

# **CLIMATE CHANGE CONSIDERATIONS UNDER THE RESOURCE MANAGEMENT ACT: A BARRIER TO CARBON CAPTURE AND STORAGE DEPLOYMENT IN NEW ZEALAND?**

BY GREG SEVERINSEN\*

In 2004, the New Zealand Parliament enacted amendments to the Resource Management Act 1991. Among other things, these amendments introduced a suite of provisions that prohibited local government from considering the effects of activities on climate change when deciding resource consent applications. Some uncertainty exists as to whether this prohibition could act as a barrier to the deployment in New Zealand of a relatively novel climate change mitigation technology called carbon capture and storage (CCS). CCS involves the capture of carbon dioxide emissions prior to emission to the atmosphere, and the compression and injection of the gas into subsurface storage formations. The courts have taken a strongly purposive approach to the 2004 amendments, restricting the jurisdiction of local government over climate change to a greater extent than is provided in the express provisions of the Resource Management Act. In the context of CCS, where the positive effects of the activity are almost wholly related to the climate, this may in practice result in consent being declined in all cases.

This article contends that while the prohibition in the 2004 amendments could at present hamper efforts to develop CCS projects in New Zealand, a solution can be found within the Resource Management Act itself, without the need for wholesale legislative amendment. In short, national environmental standards and national policy statements should be developed to direct or enable consent authorities to have regard to the positive aspects of CCS. This will enable CCS to occur in contexts where it truly promotes sustainable management, and allow market signals under the emissions trading scheme to determine, without inappropriate regulatory interference, when the technology should be implemented. However, alternative options involving more far-reaching legislative reform are possible, and may be preferable for reasons outside the scope of this article.

## **I. INTRODUCTION**

Climate change is poised to be one of the defining global issues of the 21st century. New Zealand's response to this threat thus far has been to implement an emissions trading scheme (ETS) under the Climate Change Response Act 2002 (CCRA). This reflects a policy intention that effects on climate change are to be regulated primarily by economic incentives rather than command and control

---

\* LLB (hons), BA. PhD Candidate, Victoria University of Wellington. A four-page summary of the key points in this article appears in ch 2 of B Barton, K Jordan and G Severinsen *Carbon Capture and Storage: Designing the Legal and Regulatory Framework for New Zealand* (University of Waikato, Hamilton, 2013), where the author was the primary contributor on this specific area. I am grateful for the kind agreement of my co-authors to expand and publish on this topic.

mechanisms, and that responses are to occur at a national level. A complementary national-level focus has been implemented in the Resource Management Act 1991 (RMA, or the Act) through amendments to the Act in 2004. These require that local authorities, when making rules and considering applications for resource consent, cannot (as a generalisation) consider effects on climate change. In this paper, this requirement is generally referred to as the “prohibition”.

Overseas, the prospect of climate change has led to the development of carbon capture and storage (CCS) technology. CCS is a climate change mitigation tool that involves three main phases. First, carbon dioxide (CO<sub>2</sub>) is captured at a point source, such as a large industrial plant or power station, and prevented from escaping into the atmosphere. Second, the captured CO<sub>2</sub> is liquefied and transported to an injection site. Thirdly, the CO<sub>2</sub> is injected into a deep geological formation for long-term storage, post-closure monitoring and stewardship. In this manner, CO<sub>2</sub> is prevented from escaping to the atmosphere and contributing to climate change.

A number of CCS projects are currently operating or under construction globally.<sup>1</sup> Technical capabilities for CCS deployment in New Zealand and the required features of a regulatory regime are also being seriously investigated, although no CCS-specific regulatory or policy action has yet been taken.<sup>2</sup> No applications for resource consent have been lodged in New Zealand, and the activity is not yet commercially viable. However, in the future there is a possibility that it will provide one tool in the national toolbox for addressing climate change. The removal of regulatory barriers to the deployment of the technology is therefore a worthwhile exercise.

The interaction between CCS activities and the RMA’s prohibition on considering effects on climate change is one potentially problematic regulatory barrier to CCS. There has been no judicial or academic comment on how this might affect consent applications for CCS, and the extent of the prohibition is not always clear. In fact, the courts in other contexts have adopted a purposive approach to read in features that are not apparent from a literal reading of the relevant sections.<sup>3</sup>

This paper seeks to explore the extent to which a purposive approach to the 2004 amendments presents a regulatory hurdle for CCS deployment in New Zealand. In short, the paper’s contention is that the absence of other positive effects associated with CCS may result in applications being inappropriately declined, if the positive effects of CCS on climate change cannot be considered by consent authorities. It also contends that there exists at least one appropriate solution that could be implemented within the RMA framework, without wholesale legislative amendment.

On a policy level, CCS should not be allowed to stymie the development of essential renewable energy resources, or put at risk New Zealand’s long term energy security by increasing reliance on fossil fuels. It is, however, unlikely to do so, given the country’s existing and planned focus on renewable generation. The practical impact of CCS, should it occur, is more likely to be felt in large industrial applications. As long as the technology is implemented in an environmentally responsible fashion, CCS provides an attractive temporary option to reduce harmful greenhouse gas emissions, while easing the social and economic costs of the transition to more sustainable heavy industry practices. It is also notable that the Fifth Assessment Report of the Intergovernmental

---

1 Global CCS Institute *The Global Status of CCS* (Global CCS Institute, Melbourne, 2013).

2 Barry Barton, Kimberley Jordan and Greg Severinsen *Carbon Capture and Storage: Designing the Legal and Regulatory Framework for New Zealand* (Centre for Environmental, Resources and Energy Law, Hamilton, 2013).

3 *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

Panel on Climate Change has built into its forecasts an assumption that CCS technology will be deployed in the future.<sup>4</sup>

## II. THE CHARACTERISATION OF CCS UNDER THE RMA

At the outset it is important to consider how the range of CCS activities is likely to be characterised under the RMA. The prohibition under the Act may apply differently to different kinds of activities.

In a terrestrial context, the construction of pipelines and the injection of CO<sub>2</sub> would require land use consent under s 9 of the Act, and injection would also require a discharge permit under s 15.<sup>5</sup> If CCS injection were to occur offshore within the coastal marine area, a coastal permit would be required for the laying of pipelines and the construction of an injection installation under s 12. A coastal permit would also be required for the injection of CO<sub>2</sub>, although it is unclear whether this would be required under s 15A, concerning dumping of waste or other matter, or s 15B, concerning the discharge of contaminants from offshore installations. Given that, internationally, CCS has tended to be characterised as a form of dumping, it is more likely that s 15A would govern applications for injection to the sub-seabed.<sup>6</sup> Although additional authorisations may be required for CCS under other regimes, this paper is concerned only with authorisations affected by the prohibition under the RMA.

