

An abstract graphic on the right side of the slide. It features a large, stylized sun in the upper left, with rays extending downwards. Below the sun are several white, fluffy clouds. To the right of the clouds is a blue and white striped lighthouse. A black line, possibly representing a kite string, curves from the top right towards the lighthouse. The background is a deep red color.

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WEBINAR

Climate Change Litigation Trends and Outlook

This webinar will begin shortly...

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Climate Change Litigation Risk

Agenda

11.00am Eoin Cassidy, Construction, Infrastructure & Utilities Partner, Mason Hayes & Curran LLP

11.05am John Kenny, BL

Climate Litigation in Ireland: Progress and next steps

11.15am Stephanie Lodola, Associate, Mason Hayes & Curran LLP

Climate Change Litigation Risk: Global Context

11.25am Jay Sattin, Senior Associate, Mason Hayes & Curran LLP

Climate Change Litigation Risk in Ireland: Development Context

11.35am John Kenny, BL

Climate Case Ireland: A year on

11.45am Q&A

Climate Risk Litigation

John Kenny
BL



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Climate Litigation in Ireland: Progress and next steps



John Kenny
6th July 2021

Starting point:

UNFCCC and Paris Agreement goals

- **UN Framework Convention on Climate Change (UNFCCC, 1992):**
 - Aims to stabilise GHGs at level that will “prevent dangerous anthropogenic interference with the climate system” (Art. 2)
 - 2°C above pre-industrial levels was for a while treated as the safe ‘line in the sand’; more recently, recognition that 2°C is not safe.
- Hence the **Paris Agreement (2015)** objective (Article 2(1)(a)):

“Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”
- We are currently at c.1.2°C above pre-industrial levels.

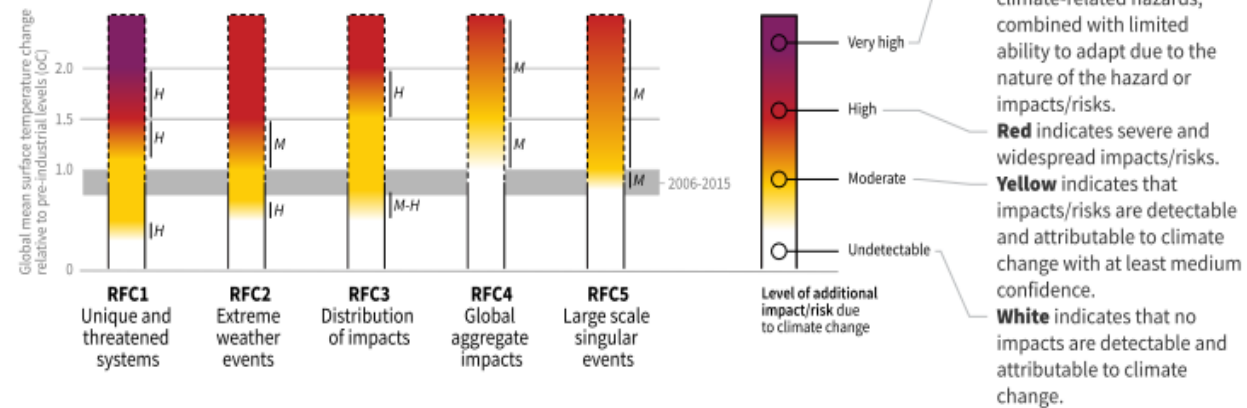
IPCC 2018

How the level of global warming affects impacts and/or risks associated with the Reasons for Concern (RFCs) and selected natural, managed and human systems

