IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-004617

	BETWEEN	GREENPEACE NEW ZEALAND Appellant
	AND	NORTHLAND REGIONAL COUNCIL Respondent
	AND	MIGHTY RIVER POWER LIMITED Applicant

Hearing: 25 September 2006

Appearances: DM Salmon and M Heard for Appellant
RM Bell for Respondent
BIJ Cowper and JC Campbell for Mighty River Power
(Party appearing under Resource Management Act 1991 s 301)

Judgment: 12 October 2006 at 12:00m.d.

JUDGMENT OF WILLIAMS J

This judgment was delivered by
Hon. Justice Williams
on

Thursday, 12 October 2006 at 12:00md

pursuant to R 540(4) of the High Court Rules

……..
Registrar/Deputy Registrar
Date: ……...

A The appeal is allowed with leave reserved to the parties to file memoranda as to the precise terms of the order resulting from this judgment if counsel are unable to agree.

B If costs are appropriate, they are to be sought and opposed in accordance with the timetable in para [62].

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Introduction and Issue

[1] This appeal against a decision of the Environment Court delivered on 11 July 2006 concerns the correct interpretation of the Resource Management Act 1991 s 104E.[1] The section reads:

> **104E Applications relating to discharge of greenhouse gases**
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> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or

[1] All section references in this judgment are to the Resource Management Act 1991 unless otherwise specified.

(b) relative to the use and development of non-renewable energy.

[2] The appeal arises because Mighty River Power, a party which appeared pursuant to s 301, applied to the respondent, the Northland Regional Council, for resource consent to commission its unused facilities at Marsden Point near Whangarei commonly referred to as "Marsden B" as a coal-fired power station. It is common ground that Mighty River Power's application does not involve the use or development of renewable energy. It says therefore, that there is no extent to which the use of Marsden B as a coal-fired power station would enable a reduction in greenhouse gas emissions and accordingly, in what it says are the plain terms of s 104E, its application involves no scope for consideration of the effects of the discharge of greenhouse gases and the section is inapplicable.

[3] The contrary view, propounded by the appellant, Greenpeace New Zealand, is that the exception in s 104E applies to all resource consent applications that would otherwise contravene ss 15 and 15B relating to the discharge of contaminants and harmful substances into the environment regardless of whether such applications are made in respect of renewable or non-renewable energy projects and there is no basis in the exception to s 104E justifying restricting it to applications for renewable energy projects, particularly having regard to the new mandatory factors required to be taken into account under s 7 in resource consent applications.

[4] Mighty River Power's application was approved by a Joint Hearing Committee of the Northland Regional and Whangarei District Councils on 22 September 2005. The point currently in issue does not appear to have been extensively canvassed at that hearing.

[5] Greenpeace and others who oppose Mighty River Power's application appealed the Commissioners' decision to the Environment Court, but on 21 February 2006 Mighty River Power applied to that Court to have certain aspects of Greenpeace's appeal struck out on the basis it disclosed no reasonable or relevant case in respect of the proceedings (s 279(4)). That subsection, it is agreed, largely mirrors R 186 and imports the well-settled principles applying to striking-out applications.

[6] Decided by the Environment Court, by agreement between the parties, on submissions filed between 20 March 2006-23 June 2006, the application was granted in large part by striking out paras 8 and 11(h)(v) of Greenpeace's appeal and amending para 11 (h)(iv). It is against that decision that this appeal is brought.

Relevant Statutory provisions

[7] The relevant definitions include the following:

> "Climate change" means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

And "greenhouse gas" is defined as having the meaning given by the Climate Change Response Act 2002 s 4(1) which lists such gases in Annex A. It is unnecessary to detail those since Mighty River Power accepts that Marsden B's discharge would include greenhouse gases.

[8] "Renewable energy" means energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources.

[9] All those definitions were enacted by the Resource Management (Energy and Climate Change) Amendment Act 2004 s 4 with effect from 2 March 2004.

[10] Section 7 in Part 2, the "Purpose and Principles" of the Act, requires everybody exercising functions and powers under the Act in relation to the use, development and protection of resources to have particular regard to the "effects of climate change" (s 7(i)) and the "benefits to be derived from the use and development of renewable energy" (s 7(j)), both those additional purposes and principles being inserted by s 5(2) of the 2004 Amendment.