## III. THE STATUTORY PROHIBITION IN THE RMA

The Resource Management (Energy and Climate Change) Amendment Act 2004 (the amendment Act) introduced a suite of four provisions aimed at removing the regulation of activities' effects on climate change from the purview of local decision-making in favour of national-level decision-making. This suite comprises ss 70A, 70B, 104E and 104F of the RMA. As a generalisation, the amendments have resulted in all effects of activities on climate change being addressed solely through the ETS.<sup>7</sup>

Section 70A of the Act prohibits the consideration of effects on climate change of discharges of greenhouse gases into air, when a regional council is developing rules in a regional plan that relate to the discharge of contaminants. Section 70B provides, however, that national environmental standards (NESs), developed under s 43, can be mirrored in regional rules to control the effects on climate change of such discharges. Regional and district rules must not conflict with an NES.<sup>8</sup> Section 104E reflects s 70A in the context of an application for resource consent to discharge contaminants, and prevents the consideration of the effects of that discharge on climate change

4 Intergovernmental Panel on Climate Change "Climate Change 2013: The Physical Science Basis" (Intergovernmental Panel on Climate Change, Working Group 1 Contribution to the Fifth Assessment Report of IPCC, September 2013) at 526; Detlef P van Vuuren and others "The representative concentration pathways: an overview" (2011) 109(1–2) *Climate Change* 5 at 17.

5 Carbon dioxide falls within the broad definition of a "contaminant" under s 2 of the RMA and CCS injection is therefore restricted by s 15.

6 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 36 ILM 1 (signed 7 November 1996, entered into force 24 March 2006).

7 Apart from the positive effects on climate change of renewable energy, in cases of applications for renewable energy projects.

8 Resource Management Act 1991 (RMA), s 44A.

by a consent authority. Similarly, s 104F mirrors s 70B in the context of applications for consent, enabling the consideration of any NESs that have been developed to address climate change.

In both ss 70A and 104E, the general prohibition is subject to only one express exception: the effects of a discharge on climate change can be considered to the extent that renewable energy enables the reduction of greenhouse gas emissions. The courts have held that this exception applies only where an application is *for* a renewable energy project and the relative climate change benefits of renewable generation cannot be considered where applications are for non-renewable energy projects.<sup>9</sup> Therefore, the exception is not directly relevant to CCS, given that the technology does not amount to, facilitate or encourage renewable energy projects. Furthermore, no NES has been developed thus far under the powers in ss 70B and 104F which overrides the general prohibition. These sections can therefore be disregarded, for now.

One further point requires emphasis at this juncture. Section 7(i) of the RMA, also inserted by the 2004 amendment Act, obliges decision-makers to have particular regard to “the effects of climate change”. This reflects the importance of requiring local authorities to plan for the effects “of” climate change by planning for adaptation measures,<sup>10</sup> and does not generally allow local authorities to address the root causes of climate change by considering, in consent decisions, the effects of activities “on” climate change.<sup>11</sup>

#### IV. THE IMPACT OF THE STATUTORY PROHIBITION IN S 104E ON THE CONSIDERATION OF APPLICATIONS FOR CCS

In assessing the extent to which the prohibition in s 104E affects decision-making on CCS consent applications, two key questions need to be examined. Firstly, what are the points at which the prohibition is triggered? Secondly, in cases where the prohibition is triggered, what is the scope of the prohibition? These questions are intertwined and require consideration of both the express wording of s 104E and the purpose behind this provision.

##### A. *A Literal Interpretation of s 104E*

Section 104E provides that:

##### **104E Applications relating to discharge of greenhouse gases**

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

---

<sup>9</sup> *Greenpeace*, above n 3, at [56].

<sup>10</sup> Adaptation measures could include appropriate land use zoning in coastal areas, and the provision of coastal erosion structures.

<sup>11</sup> *Buller Coal*, above n 3, at [130].

The express wording of the section suggests that the prohibition will be triggered only where applications are made for permits to do something otherwise restricted under s 15 (concerning the discharge of contaminants) or 15B (concerning the discharge of contaminants from offshore installations and ships). In its terrestrial context, CCS injection will constitute the discharge of a contaminant under s 15.

On a literal interpretation of s 104E, land use consent applications or incidental applications for the taking or use of water would appear not to trigger the prohibition, as they are not restricted under s 15 or 15B and do not relate to the discharge control functions of a regional council. This would equally be the case for applications for coastal occupation or construction of installations and pipelines in the coastal marine area, as these are governed under s 12 rather than s 15.

Whether the prohibition is triggered in cases of CCS injection in the coastal marine area is less straightforward. Injection into the seabed is likely to be characterised as a “dumping” rather than a “discharge”, and therefore require a coastal permit by virtue of s 15A of the RMA rather than s 15 or 15B. On the face of s 104E, which applies only to applications concerning s 15 or 15B matters, a regional council would not be barred from considering the impacts of CCS on climate change by taking into account the positive effects of this “dumping”. This stands in contrast to the position in the terrestrial context, where injection is a “discharge” restricted by s 15.

However, for the s 104E prohibition to apply to terrestrial injection, an application for CCS must also “relate” to the discharge into air of greenhouse gases. If it does not, the prohibition does not bite on such applications. That said, an application may not have to *propose* that a discharge to air take place for it to “relate” to the atmospheric discharge of CO<sub>2</sub>. It could be sufficient for a discharge to require consent under s 15 or 15B (which could include proposals to discharge not only to air but also to land or water) as long as it somehow related to a discharge to air. By way of example, a regional council could, in theory, be prevented from considering the effects of a discharge of greenhouse gas to air where an application itself sought consent to discharge a contaminant to land (from an industrial or trade premises) or to water.

This may appear to be largely an academic scenario, given that a discharge to land or water would not generally require any consideration of the effects of a discharge to air. However, an application for CCS injection to land would be unique. Such an application would not itself involve an application to discharge CO<sub>2</sub> to the air. The purpose of the activity is the prevention of the escape of gases to the atmosphere. However, at least in the terrestrial context, CCS *would* involve the discharge of a contaminant to land under s 15. The application may also, arguably, “relate to” the discharge into air of greenhouse gases, in the sense that it would require a decision-maker to consider the effects on climate change of a discharge to air.