IPCC (2018) SR15 SPM

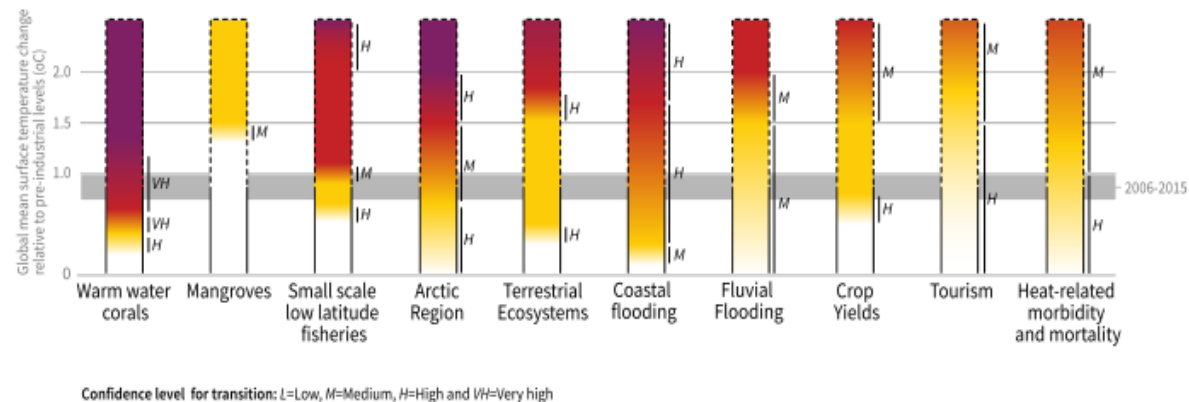
Five Reasons For Concern (RFCs) illustrate the impacts and risks of different levels of global warming for people, economies and ecosystems across sectors and regions.

Impacts and risks associated with the Reasons for Concern (RFCs)



IPCC 2018: “Coral reefs would decline by 70-90 percent with global warming of 1.5°C, whereas virtually all (> 99 percent) would be lost with 2°C.”

Impacts and risks for selected natural, managed and human systems



- As temperatures increase climate change is resulting in large, abrupt and irreversible changes to which parts of society and nature will not be able to adapt.
- The IPCC assesses that some of these tipping points might have already been triggered at the current level of warming and that the risks of these tipping points occurring greatly increases between 1°C and 2°C of warming.
- Per the WHO, 250,000 additional human deaths are estimated *each year* between 2030 and 2050 as a result of climate change.
- Per Ireland's EPA, *"For warming levels beyond this range...the world as we know it would be bound to disappear."*
- If no additional mitigation efforts take place, average temperatures will increase by more than 4°C by the end of the century, and will continue to rise after that.

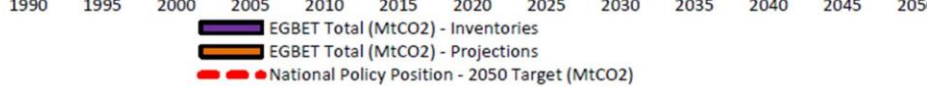


Agreed impacts: global to local E.g. Right to family life & home

- **IPCC SR15: Between 1 and 1.5°C** of warming, the risk of **extreme weather events** such as heat waves, heavy rain, drought and associated wildfires and coastal flooding, which threaten human health, livelihoods, assets, and ecosystems **increases from moderate to high**.



EPA: hundreds of square kilometres of coastal land at risk of inundation due to sea level rise in Ireland; “more extreme storm activity with the potential to bring the devastation of storm surges to the coast of Ireland”



What's needed?

- At UNFCCC level, countries (including Ireland) repeatedly endorsed the IPCC's advice from its Fourth Assessment Report (2007) that GHG emissions reductions needed from developed countries of:
 - **25-40% by 2020 (compared to 1990);** and
 - **80-95% by 2050 (compared to 1990)**