[11] Section 15(2) debars the discharge of contaminants into air or onto land in a manner that "contravenes a rule in a regional plan … unless the discharge is expressly allowed by a resource consent or regulations". The reference to "regulations" is to s 43 which permits the Governor-General to make national

environmental standard regulations for, amongst other things, contaminants and air quality. Counsel advised no national environmental standards relevant to the present appeal have as yet been promulgated. Sections 43A and 43B make clear that, in the event of conflict between national environmental standards and local rules or resource consents, the former are to prevail, or, if the latter are more stringent, they may prevail only if the national environmental standard expressly allows.

[12] The rules relating to the discharge of greenhouse gases are covered by s 70A which says that a Regional Council -

> …when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

[13] Section 87 defines "resource consent" as including a "discharge permit" and a "coastal permit" that is a "consent to do something … that otherwise would contravene s 15" or, for coastal permits, s 15B.

[14] And s 70B requires regional councils to make rules no more or less restrictive than national environmental standards to "control the effects on climate change of the discharge into air of greenhouse gases" if and when such a standard is made.

Decision under appeal

[15] After normal introductory remarks including recounting the Court's striking-out jurisdiction and relevant statutory provisions, a major portion of the judgment consisted of summarising counsel's competing submissions. However, since those presented to this Court largely reflected the submissions to the Environment Court, they require no separate recital.

[16] The discussion and decision is relatively brief. It can be encapsulated in the following citations:

> [42] … It cannot be doubted that s 7(i) and (j), read alone, appear to take a broad and unqualified view of the issues of climate change and the use and development of renewable energy. And neither can it be overlooked that they are found in Part II of the Act, a suite of key provisions. However that may be, to focus on them …, along with s 104E, is to produce an interpretation of the latter that I consider strained and wrong.
>
> [43] It is instructive to read the [2004] Amendment Act in the round. Section 3, setting out its purpose, is obviously an important provision. Commencing with s 3, particularly subsection (b)(ii), it appears that the thrust of the Amendment Act is …, to place regulation about the discharge into air of greenhouse gases firmly in the national regulatory arena, and not regional. … It has the same flavour in this regard as sections 70A and 70B …, regarding new regional rule making.
>
> [44] Mr Currie's [counsel for Greenpeace] argument about the meaning of s 104E is at odds with the thrust of the Amendment Act. It Mr Currie was correct that it was open to the Court to consider the comparative situation between a proposal such as Marsden B and an actual or hypothetical proposal using renewable energy, the inescapable result would be that it would be considering the effects on climate change of discharges into air of greenhouse gases. Taken to its limit, if the actual or hypothetical proposal being compared emitted no such discharge, the Greenpeace argument would invite consideration by the consent authority of the entire discharge from the proposing user of non-renewable energy. Comparison of Marsden B with any such alternative whether to the full extent of discharge by the former, or partial, would in my view be completely contrary to the Amendment Act.
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> …
>
> [46] Whether or not there is a need to resolve ambiguity (and I do not consider that there is), I hold that Mr Cowper [counsel for Mighty River Power] is right in submitting that the purpose s 104E is to allow consideration of the effects of discharge on climate change only in the context of applications to use or develop renewable energy that will enable a lowering of greenhouse gas emissions in either absolute or relative terms. That can be relevant, for instance, when a consent authority is weighing all matters before it, faced with a proposal having adverse landscape or other effects …
>
> [47] It follows that the paragraphs in the appeal, the subject of the application, must in large measure be struck out. …

Submissions

[17] For Greenpeace, Mr Salmon, its leading counsel, submitted 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. The decision failed to have regard to the effects of the proposed discharge on climate change to the extent required by s 104E. He submitted that subject to the exception in that section preventing decision-

makers from having regard to the effects of a discharge on climate change, s 7(j) remained in full force and decision-makers must consider all benefits of renewable energy.