This last point requires some elaboration. Because CO<sub>2</sub> is captured before it is discharged into the atmosphere, the sequestration of the gas underground has no real environmental benefit, relative to the status quo, at the time of injection. If a bystander were to measure the levels of CO<sub>2</sub> in the global atmosphere immediately prior to injection and again immediately after injection, the injection would not affect atmospheric CO<sub>2</sub> levels in any way. This is because gas, prior to injection, would necessarily be contained and separated from atmospheric CO<sub>2</sub>. Carbon capture and storage is concerned with preventing future effects rather than remedying existing effects. However, the positive future effects of CCS on climate change can be assessed only by making a comparison to the negative impact the gas would have *if it were discharged to the air*. This requires consideration of the effects of a discharge into air of greenhouse gases on climate change, even though no discharge is actually proposed. This may be described as a hypothetical discharge,

which is used only as a reference point to determine the positive effects of sequestration. Without considering the adverse effect of discharging the gas to the atmosphere, it would be impossible to assess the relative benefit of injecting it underground.

The question that needs to be answered is therefore whether the consideration of a hypothetical discharge to air, as a reference point to determine the climate benefits of CCS, is a prohibited consideration under s 104E of the RMA. In other words: does the consideration of the effects of a hypothetical discharge, as a reference point, “relate to” the discharge of greenhouse gases to air?

On a literal interpretation of s 104E, seeing CCS as triggering the prohibition may seem somewhat strained because the phrase “relating to the discharge into air” would more comfortably be interpreted as requiring that an application actually propose a discharge to the air. On the other hand, one may argue that the phrase has a wider meaning than other formulations that could have been used. Parliament could have used more specific terminology – for example, to do something “involving” the discharge into air of greenhouse gases – but instead chose the more general term “relating to”. This may suggest that a proposed activity does not have to “involve” or “propose” a discharge into air of greenhouse gases for local authorities to be prevented from considering the effects of a hypothetical atmospheric discharge of greenhouse gas.

However, on balance, it would be reading down the wording of s 104E to claim that the injection of CO<sub>2</sub> to the subsurface “relates” to the discharge “into air” of greenhouse gases. The release of CO<sub>2</sub> into the atmosphere is the very thing CCS is designed to prevent. Thus on a literal reading, it is more likely that the prohibition does not bite in the case of CCS applications and local authorities *could* consider the positive effects of CCS on climate change by measuring them against the discharge into air that would otherwise result. There would thus be no issue, and no need to amend the RMA or remove CCS from the Act on these grounds.

However, the courts have not taken a literal approach to s 104E. They have taken a highly expansive purposive approach. This approach would be likely not only to recognise such a prohibition in cases of CCS, but to widen it considerably – to include within the prohibition decisions on CCS applications for land use, coastal occupation, construction of marine structures, and marine dumping.

### *B. A Purposive Approach to s 104E*

A purposive approach to s 104E could present a substantial regulatory hurdle to CCS applicants. The material part of the purpose of the 2004 amendment Act provides:<sup>12</sup>

3 The purpose of this Act is to amend the principal Act—

...

(b) to require local authorities—

...

(ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

---

<sup>12</sup> Resource Management (Energy and Climate Change) Amendment Act 2004, s 3.



This purpose is expressly incorporated into the RMA by virtue of ss 5(1) and 23 of the Interpretation Act 1999, despite the fact that the purpose text does not appear in the amended legislation itself.<sup>13</sup> Section 3 of the amendment Act is to be read in conjunction with the overall purpose in s 5 of the RMA and the statute as a whole.<sup>14</sup> The purpose of the amendment Act is clearly much broader than the wording of the prohibition in s 104E in that the latter applies only to activities restricted by ss 15 and 15B.

The Supreme Court has, in the context of s 104E (although in relation to a different issue),<sup>15</sup> emphasised the importance of focusing on the purpose of legislation:<sup>16</sup>

The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose . . . .

If s 104E were interpreted in the light of its purpose, the prohibition may prevent the consideration of the positive effects of CCS on climate change in deciding any consent application required for a CCS project. The prohibition would not only apply to applications to a regional council for discharges restricted by s 15 or 15B. The prohibition would likely also apply to both district and regional councils, to the determination of applications for consent under s 15A, and to the determination of applications for incidental consents (such as permits to take or divert water).

### *1. Greenpeace v Genesis Power*

A purposive approach to s 104E has been taken by the courts in the two leading cases under the section: *Greenpeace New Zealand Inc v Genesis Power Ltd*<sup>17</sup> and *West Coast ENT Inc v Buller Coal Ltd*.<sup>18</sup> Earlier cases on the validity of climate change effects under the RMA are of little relevance, as they were decided before the coming into force of the 2004 amendments.<sup>19</sup> The Supreme Court in *Greenpeace* held that:<sup>20</sup>

[t]he underlying policy of the Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis while enabling the positive effects of the use of renewable energy to be assessed locally or regionally.

While undoubtedly this statement represents the current law, it is silent on the particular issue that arises in the context of CCS. The Court clarified that negative effects on climate change are to be considered on a national level and that positive effects of renewable generation are to be considered on a local level. However, the Court did not clarify whether the positive effects on climate change

13 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552 at [14], undisturbed on appeal by the Supreme Court's majority judgment in *Buller Coal*, above n 3, at [176] (despite a dissenting view from Elias CJ at [86]).

14 *Buller Coal*, above n 3, at [153].

15 In relation to the scope of the exception to the s 104E prohibition for renewable energy development.

16 *Greenpeace*, above n 3, at [51].

17 *Greenpeace*, above n 3.

18 *Buller Coal*, above n 3.

19 *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC), (2003) 9 ELRNZ 1; *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002; *Todd Energy Ltd v Taranaki Regional Council* EnvC Wellington W101/05, 7 December 2005.

20 *Greenpeace*, above n 3, at [55].

of a non-renewable energy activity like CCS, where these involve the consideration of the effects of a discharge on climate change, are to be considered nationally or sub-nationally. There was no need in the case to contemplate the existence of a technology that impacted positively on climate change while not itself involving renewable generation.

The question remains: does the prohibition in s 104E extend to the consideration of the positive aspects of an activity on climate change? The majority decision in *Greenpeace* made comments of broader application concerning the centralising purpose of the amendments,<sup>21</sup> including that “local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases”.<sup>22</sup> This suggests that regional and district councils (and the Environment Court) are generally prohibited from considering both the negative and positive effects of activities on climate change.

Section 104E does, of course, make a narrow exception to allow local consideration of the positive impacts of renewable energy on climate change. The need for this explicit statutory exception for the positive impacts of renewable generation suggests that the general effect of the section is to prohibit consideration of not only the negative but also the positive effects of activities on climate change. A purposive approach does not require that effects be treated as an exception to the prohibition simply because they are positive. It can be speculated that this issue may arise, in the future, in the context of forestry projects. Any positive effects on climate change from the planting of trees (as a carbon sink) may well be an irrelevant consideration under the Act, just as it would be if planting were imposed as a condition to mitigate the climate impacts of industrial emissions. In practice, the prohibition may impact less on forestry than CCS. Forestry projects are likely to have fewer negative effects on the environment than CCS, and more justiciable positive effects, thus making a grant of consent more likely.