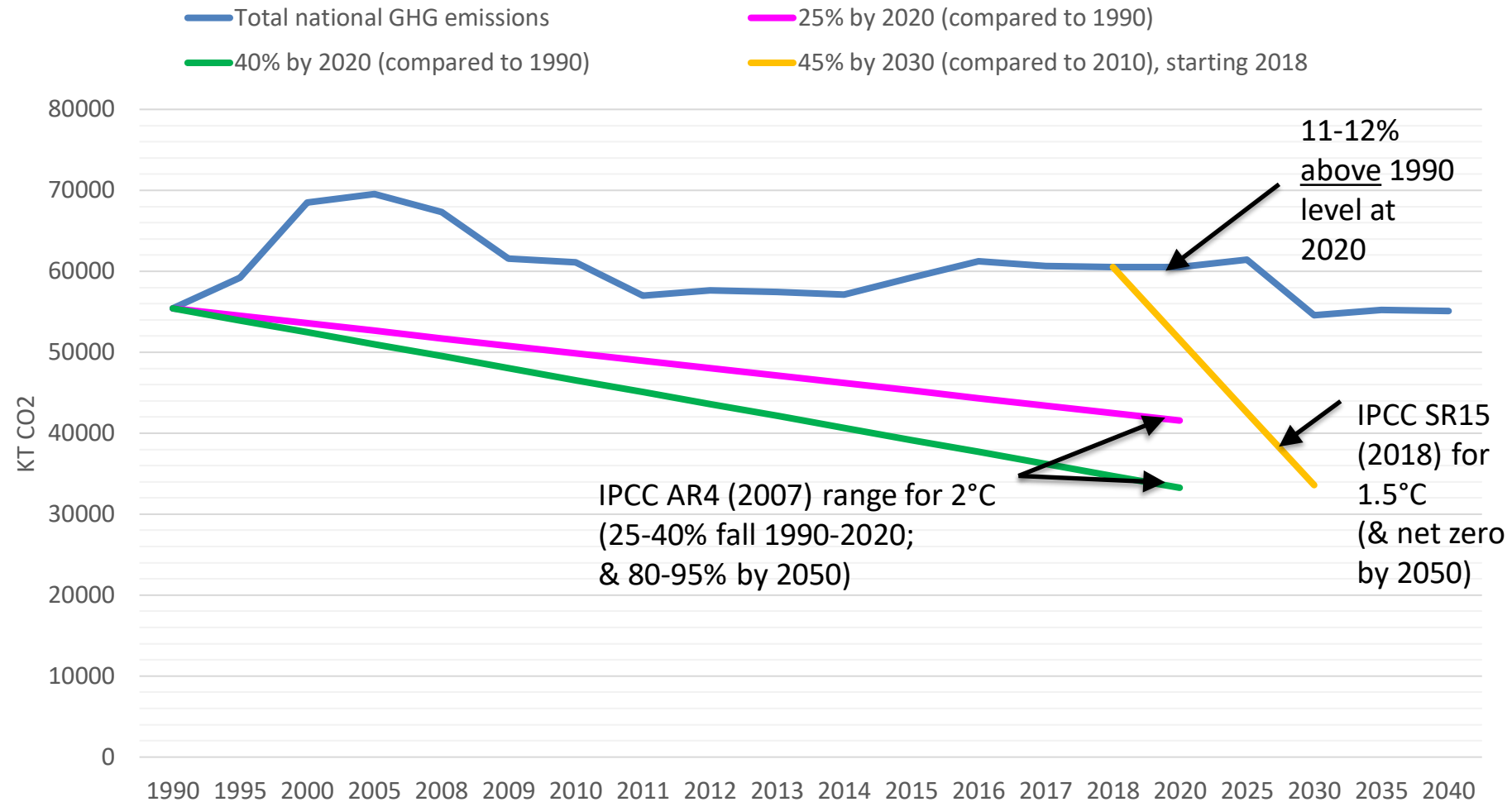
“Ireland’s greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Instead of achieving the required reduction of 1 million tonnes per year in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year;

Climate change is already having an impact in Ireland...Ireland is completely off course in terms of its commitments to addressing the challenge of climate change.”