[18] After noting that it was Greenpeace's central proposition that the s 104E exception applies to applications whether for renewable or non-renewable energy proposals, as against Mighty River Power claiming the section applies only to renewable energy proposals – the latter being the stance upheld by the Environment Court – he submitted the judgment did not direct itself to the full scope of s 7(j). It held that section would only apply if the s 104E exception applied, but in that, he submitted, the Court fell into error.

[19] He submitted the plain meaning of s 104E was that its exception applied to all applications which would otherwise contravene ss 15 or 15B regardless of whether they were in respect of renewable or non-renewable energy projects. There is no justification in the words of the section to restrict its operation only to the former. The Environment Court also fell into error in holding that applying the s 104E exception to non-renewable energy proposals would require comparisons between actual and hypothetical renewable energy proposals. Greenpeace, he said, had never contended that such was the case. Applying s 104E to non-renewable energy proposals required consideration of the entire discharge. He submitted that if Parliament had intended to say that s 104E was only to apply to renewable energy project, such would have been expressed. The words "except to the extent" meant the following words were not equivalent to "except to the extent that the application allows only for renewable energy projects". Indeed, he noted that, as the 2004 Amendment passed through Parliament, the draft s 104E (and s 70A)) were changed to the present wording from:

> 104E **Applications relating to discharge of greenhouse gases**
>
> Despite **section 7(i)**, when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority –
>
> (a) must not have regard to the effects of such a discharge on climate change; but

(b) may have regard to the effects on climate change of an activity involving the use and development of renewable energy to the extent that it reduces the discharge of greenhouse gases in New Zealand.

[20] Mr Salmon submitted that not only did Mighty River Power's suggested interpretation jar with the words of s 104E, it was even harder to read that interpretation into s 70A where, the words being identical, an identical meaning must have been Parliament's intention. If s 104E were to be construed as Mighty River Power suggested, Mr Salmon said the section would be rendered largely redundant since few applications for discharge or coastal permits otherwise contravening ss 15 or 15B would include renewable energy proposals. He accepted, as had the Environment Court, that the 2004 Amendment showed a Parliamentary intention to move the effects of greenhouse gas emissions to national standards but suggested s 104E in its terms left consideration of an aspect of that topic to local bodies. In any event, he suggested, moving such matters to national standard did not impact on the correct interpretation of s 104E.

[21] He contested Mighty River Power's suggestion that the adoption of Greenpeace's interpretation would create difficulties in application by saying that the section would be difficult to apply whichever interpretation were adopted, but either required a relative analysis in relation to any s 104E application. In any event, he submitted, such was a matter for the substantive hearing and not a matter which should have been taken into account on a striking-out application.

[22] Relying on the Interpretation Act 1999 s 5(1), Mr Salmon submitted the Greenpeace interpretation was correct having regard to the Act's text and purpose (*Dixon-McIver v Director-General of Social Welfare* HC WN AP94/98, 20 March 2000 at paras [30] – [33] p 7) and the Environment Court's ruling overlooked or gave insufficient weight to the mandatory terms of s 7(j). Although not overriding specific provisions of the Act, the Part 2 provisions offered guidance in the interpretation of other sections (*Lee v Auckland City Council* [1995] NZRMA 241, 248). Greenpeace, he said, was propounding an interpretation of s 104E that would enable those dealing with applications under the section to give effect to obligations under s 7 (in particular s 7(j)).

[23] He submitted s 104E was a limited exception to s 104 prescribing matters to which consent authorities must have regard in considering resource consent applications, including the effects of an activity on the environment in allowing the activity.

[24] Mr Salmon suggested the Environment Court assumed the only benefit of the use and development of renewable energy related to climate change, so that, if climate change could not be considered under s 104E, there was no further need to have regard to s 7(j). Renewable energy developments, he suggested, had positive impacts for climate change and benefits in other forms of development unrelated to climate change such as economic growth. Even if the Environment Court was correct to rule that regard could not be had to the positive impact on climate change derived from the use and development of renewable energy, it could not be correct that other benefits derivable from the use and development of renewable energies could not be considered because s 7(j) requires consideration of all the benefits to be derived from the use and development of renewable energy, not just climate change as debarred by s 104E.

