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Greenhouse gases and climate change – relevance to discharge permit application

Editorial by Ceri Warnock

The decision of *Greenpeace New Zealand v Northland Regional Council* considered to what extent, if at all, consent authorities are permitted to take into account climate change factors when considering applications for discharge of greenhouse gases.[1]

In 2005, Northland Regional Council and Whangarei District Council granted consent to Mighty River Power Limited (Mighty River) authorising the operation of Marsden B, a coal-fired electricity-generating station. Greenpeace New Zealand lodged an appeal against this decision. The notice of appeal averred error on the part of the consent authorities in, inter alia, finding that "s 104E specifically prohibits them from considering the effects of climate change and in not considering the benefits to be derived from the use and development of renewable energy".[2] Fundamentally, Greenpeace argued that the decision failed to pay regard to s 7(i) and (j) of the Resource Management Act 1991 (RMA):

> **7 Other Matters**
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to —
> ...
> (i) the effects of climate change:
> (j) the benefits to be derived from the use and development of renewable energy.

Mighty River applied to strike out the grounds of the appeal relating to the effects of climate change on the basis that they "disclosed no reasonable or relevant argument" (in accordance with s 279(4)(b) of the RMA) and were "clearly untenable".[3] The Environment Court Judge struck out the offending parts of the notice. Greenpeace appealed to the High Court.

Submissions

Counsel for Mighty River advocated an interpretation of s 104E of the RMA that restricted consent authorities' consideration of the climate change effects of greenhouse gas discharge to applications specifically concerning renewable energy projects. As Mighty River's proposal did not concern a renewable energy project, counsel submitted that the consent authority was not entitled to consider the effects of the discharge of greenhouse gases from Marsden B and s 7(j) was rendered irrelevant (at paras [31] and [37]). Further, counsel averred that "the 2004 Amendment made plain that the effects of the discharge of greenhouse gases on climate change are to be dealt with under the Act only at a national level" (at para [35]).

Counsel for Greenpeace submitted that "the 104E exception applies to applications whether for renewable or non-renewable energy proposals" (at para [18]) and that "s 7(j) required all benefits of renewable energy to be considered in all resource consent applications not just those limited to reducing climate change" (at para [17]). In the original notice of appeal, Greenpeace posited an economic argument submitting that, as the costs of greenhouse gas emissions are not internalised by coal-fired energy production, the coal industry is effectively subsidised. This subsidy makes renewable energy production, by comparison, less competitive and hinders the development of such (see Environment Court judgment at para [12]). Counsel for Greenpeace returned to the issue of macroeconomic considerations in the High Court, averring that Greenpeace should be permitted to adduce evidence on "relevant macroeconomic effect" at a substantive hearing, and that this was a valid factor for the consent authority to have regard to (at para [28]).

Decision

The High Court noted (at para [41]) that the preliminary part of s 104E sets out three criteria for consent applications that must be met before the section comes into play. First, the application must be for a discharge or a coastal permit. Secondly, the proposed activity must contravene ss 15 or 15B (note that s 15(1)(c) of the Act is relevant in the present case not s 15(2) as Williams J seems to suggest in para [41]). Finally, the activity must contravene ss 15 or 15B by proposing a discharge of greenhouse gases into air. If an application qualifies on all three limbs, the Court noted (at para [42]) that:

> the section requires the consent authority to have no regard to the effect of the discharge of those greenhouse gases on "climate change" as defined in s 2.

The Court, however, then acknowledged the conflict between the first part of s 104E and s 7(i) and concluded that:

> such conflict is to be resolved by the exception to 104E [contained in the final part of the section] which permits the consent authority to consider an application which otherwise qualifies under the earlier terms of the section to the extent that the application proposes the use and development of renewable energy and thus would enable reduction of the discharge into air of greenhouse gases either in absolute terms or terms relevant to the use and development of non-renewable energy (at para [44]).

Accordingly, the Court (at para [49]) mandated that consent authorities should:

take into account that a "reduction in the discharge into air of greenhouse gases" arising from the "use and development of renewable energy" is an activity which

is beneficial in terms of s 7(j). It must therefore be the case that one of the factors which the consent authority is entitled to take into account in considering whether to grant discharge (or coastal) permits for activities which relate to the "discharge into air of greenhouse gases" is whether the application will result in the beneficial "reduction in the discharge into air of greenhouse gases" because the application includes the "use and development of renewable energy".