(Climate Change Advisory Counsel, Annual Report 2018)

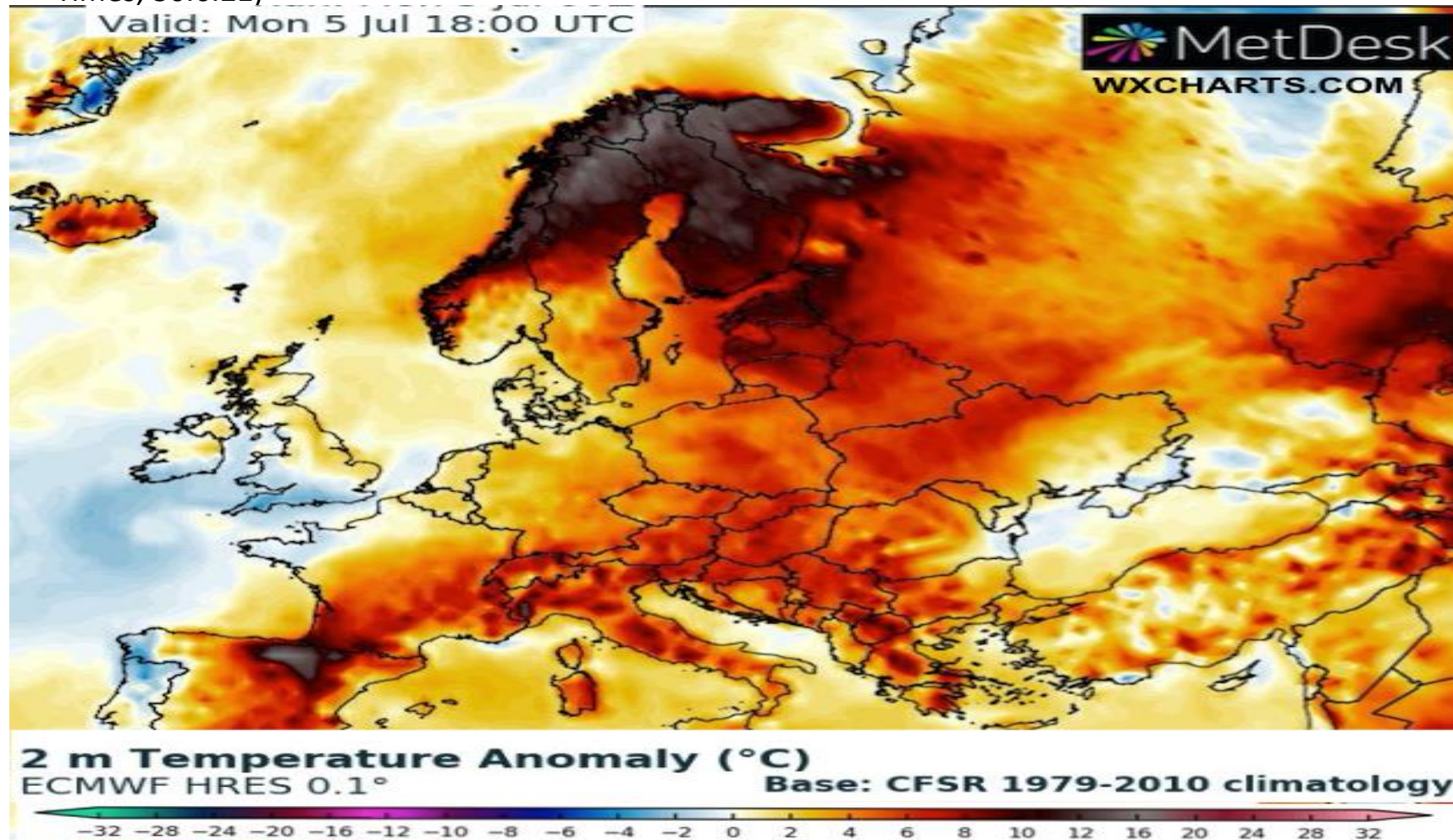


Ireland's GHG emissions vs. what's needed per IPCC



EPA figures: [1990-2018](#) (provisional), [2020-2040](#) (projected WAM)