[25] Mr Salmon also relied on the terms of the 2004 Amendment, s 3 which reads:

> **3 Purpose**
>
> The purpose of this Act is to amend the principal Act –
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to –
>
> (i) the efficiency of the end use of energy; and
>
> (ii) the effects of climate change; and
>
> (iii) the benefits to be derived from the use and development of renewable energy; and
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> (b) to require local authorities –
>
> (i) to plan for the effects of climate change; but
>
> (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

[26] He submitted that Greenpeace's approach was consistent with s 3 and the "plain meaning" of s 104E for which Greenpeace contended.

[27] It was impermissible as an exercise in statutory interpretation, he submitted, for a Court to adopt a reading of the Statute that effectively incorporated additional words into it (*Hunia v Parole Board at Wellington* (2001) 18 CRNZ 543, 561-562 paras [30]–[32]).

[28] Looking at the practical effect of s 104E, Mr Salmon submitted the effect of a discharge of greenhouse gases on the environment is mainly macro-economic in view of the benefits to be had from the use and development of renewable energy and the extent that the use and development of renewable energy reduces the discharge into air of such gases. He submitted Greenpeace should be entitled to lead evidence on relevant macro-economic effect (*New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70).

[29] Mr Bell's submissions for the Regional council were based on the state of law and policy before enactment of the 2004 Amendment and, in particular, the Regional Council's functions before that time as to capacity to control emissions of greenhouse gases through regional plans (ss 30(1), 68)). He accepted that following New Zealand's ratification of the Kyoto Protocol, Government's intention was to address greenhouse emissions at a national level. It therefore suggested conditions leading to the passage of the 2004 Amendment and included submissions giving the Environment Court power to impose conditions under s 108 on the discharge of greenhouse gases, such as by carbon sinks (*Environmental Defence Society Inc. v Auckland Regional Council* [2002] NZRMA 492, *Environmental Defence Society Inc. v Taranaki Regional Council* A184/02, 6 September 2003 and *Todd Energy Ltd v Taranaki Regional Council* W101/05, 7 December 2005).

[30] Mighty River Power's leading counsel, Mr Cowper, began his submissions by noting the necessity for Greenpeace to prove that any error on the part of the Environment Court was material to its decision (*Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81, *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, 153) and

submitted that even if the Court fell into error of law it was nonetheless correct in striking-out paragraphs 8 and 11(h) (v) of Greenpeace's appeal. So, it was argued, there being no material effect on the result of the Court's decision, no relief should be granted to Greenpeace.

[31] Mr Cowper summarised Mighty River Power's submissions in the following terms :

> (a) Section 104E of the Act permits a consent authority to consider the effects of the discharge of greenhouse gases on climate change only to the extent that the use and development of renewable energy enables a reduction in greenhouse gas emissions (either in absolute or relative terms). Mighty River Power has not applied to use or develop renewable energy at Marsden B, and therefore there is no extent to which such a use will enable a reduction in greenhouse gas emissions. There is consequently no scope for consideration of the effects of the discharge of greenhouse gases from Marsden B by a consent authority.
>
> (b) The exception in s 104E allows a consent authority to give favourable consideration to renewable energy developments that despite contravening s 15 or s 15B in terms of greenhouse gas emissions, enable a reduction of such emissions in either absolute or relative terms. The exception does not apply to:
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> (i) Applications to use or develop non-renewable energy (e.g. a coal fired power station);
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> (ii) Applications to use or develop renewable energy that do not contravene s 15 or s 15B in terms of greenhouse gas emissions (e.g. a wind farm); and
>
> (iii) Applications to use or develop renewable energy that do not enable a reduction in greenhouse gas emissions in either absolute or relative terms (e.g. an inefficient biomass plant).
>
> (c) In respect of s 7 (j) of the Act, the Marsden B application involves no "*benefits to be derived from the use and development of renewable energy*". There being no benefits to be considered, s 7(j) of the Act is simply not relevant to the Marsden B application. Section 7(j) is however of relevance to any application to use and develop renewable energy.
>
> (d) Neither s 7(j) nor s 104E provides for the consideration of the effect of granting consent to an application to develop non-renewable energy on the profitability of renewable energy development. The presentation of evidence in respect of that effect would therefore be irrelevant to a consent authority's consideration of Mighty River Power's application.