Further, the Court stated (at para [50]) that:

> [i]f the application for a discharge permit which otherwise qualifies under s 104E includes no proposal which, if consented to and built, would enable a "reduction in the discharge into air of greenhouse gases" by the "use and development of renewable energy" then that, too, is a factor the consent authority is entitled to take into account in deciding whether to exercise its discretion and grant resource consent. Thus the consent authority's discretion to grant resource consent for discharge permits which otherwise qualify under s 104E which include a proposal which, when built, would result in a "reduction in the discharge into air of greenhouse gases" by the "use and development of renewable energy" are more likely to be granted than discharge permit applications which otherwise qualify under s 104E but include no proposal incorporating those features. To that extent – and to that extent alone – the consent authority may "have regard to the effects of such a discharge on climate change".

The Court determined that such an interpretation "accords with the final provisions of s 104E" (at para [51]), accords with s 70A (at para [53]), and also s 7 (at para [54]). In practice, the Court noted that the final part of s 104E bestows upon consent authorities:

> power to balance a proposal involving the "use and development of renewable energy" which "enables a reduction in the discharge into air of greenhouse gases" against the proposal itself which must involve the "use and development of non-renewable energy" (at para [51]).

The Court (at para [57]) confirmed that the comparative exercise would not concern "the entire discharge from the proposing user of non-renewable energy" but would only involve consideration of the discharge of greenhouse gases. The view that "the thrust of the 2004 Amendment was to put regulation of the discharge into air of greenhouse gases in the national arena" was accordingly "only partially correct" (at para [57]). The Court found that the Environment Court fell into error in determining that the effects of discharge on climate change could only be considered in applications for projects concerning renewable energy. Williams J overturned the decision of Environment Court and directed the parties to redraft the grounds of appeal in accordance with the judgment given.

Comment

The High Court has provided a thought-provoking, albeit difficult, judgment on the interrelationship between sections in the RMA relevant to climate change issues. In particular, the Court has provided an answer to the seemingly intractable contradiction contained within s 3 of the Resource Management (Energy and Climate Change) Amendment Act 2004 and between ss 7 and 104E of the RMA.

The Court accepted that s 104E has a confining function, however, this does not equate to debarring a consent authority from any consideration of the effects of greenhouse gas emissions on climate change. The section does, however, limit the consent authorities' consideration of the link between greenhouse gas emissions and climate change. Thus, a consent authority is not entitled to consider the relationship between greenhouse gas emissions and climate change in a wholesale manner via a wide-ranging review of the issue but rather to take as a given the fact that a reduction in emissions brought about by the use of renewable energy is of benefit. Thereafter, consent authorities are limited in their decision making, to taking into account "whether the application will result in the beneficial 'reduction in the discharge into air of greenhouse gases' because the application includes the 'use and development of renewable energy'" (at para [49]). This consideration is to be included in decision making relating to both applications concerning renewable energy projects and, by virtue of the comparative exercise set out in s 104E(b), in those concerning non-renewable projects.

The decision is of particular interest with regards to two issues. First, the High Court's approach to s 104E(b) is of importance and likely to cause controversy. Rejecting an interpretation of s 104E(a) and (b) as delineating applications for various renewable energy projects (for example s 104E(a) may be applicable to wind farms and subs (b) applicable to bio-fuel plants), the Court read s 104E(b) as bringing into play applications for non-renewable energy projects. In essence, the Court concluded that s 104E contains a comparative exercise that permits consent authorities to balance the benefits, in terms of greenhouse gas reduction, of a hypothetical renewable energy project against the actual application concerning a non-renewable energy project (at para [51]).