Practically no one has articulated the reservation that it may not make sense for Ireland to be in the frontline of the international climate change drive. There is another way of looking at our national interest... (Michael McDowell Irish Times, 30.6.21)



Climate Risk Litigation

Stephanie Lodola
Solicitor, Mason Hayes & Curran LLP



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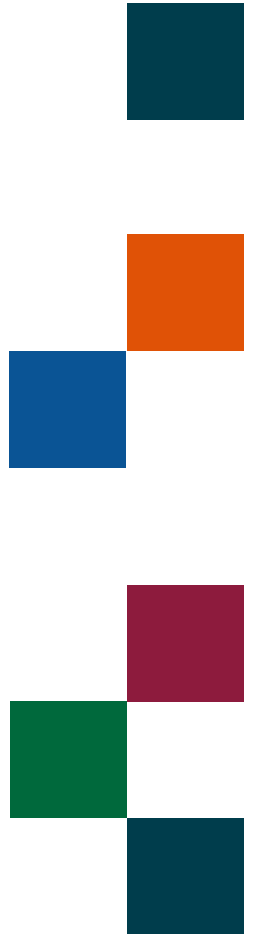
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Recent trend towards climate litigation

- Through litigation, citizens and environmental groups are increasingly holding their governments to account on climate action and the commitments made under the Paris Agreement.
- Public bodies and private entities will need to be aware of now and in the future.
- Advancements in science have made it easier to show how climate change can have dangerous effects.



Climate Litigation in Europe

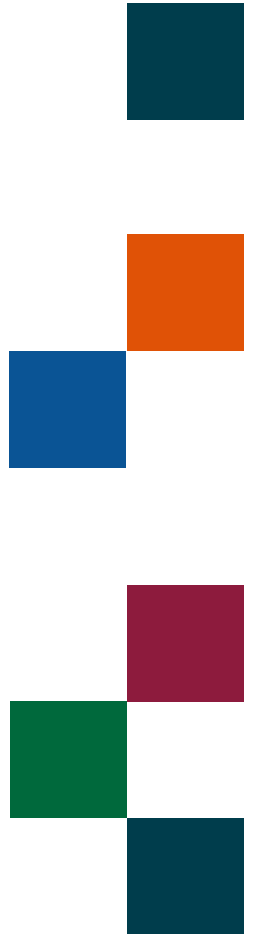
- Cases have been successfully brought in countries such as the Netherlands, France, Belgium and Germany.
- These cases show that climate litigation is primarily being brought on two grounds:
 - 1) failure to adhere to the nationally determined contributions committed to under the Paris Agreement, and
 - 2) failure to reduce the risk of dangerous climate change which will infringe human rights

The Urgenda Climate Case

- Seminal case on climate litigation.
- The Dutch Supreme Court held that the Dutch government have a legal duty to its citizens to prevent dangerous climate change.
- Soon after, further climate litigation cases followed in Germany, France and Belgium.

Neubauer, et al. v. Germany

- Concerned a challenge to Germany's Federal Climate Protection Act, the Bundesklimaschutzgesetz ("KSG").
- The German Federal Constitutional Court found that the KSG failed to set out sufficient provisions for emission reductions beyond 2030.
- This case requires the legislature to set clear provisions for emission reducing targets from 2031 onward.



Recent Belgian Case

- The Brussels Court of First Instance held that the government breached the Belgian Civil Code, the ECHR and the UNCRC by failing to take the necessary measures to prevent the impacts of climate change on the Belgian population.
- Key difference from the Urgenda case – unlike Urgenda, the Brussels Court refused to order the government to meet stricter emission reduction targets.
- This was due to concerns surrounding the separation of powers doctrine.