Although recognising a broad prohibition by taking a purposive approach to the 2004 amendment Act, the Court’s specific comments in *Greenpeace* were targeted towards the consideration of applications that themselves propose the discharge of greenhouse gases to air (such as from a gas fired power plant).<sup>23</sup> In contrast, CCS would not propose any discharge to air and the atmospheric discharge being considered would be a hypothetical one. However, the more recent judgment in *Buller Coal* saw the Supreme Court determine, in an appeal on declaratory proceedings, the effect of the prohibition in a context that is more analogous to CCS.

## 2. *West Coast ENT Inc v Buller Coal Ltd*

The Supreme Court in *Buller Coal* considered whether the effects on climate change of the end use of coal (that is, the eventual discharge of CO<sub>2</sub> to air overseas) could be considered in a land use application for the extraction of coal in New Zealand. The Court in its majority decision upheld the

---

21 At [58].

22 At [62].

23 Some commentators have attempted to characterise the Supreme Court’s approach in *Greenpeace* as “textual” rather than purposive, based on the order in which s 104E and the purpose of RMA were considered (see Edward Willis “The Interpretation of Environmental Legislation in New Zealand” (2010) 14 NZJEL 135). However, it is difficult to avoid the basic conclusion that the majority in *Greenpeace* used the purpose of the Amendment Act to widen significantly the apparent scope of the text of s 104E. In this sense the approach must be seen as strongly purposive, irrespective of any perceived unorthodoxy in how (or the order in which) text and purpose were reconciled by the Court.



decision of the Environment Court<sup>24</sup> and the High Court<sup>25</sup> that a consent authority could not do so, because the intention of s 104E is to prevent the consideration of the effects on climate change of any discharge to air of greenhouse gases.<sup>26</sup> The Supreme Court established that, despite the express wording of s 104E, the prohibition applies not only in relation to applications that *themselves* propose discharges of greenhouse gases and not only in relation to activities otherwise restricted by s 15 or 15B. It applies also in relation to any consent application, whether at district or regional level, and also prohibits the consideration of the effects of purely hypothetical discharges that have not occurred or may never occur.<sup>27</sup> On the facts, the Supreme Court considered that a local authority could not consider the impact that the end use of coal would have on climate change, even though the land use applied for (mining) did not propose or involve any discharge (except incidental discharges). To conclude otherwise would result in anomalous results.<sup>28</sup> For example, proposals to discharge greenhouse gases could be challenged by the “back door”, by allowing climate change arguments to be advanced in hearings for land use or other consents only incidental to a discharge activity.<sup>29</sup> This would defeat the purpose of the 2004 amendments.<sup>30</sup>

Despite some criticism of the courts’ position<sup>31</sup> and a forceful dissent by Elias CJ in *Buller Coal*, it is submitted that the majority decision of the Supreme Court was correct in law. The broad purpose of the 2004 amendments signalled an intention by Parliament to remove consideration of the effects of greenhouse gases from regional and district control, irrespective of the specific wording of s 104E and irrespective of the merits of such a policy choice. To carve out wide exceptions would be to upset Parliament’s intent, threaten the practical effectiveness of the prohibition where it did apply, and undermine the financial signals to be sent to participants under the ETS. Arguments against the majority judgment have, quite understandably, been driven by more practical motives and have pointed to the ineffectiveness of the current regime governing climate change (due partly to the absence of a national environmental standard to regulate greenhouse gas emitters) as well as the weakness or inapplicability of the ETS.<sup>32</sup> Such arguments have not focused on legislative intention. At law, such intention is paramount, irrespective of the perceived desirability of the result on a policy level.

A consequence of the Supreme Court’s approach is that the phrase “relating to” a discharge into air must be given a more expansive meaning than simply “involving” or “proposing” a discharge. As in *Buller Coal*, the prohibition can be triggered when a local authority purports to consider the effects on climate change of any discharge of greenhouse gas to the air, including a hypothetical discharge that may or may not occur. Thus it seems possible that the prohibition would bite in the case of a CCS application, which also involves the consideration of a hypothetical discharge to air.

---

24 *Re Buller Coal* [2012] NZEnvC 80, [2012] NZRMA 401.

25 *Royal Forest and Bird Protection Society of New Zealand*, above n 13.

26 *Buller Coal*, above n 3, at [175] and [176].

27 At [175].

28 At [169].

29 At [169].

30 At [170].

31 Sarah Baillie “RMA and Climate Change” [2013] NZLJ 11.

32 At 12.

The drafters of the 2004 amendments would not have envisaged that climate change arguments could arise in a context other than an application for a discharge consent.<sup>33</sup> This gave rise to the confusion in *Buller Coal*, where the Court was compelled to discover the will of Parliament in a scenario not directly contemplated in the Act. Similarly, it is unlikely that the drafters of the amendment contemplated an activity like CCS, which also involves the consideration of a hypothetical discharge but has potential to have *positive* effects on climate change.

### 3. *Distinguishing CCS from Buller Coal on the Grounds of Causation*

Although the Court in *Buller Coal* settled on a broad interpretation of s 104E that, *prima facie*, could restrict consent authorities considering CCS applications, it may be possible to distinguish the scenario in *Buller Coal* from a proposal for CCS. The latter may justify an exception to the broad prohibition recognised under the purposive approach in *Buller Coal*, for a number of reasons.

Firstly, in *Buller Coal* there was no causation between the activity applied for and the alleged effect on climate change. The future discharge in *Buller Coal* was considered not to be an effect of the land use proposed.<sup>34</sup> It was seen rather to occur only indirectly from mining and to be an effect of a different activity that would occur outside New Zealand's geographical jurisdiction, being a discharge from the combustion of coal.<sup>35</sup> This argument rested partly on a jurisdictional bar – the inability of consent authorities to consider speculative effects overseas – rather than an assessment of the scope of the prohibition under s 104E itself.

The Supreme Court held that the discharge from coal combustion would not be an “effect” of mining under the RMA at all (even if the 2004 amendments had not been enacted) because it arises only indirectly from the land use and is thus too remote.<sup>36</sup> In contrast, the consideration of a hypothetical discharge to air (and the consequent positive effects on climate change) in the case of CCS injection would clearly be within the scope of the effects of the activity actually applied for (a discharge or dumping into the subsurface). The relevant activities associated with a CCS project would also take place within New Zealand's geographical jurisdiction, removing any practical and legal difficulties with applying sustainable management to activities in other countries.<sup>37</sup> In other words, there would be no jurisdictional bar on a consent authority in considering the effects of CCS on climate change, and this aspect of *Buller Coal* would be distinguishable.