[32] Mr Cowper elaborated on those submissions in a number of ways.

[33] After drawing attention to the Interpretation Act 1999 s 5(1), Mr Cowper submitted that the plain meaning of s 7(j) is that "when powers or functions under the Act are exercised such as … considering resource consent applications the benefits to be derived from use and development of renewable energy are to be given particular regard" but does not require "consideration to be given to the detrimental effects of the use and development of non-renewable energy or the economic viability of the use and development of renewable energy".

[34] Similarly, he submitted, the plain meaning of s 104E was that when a consent authority was considering an application that contravened ss 15 or 15B it must not have regard to the effect of the discharge of greenhouse gases on climate change except to the extent that the use and development of renewable energy enables a reduction in such discharges. Accordingly, a qualifying application only invoked s 104E if it proposed a reduction in greenhouse gas emissions and satisfied all statutory criteria.

[35] He submitted ss 104E and 7(j) should be read in context, including all provisions of the 2004 Amendment and including comparable interpretations of both pairs of ss 70A and 70B and ss 104E and 104F. From that, he submitted 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. The drafting of ss 70A and 104E was intended to restrict their ambit to benefit applications using or developing renewable energy but not in a way which would be detrimental to applications using or developing non-renewable energy.

[36] Mr Cowper submitted Parliament's changing wording in the wording of s 104E during the Bill's passage through the house clarified, but did not alter, its intended meaning.

[37] The criteria in s 7 are not universally relevant to every application and to suggest that s 7(j) required the Court to have particular regard to the benefits to be derived from the use and development of renewable energy made, Mr Cowper

submitted, no more sense than saying the Court should have particular regard to any other clause in s 7. Thus s 7(j) is irrelevant to an application such as this unless there are benefits of renewable energy use to be considered.

[38] He submitted that s 104E first prohibits consent authorities from considering the effect on climate change of the discharge of greenhouse gases if such would contravene s 15 and 15B and, secondly, allows, through the exception, such authorities to give favourable consideration to renewable energy developments to the extent that, although they require consent under ss 15 or 15B and produce greenhouse gas emissions, they enable an absolute or relative reduction in the same. The section, he suggested, ensures that any national environmental standard relating to the discharge of greenhouse gases would not make it overly difficult to obtain future resource consents for the use and development of geothermal and biomass energy. The exception allows renewable energy applications, whose greenhouse gas discharges contravene ss 15 or 15B to be considered not only on their own merits but comparatively with existing discharges or discharges from non-renewable sources if such a comparison is favourable.

Discussion and Decision

[39] The discussion on the issues raised in this appeal will, first, consider the correct interpretation of the terms of s 104E itself and other sections mentioned then, secondly, consider whether that interpretation requires modification having regard to the provisions of the 2004 Amendment and then, thirdly, reconsider the question having regard to the overall terms of the Resource Management Act 1991.

[40] It is the Court's view that, for the initial purposes of interpretation, s 104E should be considered as if it had a fullstop after the phrase "climate change".

[41] The preceding parts of the section ensure that, for s 104E to be applicable at all, the application under consideration must be :

(a) For either a discharge permit or a coastal permit, being two forms of "resource consent" for which s 87 provides; and

(b) The particular permit sought must be for consent to undertake an activity that would contravene ss 15 or 15B if consent were not given. Leaving s 15B aside as irrelevant for present purposes, the resource consent application must accordingly be one which would otherwise offend against s 15. In a case such as this, that must be one which is to permit the discharge of contaminants into air or onto land in a way which would contravene the relevant regional plan (or proposed plan) unless the discharge is permitted by, first, a resource consent, secondly, by regulation, or thirdly, permitted under s 20A (of no relevance to the present case). Since there are no regulations applicable to Mighty River Power's application, its resource consent application under this heading must be one that would contravene the Northland Regional Council's regional plan unless consented to; and

(c) The manner in which the resource consent application would otherwise contravene ss 15 (or 15B) must be the discharge not just of contaminants into air proscribed by s 15(2) but propose the discharge into air of contaminants, namely greenhouse gases as defined under the Climate Change Response Act 2002 s 4(1) and Annex A.