Dutch Private Sector

- May 2021 - the Hague ordered Royal Dutch Shell to reduce its global carbon emissions by 45% by 2030 compared with 2019 levels.
- This covers not only emissions of the Shell group (globally), but also the emissions of its suppliers and its customers.
- The court found that Royal Dutch Shell had a duty of care towards those affected by its acts / omissions.



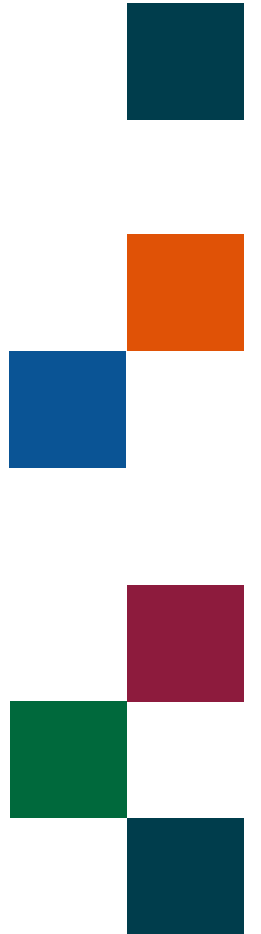
Climate Litigation Worldwide

- Columbia: Successfully brought a case against their government's failure to reduce deforestation
- New Zealand: The New Zealand Minister for Climate Change found to be acting unlawfully by failing to consider whether to review the country's climate change targets for 2050 after the publication of the most recent IPCC Assessment Report.
- Nepal and Pakistan: Successful cases against the governments of Nepal and Pakistan on a basis of the protection of constitutional rights and, in the case of Nepal, not meeting the commitments made under the Paris Agreement.



Conclusion

- These global cases highlight that governmental climate policy is not immune from scrutiny.
- The Court can intervene to determine whether the governments have engaged in wrongful conduct in pursuing their climate policy.
- This growing trend towards climate litigation is one that public bodies and private entities will need to keep an eye on now and in the future.



Climate Risk Litigation

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Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695: extending a planning permission

- FCC had granted a 5-year extension to a 10-year planning permission to construct a new runway at Dublin airport under section 42 Planning and Development Act 2000
- FIE alleged that FCC had breached s15 of CALCD Act 2015
- The Court held s15 CALCD had not been breached. FCC determined that the potential implications of aviation are being addressed more widely through a collaborative industry-based and multilateral approach.

Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695: extending a planning permission

- FIE also complained that FCC had interfered with their “constitutional rights” when granting the planning permission extension
- The Judge held that there is an unenumerated “*constitutional right to a healthy environment*” which was a derived right from other rights set out in the constitution.
- FIE was considered to have standing.
- Although s42 does not allow for public participation, this is “nothing more *than a proper and proportionate legislative interference*” with that constitutional right.