However, the material question for CCS is not the existence of this kind of jurisdictional bar or lack of causation (which would be relevant even if the 2004 amendments had not been made) but rather whether CCS would be subject to the prohibition in s 104E itself. In *Buller Coal*, the issue of causation and difficulties with measuring effects in foreign jurisdictions did not detract from the fact that the purpose of s 104E (a shift in jurisdiction from local to central) poses a separate barrier to the consideration of effects of coal mining on climate change.<sup>38</sup> Therefore, even though the effects of CCS would be within the jurisdiction of the New Zealand courts and would be a direct result of the activity requiring consent, it may still fall foul of the wider jurisdictional purpose behind the prohibition in s 104E.

---

33 *Buller Coal*, above n 3, at [168].

34 Baillie, above n 31, at 12.

35 *Buller Coal*, above n 3, at [175].

36 At [172].

37 Such difficulties are described by the Supreme Court in *Buller Coal*, above n 3, at [175].

38 At [173]–[176].

#### 4. Distinguishing CCS from Buller Coal: Positive and Negative Effects

The second reason CCS may arguably be distinguished from the scenario in *Buller Coal* is because CCS would have a positive effect on climate change, while the use of fossil fuels as in *Buller Coal* would have adverse effects. In *Buller Coal* the discharge of CO<sub>2</sub> and its associated adverse effects were at least likely to occur at some point, namely when the coal in question was burned after it was exported overseas. In part, the prohibition in that case was extended beyond the wording of the section to prevent the negative effects of a discharge being considered by the “back door” in applications for activities only incidental to a discharge. In the context of CCS, a purely hypothetical discharge of CO<sub>2</sub> to the air would be considered only as a reference point to assess the merits of sequestration (a discharge to land), rather than something that would be likely or even possible as a downstream adverse effect. Allowing this discharge to be considered would therefore not provide an opportunity to debate the *adverse* climate effects of CO<sub>2</sub>-emitting activities by the “back door”, which was a central concern of the Supreme Court in *Buller Coal*.

However, to use this difference between positive and negative effects to conclude that the prohibition would be inapplicable to an application for CCS would be misguided. This is so for three reasons.

Firstly, it would require that an artificially narrow view of the purpose in s 3 of the amendment Act be taken. The courts have taken an expansive construction of s 3 and indicated that the amendment was not simply a tool to prevent the obstruction of emissions-intensive activities. The fundamental rationale behind s 104E is that climate change mitigation as a whole, wherever it involves the consideration of discharges to air, requires a national-level response. To allow divergent regional approaches would undermine the coherency of this national approach.<sup>39</sup>

Thus the Supreme Court has recognised “the clear legislative policy that addressing effects of activities on climate change lie outside the functions of regional councils and, *a fortiori*, territorial authorities”<sup>40</sup> and commented that the “commitment and the statutory and national mechanisms provided for in the 2002 [Climate Change Response] Act left little – and arguably no – scope for useful involvement by local authorities”.<sup>41</sup> The High Court in *Buller Coal* (undisturbed on appeal to the Supreme Court) also held that “the unambiguous policy of these amendments is to secure coherent regulation of greenhouse gas emissions at a national level and subject to national instruments”.<sup>42</sup> Whata J here also chose not to disagree with the words of the Environment Court that “the whole of the Amendment Act, but particularly section 3, point strongly to a finding that regulatory activity on the important topic of climate change is taken firmly away from regional government”.<sup>43</sup>

This wide interpretation of s 3 is supported by the fact that the purpose of the amendment Act makes no distinction between jurisdiction over the positive and the adverse impacts of activities on climate change. Although both *Greenpeace* and *Buller Coal* involved activities that would make climate change worse if consented, the prohibition is not limited to activities that would exacerbate climate change.

39 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [40], undisturbed on appeal by the Supreme Court’s majority judgment in *Buller Coal*, above n 3, at [176].

40 *Buller Coal*, above n 3, at [173].

41 *Greenpeace*, above n 3, at [127].

42 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [40].

43 At [37].

Secondly, it would be a mistake to see the purpose of the 2004 amendments as being to enhance climate change mitigation and therefore being inherently in favour of measures, like CCS, that have positive effects on climate change. It is worthwhile pausing at this juncture to consider what exactly is being meant by a “purposive” approach in this context. The Supreme Court characterised its expansive interpretation of s 104E in *Buller Coal* as resting on a purposive, rather than literal, approach to the amendments.<sup>44</sup> But is the wider context of New Zealand’s commitment to mitigation relevant to the interpretation of s 104E? Some may argue that, because New Zealand has set targets to reduce its greenhouse gas emissions and because CCS is designed to improve rather than contribute to climate change, a wider purposive approach would exclude CCS from the scope of the s 104E prohibition. For example, the purpose of the CCRA, which is strongly supportive of reducing emissions, would *prima facie* support the ability to consider the climate benefits of CCS.<sup>45</sup>

The Supreme Court in *Buller Coal* explored the context provided by the CCRA and the ETS, notably recognising that the ETS left little room for local authority jurisdiction over climate change.<sup>46</sup> However, the Court did not place weight on the purpose of the CCRA when determining the scope of the prohibition in s 104E. Instead, it focused on the purpose of the 2004 amendment Act itself, in conjunction with the scheme of the RMA as a whole, to widen the scope of the prohibition expressed in s 104E.<sup>47</sup>

This is an appropriate approach. While the intention of Parliament to transfer wider climate change mitigation jurisdiction from local to central government is not clear from s104E itself, the purpose of the CCRA should not be used to guide or cast doubt on the meaning of a section in a different Act that is subject to its own expression of legislative intent (that is, in section 3 of the amendment Act).

The purpose of the CCRA is, at least in its aspirations, what may be termed “climate friendly”. It aims, among other things, to implement an ETS that reduces New Zealand’s net emissions. The ETS is designed to be the primary mechanism by which New Zealand addresses greenhouse gas emissions. The complementary prohibition in s 104E of the RMA suggests that the CCRA is intended to do so to the express exclusion of local mitigation measures. This is understandable, of course, given that the ETS could be undermined if activities were also subject to varying regulatory and policy restrictions in local planning instruments. Thus the “climate friendly” approach of the CCRA cannot be automatically transferred to the interpretation of other instruments that are specifically designed *not* to have a major role in mitigation. In other words, one should not assume that any relatively weak climate outcomes under the RMA are inappropriate or should be subject to a strained interpretation simply because of statements in the CCRA that would support climate mitigation measures.