[42] If the particular application under consideration qualifies on all limbs of the initial wording of s 104E, then the section requires the consent authority to have no regard to the effect of the discharge of those greenhouses gases on "climate change" as defined in s 2.

[43] On its face, that position conflicts with s 7(i) which, as an aspect of the Part 2 Purposes and Principles of the Act requires the consent authority to have particular regard to the effects of climate change.

[44] That conflict is to be resolved by the exception to s 104E 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 greenhouses gases either in absolute terms or terms relevant to the use and development of non-renewable energy.

[45] Several observations arise from that.

[46] The first is that the consent authority can consider a resource consent discharge permit application which seeks consent to discharge greenhouse gases to air only to the extent that such discharge is reduced in terms of s 104E(a) (b) that is to say if such arises from the use and the development of renewable energy, and with reduction of that discharge being a benefit derived from the use and development of renewable energy, a matter required to be given particular regard by s 7(j).

[47] The second observation is that the proposed use and development of renewable energy reducing the discharge of greenhouse gases must arise from the qualifying permit application under consideration. Any more general consideration would be far too wide-ranging to enable consent authorities to limit the matters it would otherwise be required to consider under s 104E.

[48] The essential dissonance in the interpretation of s 104E arises through the lack of express overlap between the definitions of "climate change", "greenhouse gas" and "renewable energy". But that does not, of course, mean that there is no overlap between those concepts in effect since the discharge of greenhouse gases can cause a change in climate as being human activity which changes the composition of the atmosphere whereas renewable energy can produce a positive change in climate.

[49] In light of all of that, when approaching the correct interpretation of s 104E, a prime factor for consent authorities to take into account when considering applications for discharge (or coastal) permits is that, in order to qualify under s 104E, the application must relate to the "discharge into air of greenhouse gases" and, pursuant to the exception, the authority should also 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". If the resource consent application for a discharge permit which otherwise qualifies under s 104E includes a proposal which, if consented to and effected, will enable a "reduction in the discharge into air of greenhouse gases" by the "use and development of renewable energy" then, in terms of s 104E, that is a factor which the consent authority can take into account in deciding whether to grant resource consent.

[50] If 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 "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" since a discharge permit application which includes features which, if consented to and built, would enable a "reduction in the discharge into the air of greenhouse gases" by the "use and development of renewable energy" will, to the extent encompassed by those features, amount to beneficial "human activity that alters the composition of the global atmosphere".

[51] That interpretation accords with the final provisions of s 104E which require the qualifying application for discharge permits which includes a provision for the "use and development of renewable energy" to bring about a "reduction in the discharge into air of greenhouse gases", because such a proposal must be one which either brings about that reduction in absolute terms or terms "relative to the use and

development of non-renewable energy". Those latter terms are not defined but clearly they are set in apposition to the "use and development of renewable energy", that is to say those provisions give the consent authority 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" because, in order to trigger s 104E, the resource consent application must be one which would otherwise contravene s 15, that is to say one involving a discharge of contaminants – greenhouse gases – into air.

[52] The next consideration is whether that interpretation of s 104E accords with the other statutory provisions earlier discussed.

[53] The first observation must be that it clearly accords with s 70A which debars Regional Councils making rules to "control the discharge into air of greenhouse gases" from making any rule which, in effect, does not accord with the interpretation of s 104E. That ensures that Regional Councils may not make rules concerning the use and development of renewable energy enabling reductions in the discharge into air of greenhouse gases more stringent than national rules, when promulgated, on climate change, a matter to be planned for locally but not otherwise considered at that level because climate change has been reserved for nationwide standards. (2002 Amendment, s 3(b)).