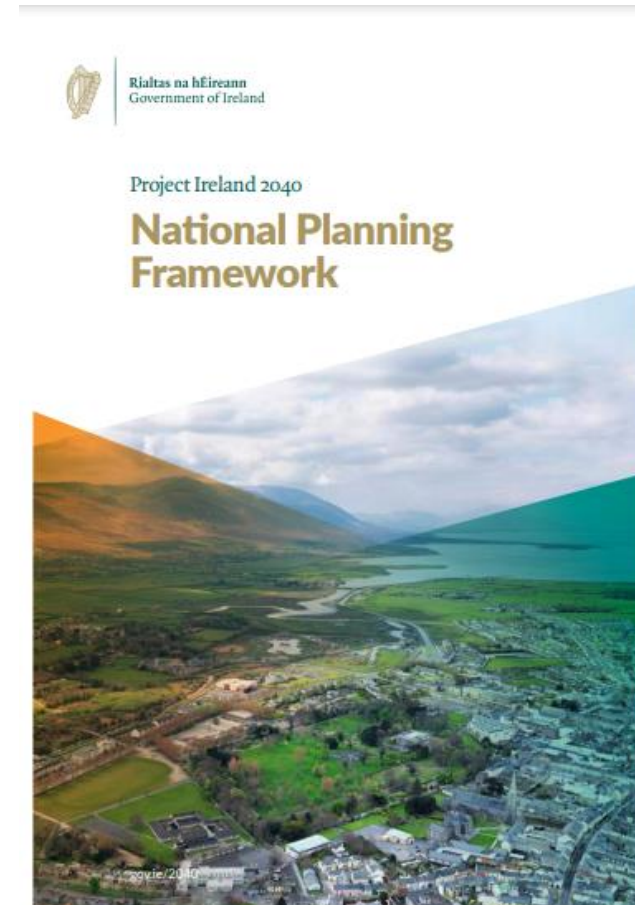


Friends of the Irish Environment CLG v Ireland & Ors Shannon LNG Limited [2021] IEHC 177

- FIE alleged that Ireland's decision not to veto the decision to include that project on the list was a breach of the State's obligations under the CALCD Act 2015.
- The Judge considered the power of a "veto" to be exercisable by the Government and not by the Minister
- However section 2 expressly provides that nothing in the Act itself shall operate to affect inter alia existing or future obligations of the State under the law of the European Union

Friends of the Irish Environment CLG v Ireland & Ors [2020] IEHC 225: National Planning Framework

- FIE challenged the validity of the Strategic Environmental Assessment of the National Planning Framework.
- The applicant wanted a quantitative assessment of the likely effect of the implementation of the NPF on climatic factors but the Court found that was not required, as the NPF is a policy document. It does not give permission for any specific development or project. Also insufficient certainty on what can be measured in the NPF.



An Taisce vs An Bord Pleanála & Ors: Edenderry Power Project [2015] IEHC 633

- In November 2013, the Board granted planning permission for the continued use and operation of Edenderry Power Plant, which used a mixture of biomass and peat as fuels
- Under s171A of PDA 2000, an EIA includes “*an examination, analysis and evaluation, carried out by the ...the Board...in the light of each individual case, the direct and indirect significant effects of the proposed development on the...climate*”.
- Peat was intended to be used for the continued operation
- The Board had not carried out an assessment of the indirect significant environmental effects of the use of peat as a fuel.
- The Court held this form of assessment was not too remote and should have been carried out before permission was granted

An Taisce vs An Bord Pleanála & Ors: Kilkenny Cheese Factory [2021] IEHC 254

- In June 2020, the Board granted permission on appeal for a cheese manufacturing plant and associated works and infrastructure.
- The applicant was Kilkenny Cheese Limited (a joint venture between Glanbia Ireland and a Dutch company, Royal A-Ware)
- About 4,500 dairy farm suppliers
- The applicant claimed that the Board was required to take into account the indirect effects of individual farms when making its decision (i.e. effects such as GHG emissions from the livestock).



An Taisce vs An Bord Pleanála & Ors: Kilkenny Cheese Factory [2021] IEHC 254

- The Judge dismissed the application and agreed that it “*would be too remote*” to take into account those effects “*where such production is sufficiently removed from the project as not to be capable of assessment in site-specific terms are not to be considered part of the project for the purposes of EIA or AA. Such effects need to be considered on a more programmatic basis and hence lie outside the direct purview of grounds for challenging an individual planning decision.*”

Statutory requirements

- Section 143 of the Planning and Development Act 2000 (as amended), ABP is required when performing its functions to have regard to “*the policies and objectives for the time being of the Government*”.
- ABP refused to extend the duration of a planning permission for the co-firing of peat with biomass, due to the fact that the biomass would be largely imported and transported to the midlands by HGV from ports
- Planning authorities requirement under s10(2)(g) PADA to include measures in a development plan to reduce GHG emissions, and section 12 requires compliance with statutory obligations when making a development plan