It is more persuasive to see the amendment Act as being neutral in a climate policy sense. It is designed to complement the ETS by removing jurisdiction from a local to a central level, so that consistent policy decisions can be made across the country. The jurisdictional shift was designed neither to increase mitigation, nor to reduce it. It simply changes the location where such decisions can be made. The fact central government has not yet embraced its regulatory role by implementing an NES on climate change, and the resulting weakening of climate regulation in practice, is irrelevant to interpreting the purpose of the amendment itself.

---

<sup>44</sup> *Buller Coal*, above n 3, at [153].

<sup>45</sup> Climate Change Response Act 2002, s 3.

<sup>46</sup> *Buller Coal*, above n 3, at [127].

<sup>47</sup> *Greenpeace*, above n 3, at [153].

Thirdly, it would be difficult to justify a different outcome in a CCS application from that in *Buller Coal* even if it was accepted that a wider “climate friendly” purpose were behind the transfer of jurisdiction in s 104E. At first glance, the effects of the fossil fuel activities in *Buller Coal* and *Greenpeace* may appear very different to those of CCS proposals. The former would have exacerbated climate change if consent were granted, while the latter would mitigate climate change. However, in *Buller* and *Greenpeace* the Court extended the scope of s 104E to prohibit the consideration of the activities’ adverse effects on climate change, thereby increasing the likelihood of consent being granted. In other words, a purposive interpretation produced an outcome that in practice was *bad* for climate change.

Applying the prohibition to an application for CCS would, in contrast, reduce the likelihood of consent being granted. However, as in *Buller* and *Greenpeace*, this is also an outcome that would be bad for the climate. The simple fact that CCS would have a *positive* effect on climate change cannot by itself be a reason to carve out an implied exception from the prohibition, because the positive effects that would have resulted if jurisdiction had been extended in *Buller* and *Greenpeace* were not seen as good reason carve out exceptions in those cases. This is because the aim of s 104E is not to enhance climate change mitigation, but simply to create consistency in climate policy by shifting jurisdiction to central government. The difference between the adverse effects of the activity considered in *Buller Coal* and the positive effects of CCS therefore are not material in determining whether CCS falls within the scope of the s 104E prohibition.

##### 5. Distinguishing CCS from Buller Coal: Does CCS “Relate to” a Discharge to Air?

There is a third way in which it might be possible to distinguish an application for CCS from *Buller Coal* and therefore argue that the prohibition would not apply to the former. Whereas in *Buller Coal* the application in question concerned an activity that could foreseeably result, eventually, in the discharge of greenhouse gases, the intention behind CCS is that no discharge to air would ever eventuate. Therefore it can legitimately be asked whether a consent authority, in looking at the positive impacts of CCS, would be considering an application that “relates to” a discharge to air. The fictitious atmospheric discharge being considered as a reference point may be too remote to be caught by the section. It has been concluded earlier in this paper that, on a literal reading, including CCS within the scope of the prohibition would be reading down this requirement that the discharge under consideration be to air.

However, the purpose of the amendments suggests that this difference would not be material and the fictitious discharge to air would not be too remote. Firstly, the hypothetical nature of a discharge to air does not in itself put it beyond the scope of the prohibition, as was made clear in *Buller Coal*. Secondly, prohibiting the consideration of the positive impacts of CCS on climate change remains within the more general jurisdiction-shifting purpose of the amendments, as described above.

Thirdly, the approach of s 104E to renewable energy suggests that activities that have no prospect of discharging greenhouse gases to air may still “relate to” the discharge of such gases to air and thus be subject to the prohibition. As with CCS, a renewable electricity project such as a hydro-electric dam does not propose, or ever have the intention of, releasing greenhouse gases to the air. The only way in which a hydro dam involves the consideration of the discharge into air of greenhouse gases is by assessing the emissions that would be released if a non-renewable alternative were used. It involves an assessment of its relative positive impact on climate change by using a hypothetical discharge to air as a reference point, in much the same way as an assessment would be made in an application for CCS.

The fact that an express exception to the prohibition for renewable energy has been included in s 104E indicates that such projects would otherwise be caught by s 104E. It suggests that the consideration of a hypothetical discharge, even as a reference point for comparison, would otherwise be prohibited. This is highlighted by the specific inclusion in the exception of the “relative” benefits of renewable energy for climate change, which would require a comparative assessment of non-renewable, greenhouse gas-emitting options. In other words, for the exception to apply, a renewable energy project does not have to contemplate *any* discharge to air as long as it would prevent discharges to air that would result from a non-renewable alternative.

If the consideration of an atmospheric discharge as a reference point only were not caught by the general prohibition, there would have been no need to include the specific statutory exception for renewable energy. Therefore on a purposive approach, including CCS within the scope of the prohibition in s 104E does not involve a reading down of s 104E. The inclusion within the general prohibition of a hypothetical discharge to air (as a reference point) is in fact a necessary outcome, if the express exception for zero-emission renewable energy projects is to be explained. The Supreme Court in *Greenpeace* commented:<sup>48</sup>

Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but *may do so when ... considering an application for consent to an activity involving the use and development of renewable energy.*

Here, the Court clearly contemplated that assessing an application for a renewable energy activity *does* involve the consideration of the discharge to air of greenhouse gases. The judgment indicates that the prohibition, to the extent not specifically overturned by the exception, can apply to activities that do not themselves propose or ever potentially lead to the discharge of greenhouse gases to the air. Given that CCS is clearly not a renewable energy activity, it does not fall within the specific exception. It must therefore fall within the general prohibition from which the exceptions were carved out. This is consistent with the general jurisdictional rationale underlying the 2004 amendments.

Thus on a purposive approach to s 104E, an application for CCS is likely to fall within the scope of its prohibition and a consent authority is likely to be prevented from considering its positive effects on climate change. This presents a potential barrier to applications for consent for CCS.

The discharge and rapid dispersal of purified CO<sub>2</sub> to the air would in most cases have only limited or no adverse environmental effects – apart from those on climate change. In other words, if climate effects were disregarded, there may be no appreciable environmental benefit from storing the gas underground rather than releasing it to the atmosphere. If the benefits of CCS could not be considered – by contrasting sequestration with the adverse effects that would result if that gas were discharged to the air – consent would be more likely to be declined under the consent authority’s overall broad judgment. This is particularly concerning given that CCS could have a number of potentially adverse effects and, other than impacts on climate change, only limited positive effects.<sup>49</sup> The only way in which the climate benefits of CCS could be considered would be if national-level regulation were developed to address these benefits specifically. This has not yet occurred and, as

---

<sup>48</sup> *Greenpeace*, above n 3, at [62] (emphasis added).