[54] That interpretation also accords with s 7. While persons exercising powers under the Act are to have particular regard to the matters listed in the section, clearly they are of varying weight and applicability to the array of applications for resource consent made to consent authorities. The interpretation accorded to s 104E (and s 70A) means that, in resource consent applications under s 104E, though both s 7(i) and s 7(j) are for consideration, ss 104E and other provisions in the Act reserving climate change matters for national standards, they ensure the latter is to be given much greater weight than the former. The interpretation of s 104E also accords with the 2004 Amendment, s 3(a) requiring all persons exercising powers under the Act to give particular regard to efficient energy use, effects of climate change and "benefits to be derived from the use and development of renewable energy" and requiring

local authorities to plan for climate change effect but, because that is to be the subject of national standards, not to consider climate effect resulting from "discharges into air of greenhouse gases" excepted to the limited extent mentioned.

[55] Put a little more shortly, resource consent applications for discharge (or coastal) permits involving the "discharge into air of greenhouse gases" which would otherwise contravene s 15 (and 15B) are more likely, as part of the discretionary process in deciding whether to grant resource consent, to be granted such consent if they involve the "use and development of renewable energy" which will enable a "reduction in the discharge into air of greenhouse gases" because the consent authority is able to consider the "benefits to be derived from the use and development of renewable energy". However, the fact that a discharge (or coastal) permit application which otherwise qualifies under s 104E includes no proposal for the "use and development of renewable energy" does not exempt it from being considered under s 104E. That is a discretionary factor for the consent authority to take into account in deciding whether to grant consent to the permit application and, to that limited extent, to have regard to the effects of the discharge of greenhouse gases on climate change. Section 104E and the other sections discussed therefore make it more likely that resource consent will be granted for permit applications qualifying under s 104E if they include a proposal for the "use and development of renewable energy" than if they do not. Section 104E and the other sections discussed accordingly provide a spur for permit applications qualifying under the section to include such beneficial proposals to improve their chances of consent being granted.

[56] Finally, the approach this Court considers appropriate to the interpretation of s 104E also accords with the changes to the 2004 Amendment made by Parliament during the passage of the Bill through the House. In its earlier form, Parliament debarred consent authorities from considering qualifying resource consent applications under s 104E from considering the effects of climate change but empowered them to consider the effects on climate change of an activity involving the use and development of renewable energy which reduced the discharge of greenhouse gases in this country. Though slightly differently worded, the effect of

the earlier draft of s 104E largely conforms with the view taken as to the correct interpretation of s 104E as enacted.

Result

[57] It follows that the appeal must be allowed. With respect, the Environment Court fell into error. In taking 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 the Court was only partially correct (para 43). More importantly, the view in para [44] that the Greenpeace argument inviting "consideration by the consent authority of the entire discharge from the proposing user of non-renewable energy … with any such alternative" was contrary to the 2004 Amendment. That conclusion appears to overlook the necessity in terms of s 104E for the permit application to involve the "discharge into air of greenhouse gases" and the fact that the section enables the consent authority to balance that proposed activity alongside any proposal by the applicant which would effect "reduction in the discharge of greenhouse gases" by an activity which involves the "use and development of renewable energy … relative to the use and development of non-renewable energy" and to that extent to have regard to climate change.

[58] Beyond those comments in allowing the appeal it is, however, somewhat difficult to formulate the precise terms of the order.

[59] Mighty River Power's application sought an order striking out paragraphs 8 and 11(h)(iv) (v) of Greenpeace's notice of appeal. The Environment Court allowed the application in respect of all paragraphs other than 11(h)(iv) and amended that in terms of a concession made by Mighty River Power.

[60] However, the version of ground 8 in Greenpeace's notice of appeal put before this Court does not appear to include the passages cited in Mighty River Power's striking-out application.

[61] Accordingly, it is for counsel to confer and agree on the precise terms of the order resulting from this judgment. It may not go as far as Greenpeace wished in

defining the issues which can be taken into account in permit applications qualifying under s 104E. Leave will be reserved to the parties to file memoranda on the topic if counsel are unable to agree.

[62] If costs are appropriate, the Court's tentative view is that the appellant should be entitled to costs and that they should be calculated on a 2B basis. If counsel are unable to agree or wish to endeavour to persuade the Court to a different course, memoranda may be filed (maximum five pages) with that from the appellant being due 28 days after delivery of this judgment and that from the respondent and Mighty River Power within 35 days of that date and with counsel certifying, if they consider it appropriate so to do, that the Court may determine all issues of costs without a further hearing.

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WILLIAMS J

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