Conclusion

- The High Court has allowed planning authorities and ABP a wide discretion to discharge its duty under section 15 of the CALCD 2015
- To “have regard” to the Government’s plans for reducing GHG emissions, has included referring to Government plans, or industry initiatives, that may help to reduce GHG emissions
- The CALCD Bill 2021, if enacted, will require “a relevant body shall, in so far as practicable, to perform its functions in a manner consistent with... the national climate transition objective...”.
- Local authorities will need to accommodate ambitious renewable energy plans



Climate Risk Litigation

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Case commenced:
October 2017



High Court judgment:
September 2019
Supreme Court judgment:
July 2020

CLIMATE CASE IRELAND

- Administrative law challenge to Ireland's **2017 National Mitigation Plan**, alleging that the decision to adopt the Plan. Counter-intuitively - it allowed for an increase in the emissions:
 1. **Did not comply with the Climate Act 2015;**
 2. **Breached Ireland's Constitution:** right to life; right to bodily integrity; 'unenumerated' right to an environment (NB. when case launched in 2017, no such right had been recognised in Ireland)
 3. **Breached human rights law:** ECHR - right to life (Art 2); right to respect for private and family life and home (Art 8) (NB. when case launched, *Urgenda* judgment at first instance was out but no finding (yet) of a direct breach of ECHR)
- Case was inspired by the *Urgenda* litigation and was built - very deliberately - on IPCC science & other authoritative, effectively *incontestable* sources of evidence.

October 2018: Urgenda, Court of Appeal

Direct breach of ECHR

- Regarding the ECHR:

*“the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the **serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.**”*

- Court of Appeal found a direct breach of human rights obligations (in contrast to first instance decision of District Court).
- Clearly an important precedent for other climate litigation globally, particularly in countries that are party to the ECHR such as Ireland.



The campaign

>20,000 supporters!

Tell the Government:

“This case is in my name!”

Add your support today

Sign here

20996 supporters

High Court hearing in January 2019



....but disappointing judgment in September 2019

A socially-distanced 7-judge Supreme Court hearing during a global pandemic!





Supreme Court's judgment: July 2020

- Unanimous judgment delivered by Chief Justice
 1. Plan “falls well short” of requirements of Climate Act 2015 so is quashed (participation, **substantive review**)
 2. As a corporate body, FIE does not enjoy standing to litigate the rights aspects of the case
 3. There is no ‘unenumerated’ or derived constitutional right to a healthy environment in the Constitution (either superfluous or excessively vague)

Next Steps – ‘Vertical’ climate litigation

- The message: Governments can be and will be held accountable in court for their climate obligations.
- Future long-term climate strategies will need to:
 - cover entire period to 2050 & will need to be sufficiently detailed **and credible**, because it is **impossible** to achieve longer-term targets and realize rights whilst ignoring what the science tells us about the carbon budget & the emissions reductions needed in the short-term as well as the medium and longer term.
 - in addition, potentially run gauntlet of a **rights-based Climate Case 2.0** brought by an individual or individuals.
- The next National Mitigation Plan will have to identify concrete reductions – 51% reduction by 2030 – if it doesn’t...



litigation – Game changer

- Holding private entities responsible for the consequences of their GHG emissions.
- Class actions – serious CSR implications whether successful or not.
- RDS had elaborate climate change policy including net zero by 2050%
- Not ‘attribution problem’ –

“...the Shell group is responsible for significant CO2 emissions all over the world. The total CO2 emissions of the Shell group...exceeds the CO2 emissions of many states, including the Netherlands. It is not in dispute that these global CO2 emissions of the Shell group contribute to global warming and climate change in the Netherlands and the Wadden region.”

- Suppliers + Primary Activity + End Users



- Cliff edge reductions incompatible with ECHR

“In answering the question what can be expected of RDS, the court considers that an important characteristic of the imminent environmental damage in the Netherlands and the Wadden region at issue here is that every emission of CO₂ and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.”

- Application to Ireland
Aviation/Agriculture/Power...



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