<sup>49</sup> For example, potential effects could include acoustic effects, disruption of marine and terrestrial ecology, effects on petroleum or water resources, and disturbance of seabed and land. Compared to these adverse effects, non-climate-related positive effects such as increased employment opportunities may receive little relative weight.



explored below, some questions remain over the ability of local and central government to develop the policy instruments necessary to make such regulation effective in practice.

## V. THE IMPACT OF THE PROHIBITION IN S 70A ON CCS CONSENT APPLICATIONS

In the consenting context, the RMA requires a consent authority to have regard not only to the effects of the proposed activity but also policy provisions in regional and district planning documents that are relevant to those effects.<sup>50</sup> When developing or reviewing these planning documents, s 70A of the RMA mirrors s 104E and prevents regional councils from developing policies addressing the causes of climate change. The section provides:

### **70A Application to climate change of rules relating to discharge of greenhouse gases**

Despite section 68(3), 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.

On its express wording, the prohibition in s 70A appears to have limited effect on CCS applications. This is so in three ways. Firstly, it expressly applies only to regional and not district councils. The prohibition does not apply to the consideration of territorial authority functions relating to land (for example land use or subdivision control). Secondly, it applies only to a regional council's functions relating to the control of discharges. It does not apply, for example, to coastal occupation or the taking of freshwater. Thirdly, the section relates only to the making of rules, and does not expressly prohibit the making of policies or objectives concerning the effects of activities on climate change.

The first two aspects identified above have been discussed already in the context of s 104E. There is no reason to believe that the courts would take a different approach to s 70A. A purposive approach would suggest that the prohibition applies equally to regional and district councils, and in developing rules pursuant to all their functions under the RMA (not only discharge control functions).

The third aspect mentioned above – the fact that s 70A relates only to the making of rules and not policies or objectives – is more difficult. Is local government barred from developing policies that highlight the positive effects of activities (such as CCS) on climate change? A view that s 70A applies only to the making of rules or controls, and not the development of sub-national policy, is supported by the express ability of a national environmental standard (NES) to dictate the extent to which climate change is controlled at a regional level.<sup>51</sup> In contrast, no provision is made for a national policy statement (NPS) to amend the extent to which policies and objectives in regional and district plans can provide for effects on climate change. This may suggest that the prohibition does not apply to policy development, because the removal of policy jurisdiction from

<sup>50</sup> RMA, s 104(1)(b).

<sup>51</sup> RMA, s 70B. This is also reflected in comments made throughout the legislative process of the 2004 amendments: *Todd Energy Ltd v Taranaki Regional Council*, above n 19, at [42].

local government has not been complemented by the granting of jurisdiction to central government (as it has been for regulatory provisions like rules and NESs).

However, the fact remains that the courts have taken an expansive, purposive approach to the 2004 amendments. In short, local authorities have been directed by the Supreme Court not to consider the effects on climate change of discharges into air of greenhouse gases. This broad direction would likely result in the prohibition applying equally to the development of regional and district policy concerning effects on climate change, because “given the unambiguous policy of the Amendment Act 2004 ... [one] must be slow to imply ... collateral jurisdiction”.<sup>52</sup> It is unlikely that a regional council could lawfully develop a policy in a regional plan that recognised the benefits of CO<sub>2</sub> injection for climate change mitigation.

Some might argue that questions over the prohibition on sub-national policy development are academic only. After all, the practical effect of the prohibition in s 104E is that a consent authority cannot consider the effects of an activity on climate change in any application for consent. Policies are only of relevance in the consenting context once a rule triggers a requirement for consent. Therefore, even if policies in plans could lawfully address the effects of activities on climate change, a consent authority would not be able to consider them when deciding an application under s 104.

However, the scope of the prohibition in s 70A becomes more practically significant if central government were to implement an NES that imposed rules and standards for activities having effects on climate change. The ability for an NES to do so is clearly provided for in s 70B. If such activities were treated as permitted or prohibited activities under the standard, no issue would be likely to arise. This is because no consent would (or could) be granted. However, if an NES were to impose a discretionary or non-complying status on an activity having effects on climate change, a consent authority would retain discretion as to whether it granted consent. At this point, there would be a need for the consent authority to consider the policy instruments outlined in s 104(1)(b). Given that an NES is a purely regulatory instrument and not designed to provide policy guidance,<sup>53</sup> and the fact that the broad prohibition in s 104E prevents regional or district consideration of positive effects on climate change, discretionary decisions on CCS might remain skewed in favour of declining consent even if an NES “enabled” it through a discretionary activity status.

This point will, perhaps, become clearer when put in context. In the case of CCS, an NES could foreseeably be developed to provide that injection be classified as a discretionary activity, subject to certain discretionary activity standards or technical requirements. The classification of injection as a discretionary activity and the imposition of standards could, under s 70B, lawfully be based on the positive effects that CCS could have on climate change. If an application for CCS injection were to be lodged as a discretionary activity, a consent authority would then need to have regard to the policy guidance referred to in s 104. The touchstone of the decision would be pt 2 of the Act. However, pt 2 is silent on the policy direction to be taken where an activity has effects specifically on climate change, and addresses only the importance of preparing for the

52 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [41]. This point was undisturbed by the judgment of the Supreme Court on appeal.

53 Despite one curious and anomalous reference in s 46A(2)(b)(i) of the RMA to “policies in ... national environmental standards” and a comment by Whata J that the 2004 amendments “accorded primacy to national regulations by requiring regional policies on discharges to align with national environmental standards”: see *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [46]. The obligation on local authorities in s 44A of the RMA is only to remedy conflicts between an NES and *rules*, not perceived conflicts between an NES and *policies*.

effects of climate change.<sup>54</sup> The same is generally true of other national-level policy documents.<sup>55</sup> The result would be that, although an NES could technically enable CCS on the basis that it had positive effects on climate change, a consent authority may be left with a paucity of lawful policy considerations in favour of CCS. This would be set against a potentially formidable range of policy considerations against it, providing an artificial bias towards declining consent.<sup>56</sup>

For a decision on CCS truly to reflect sustainable management, all relevant matters need to be weighed with minimal interference or exceptions. The activity's positive effects on climate change, along with its adverse environmental effects and applicable policy guidance, should be considered. The technology is unique in this sense, because consideration of greenhouse gas emissions is essential, rather than incidental, to the activity. Disregarding its effects on climate change, there is little to commend CCS to a decision-maker. In contrast, activities such as forestry may have positive effects on climate change, but have many other positive features to balance against their (generally more minor) adverse effects. By no means would all CCS proposals represent sustainable management and be granted consent. However, in cases where the adverse effects of injection were outweighed by potentially significant positive effects on climate change, sustainable management should demand that consent be granted. The blanket prohibition in the RMA suggests that this may be unlikely to occur at present. A key question, therefore, is whether an NPS *could* be developed by central government to enable consent authorities to consider the positive effects of CCS on climate change, thereby alleviating the implied barrier to local policy development in s 70A.

