission
8. Not necessary for person to control site to be liable for discharge at or from site

Case studies



Eltham EADER



Case Study: Eltham EADER (1)

- **STDC v TRC [2014]**
- 253 odour complaints
- Findings articulate difference between “poisoning” (as referred to in Schedule 2 of the Health Act 1956) and adverse health effects from odour [23]
- STDC fined **\$115,000**

Case Study: Eltham EADER (2)

- **Fonterra v TRC [2014]**

Fonterra held criminally liable for discharges to air from plant they did not own or operate

Fonterra: Causation 1

We find no straining of language in saying that a person allows a contaminant to escape who fails to take the precautions that a reasonably prudent person in the position would take to prevent that escape...

*It is sufficient if there is an awareness of facts from which a **reasonable person** would recognise that escape could occur. In that case failure to investigate and take appropriate preventative steps would amount to allowing an escape should it subsequently occur.*

McKnight v New Zealand Biogas Industries Limited

Fonterra v TRC [2015]

[48] *The factors of the volume and the nature of the material required that a reasonably prudent person would take a high degree of precaution in dealing with the buttermilk.*

[51] *What the evidence establishes is that Fonterra asked virtually no questions as to the processes to be adopted by the District Council and its advisers in processing the buttermilk.*

Fonterra: Causation 4

[22] *I consider that the underlying failure was a systemic shortcoming on the part of Fonterra which left its employees in a difficult if not impossible situation in trying to deal with the volume of waste product generated at Whareroa in September and October 2013. Fonterra must bear the full responsibility for that.*

FINED

\$192,000

Case Study: Craddock Farms (1)

- Proposal for 310,000 chicken laying farm
- 67 m between shed and nearest boundary
- 303 m to nearest house
- Separation distances:
 - 300 m District Plan
 - 400 m Regional Plan

Case Study: Craddock Farms (2)

- Application for consent declined Jan 2016 due to risk of offensive and/or objectionable odour
- **Craddock Farms Ltd v AC [2016]**
- Appeal declined in Mar 2016 on similar grounds

Case Study: Craddock Farms (3)

[95] We accept that the garden or curtilage of the house is effectively part of the house in terms of people's use of their property, **whether that house is located in a rural, rural-residential, or urban area.**

Case Study: Craddock Farms (4)

- [68] We remind ourselves that ... modelling results are not absolute, and may not be what will actually happen in reality.
- [71] We conclude that there are significant uncertainties...
- [99] We conclude the proposal could involve unacceptable levels of objectionable odour

Case Study: Craddock Farms (5)

- Regional plan separation distance: 400 m
- Craddock advanced merely status of activity
- Court disagreed:

[124] We think that is to unjustifiably downgrade the **importance of the consideration** that should be given **to separation** as an approach.

Case Study: Craddock Farms (6)

- District Plan separation distance: 300 m
- 9 properties (< 300 m) **not** notified
- s104(3)(d) must not grant consent if application should have been notified and was not
- Given outcome, Court let the matter rest

Favourite Quotes

...a court is not bound to adopt the view of an expert, even where they are uncontradicted

McGregor v Rodney DC [0204] NZRMA 481

On odour...

*It is perhaps somewhat like pornography
- you will know it when you see it or,
in this case, smell it.*

Judge Thompson

Thank you

Questions?

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Citations

All available at: nzlii.org except where highlighted

- Zdrahal v Wellington CC [1995] 1 NZLR 700
- PVL Proteins v ARC [2001] CRI-2006-069-001093
- Wilson and Rickerby v Selwyn District Council [2004] C23
- Taranaki Regional Council v Remediation NZ Ltd CRI-2010-043-002334
- Brooks v Western BOPDC [2011] NZEnvC 216
- Waikato Env Protection Society & Gray v WRC & Matamata Piako DC & NZ Mushrooms [2011] NZEnvC 001
- Crown v Interclean [2012] CRI 2011-092-016845
- Taranaki Regional Council v STDC CRI-2014-043-001196
- Taranaki Regional Council v Fonterra [2014] CRI-2014-043-001198
- Waste Management v AC & Ors [2015] NZEnvC 178 [interim], [2016] NZEnvC 43 [final]
- Craddock Farms Limited v Auckland Council [2016] NZEnvC 051