A number of questions flow from this conclusion. In using a hypothetical renewable energy project as a counterpoint to a non-renewable energy proposal, the question is: What exactly does the consent authority have to weigh in the balance? Is it simply a matter of taking note that a non-renewable energy proposal will emit greenhouse gases and this is a negative factor to be incorporated into the equation, or will the authority have to go into detail in comparing the actual quantity of greenhouse gases emitted? If the latter approach is correct, it must be asked: Which type of renewable energy project does one use as a comparison? There are many forms of renewable energy production and, depending on the technology chosen, there will be varying quantities of greenhouse gases emitted from renewable energy projects. Theoretically, such an exercise may be facilitated by reference to local authority planning

documents. What do relevant planning documents provide for? The Court confirmed that s 70A permitted local authority promulgation of rules concerning the use and development of renewable energy and that the focus of this section is to prevent local rules from being more stringent than

national rules when introduced (at para [53]). In practice, however, this conduit may prove to be of limited assistance in formulating the appropriate equation. It is difficult to envisage local authorities planning for specific renewable energy projects, other than to highlight that applications are to be considered on a case-by-case basis.

The second area of likely debate concerns Greenpeace's argument that all the benefits flowing from the use and development of renewable energy, not just climate change benefits, should be taken into account in any application for a permit. In the absence of an order, it is difficult to categorically state that the Court rejected this argument, but this does appear to be the case when one considers para [50] (see above) and the judicial comments in para [61], where Williams J stated that "[this judgment] may not go as far as Greepeace wished in defining the issues which can be taken into account in permit applications qualifying under s 104E".

Thus, if consent authorities are prevented from considering other benefits of renewable energy in applications for non-renewable energy proposals, they will be unable to take into account the economic factors that Greenpeace argued for. If this is correct, it will not be possible for consent authorities to consider, for example, that a proposal may ultimately increase the number of "carbon credits" the government must acquire to ensure compliance with New Zealand's international obligations. By way of note, it is of course possible by virtue of the s 88(2) "assessment of environmental effects" for all the benefits of renewable energy use and development to be taken into account in an application specifically concerning a renewable energy project.

The aforesaid queries aside, however, fundamentally, the High Court has rejected the contention that local authorities have no role to play in the mitigation of discharges of greenhouses gases other than via consent applications for renewable energy. Mighty River has consistently argued that measures to achieve climate change mitigation are within the sole preserve of central government. At Environment Court level, Mighty River prayed in aid extracts from Hansard, 26 February 2004, concerning the third reading of the Resource Management (Energy and Climate Change) Amendment Bill.

> The Associate Minister of Energy stated that:
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> the Government has chosen to control the impact of climate change from greenhouse gas emissions at National level. By removing the ability for regional councils to apply controls, this Bill removes the potential ability for duplication and unnecessary cost to occur and the potential for local controls to conflict with National objectives.[4]

Mighty River therefore argued that as the government has not promulgated the national environmental standards suggested by s 104F, this removes consent authorities' ability to consider the contribution to climate change of greenhouse gases emitted by non-renewable energy projects. The argument is an interesting one but may prove ultimately to be a double-edged sword for Mighty River if the High Court reasoning is upheld. To equate the imperative of the issue being dealt with at a national level with the necessity for the promulgation of central government planning instruments is to miss a subtle point. The aim is to ensure that the matter is dealt with on a uniform basis, nationwide. Statutory imperatives can provide nationwide uniformity. The High Court's interpretation of s 104E, and its interrelationship with s 7, meets this objective. Thus, the very fact that all consent authorities have a statutory duty to take note of first, the inherent undesirability of industrial discharges (s 15(1) as opposed to s 15(2)), secondly, the de facto and de jure undesirability of greenhouse gas emissions and thirdly, the utilisation of the s 104E comparative tool in consent applications, has been brought about by a national instrument providing for uniformity, the Resource Management Act.

Footnotes

1. *Greenpeace New Zealand v Northland Regional Council* (High Court, Auckland, CIV 2006-404-4617, 12 October 2006, Williams J).
2. Para 8 of submission reproduced in *Greenpeace New Zealand Inc v Northland Regional Council* (Environment Court, Auckland, A94/06, 11 July 2006, Judge Newhook) at para [12].
3. *Greenpeace New Zealand Inc v Northland Regional Council* (Environment Court, Auckland, A94/06, 11 July 2006, Judge Newhook) at para [4]. See also *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).
4. Reproduced in *Greenpeace New Zealand Inc v Northland Regional Council* (Environment Court, Auckland, A94/06, 11 July 2006, Judge Newhook) at para [15].