## VI. THE DEVELOPMENT OF NATIONAL-LEVEL POLICY

In contrast to an NES, the development of an NPS on climate change is not specifically provided for in the RMA. However, the development of an NPS is likely not prohibited in the same way that sub-national policy development is likely to be prohibited. The RMA provides that an NPS can be developed on any matter of national significance, including those that reflect "New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment".<sup>57</sup> The development of an NPS touching on climate change would amount to national-level direction, and thus not infringe the purpose of the 2004 amendments.

Although there is no statutory barrier to the development of an NPS recognising the climate change benefits of CCS, some doubt remains over whether such an NPS could overcome the prohibition in s 104E when determining an application for resource consent. Section 104F creates an exception to the prohibition in s 104E only to the extent that an NES provides standards, methods and technical requirements addressing the effects of activities on climate change. There is no express exception to the prohibition stating that a consent authority can have regard to an NPS on climate change.

---

<sup>54</sup> RMA, s 7(i).

<sup>55</sup> One exception is the National Policy Statement on Renewable Electricity Generation 2011, to the extent that renewable energy enables such a reduction. This is consistent with the exception in ss 70A and 104E that the climate change benefits of renewable generation are valid considerations.

<sup>56</sup> Including the potential adverse environmental effects of CCS and the risk that CCS could undermine the substantial body of policy direction under the RMA in favour of developing renewable energy resources.

<sup>57</sup> RMA, s 45(2)(b).

However, once again it is useful to go back to first principles. The relevant purpose of the 2004 amendments was to require local authorities not to consider the effects on climate change of discharges into air of greenhouse gases. Implicit in this is the intention that these effects are to be considered on a national level, but not that they are to be beyond the consideration of any policy-setting body. Therefore, although technically falling within the prohibition in s 104E, consideration of an NPS under s 104(1)(b)(iii) would not infringe the purpose of the amendments. If anything, the ability of a national instrument to direct regional policy development concerning the effects of activities on climate change is necessary to achieve their centralising purpose and to complement the regulatory effect of an NES. The 2004 amendments did not seek to remove climate change from the RMA regime entirely, only to place a jurisdictional bar on its consideration by local government. Allowing consent authorities to have regard to an NPS concerning climate change would not fall foul of this purpose.

## VII. CONCLUDING COMMENTS AND OPTIONS FOR REFORM

The 2004 amendments to the RMA made significant changes to the ability of local authorities to consider the effects of activities on climate change. The courts have since taken an expansive, purposive interpretation of ss 104E and 70A, and have been willing to conclude that they impose a wider prohibition than is apparent from their express wording. This purposive approach, when applied to the context of an application for resource consent to undertake CCS, could pose a significant barrier to the granting of consent. If consent were not able to be granted to CCS in practice, market signals under the ETS could not apply to CCS operations. The positive effects of CCS would need to be a valid matter under the RMA to minimise regulatory interference and allow the market to operate efficiently.

Removing regulatory constraints to CCS proposals would be a relatively simple way to enable a technology that has potential to reduce New Zealand's carbon emissions and bridge a temporary gap to a more sustainable industrial future. Given the uncertainties that surround the interpretation of s 104E and its potential to dissuade investment in CCS, the scope of the prohibition should not be left to be decided by the courts. If it were, the most likely interpretation is one that would prohibit the consideration of the positive climate effects of the technology. The RMA has, to some extent, an inbuilt mechanism by which the barrier to CCS in s 104E can be overcome, if that mechanism is utilised. Sections 70B and 104F contemplate the implementation of an NES to impose an appropriate activity status, standards, and technical requirements for CCS activities, and the positive effects of CCS on climate change can lawfully be taken into account in their development. These then have independent effect as regulations, and lower level planning documents must not conflict with them.<sup>58</sup> An NES on CCS should outline the appropriate activity status for CCS injection (most likely to be discretionary) which should be tied to appropriate standards (potentially based on international approaches).

It is curious that no provision was made in the 2004 amendments for national-level guidance to influence or direct regional climate change policy. To ensure that both the positive and adverse effects of CCS operations are able to be considered and weighed appropriately under the umbrella of sustainable management, an NPS on CCS should also be developed. This would need to provide national direction on the extent to which the positive impacts of CCS on climate change can lawfully

---

<sup>58</sup> RMA, ss 43 and 44A.

be considered when deciding applications for resource consent. Although perhaps not strictly necessary, an amendment could also usefully be made to s 104F, specifying that the prohibition in s 104E applies except to the extent that an NES *or* NPS enables the effects of an activity on climate change to be considered. At present, the prohibition in s 104E appears to apply irrespective of the contents of an NPS. Taking these actions would be one way to remove a potential, and likely unintended, regulatory barrier to the deployment of CCS technology in New Zealand.

An alternative option for reform, but one that requires legislative intervention, could be to implement a simple amendment to the RMA. An additional exception could be introduced in s 104E, to the effect that the prohibition applies except in applications proposing renewable energy *or* CCS. This would have the benefit of increased clarity, but may result in less flexibility. If central government then wished to remove the consideration of the climate benefits of CCS to the national level, further legislative change may be required.

One final option for reform merits a brief note. The recent report advising the government on the regulation of CCS recommends that the injection phase of CCS be removed entirely from scrutiny under the RMA, and transferred to CCS-specific legislation.<sup>59</sup> This would mean that the prohibition in s 104E would no longer bite on applications for consent to inject CO<sub>2</sub>, thus effectively resolving the issue discussed in this paper.<sup>60</sup> However, as yet, there has been no indication that this option has been adopted by government, and it remains one of several possible avenues for reform rather than a foregone conclusion. Removing a single activity from the scope of the Act is likely to be subject to intense political debate and would have legal ramifications beyond the resolution of the narrow issue concerning s 104E.

The ability of central government to develop NESs and NPSs on CCS, the relatively straightforward legislative amendments required to remove the problem, and the potential for the environmental impacts of CCS injection to be removed from the scope of the RMA entirely, do not render the issues discussed in this paper academic only. If the attention of policy and law makers is not directed to the potential barrier posed by s 104E to the consenting of CCS projects, it may not be immediately obvious that such remedial action is needed. The purpose of this paper is to identify this barrier, explain why it is significant, and use this as a basis to argue that some reform is needed. Whether that should take the form of national policy instruments, simple legislative amendment, or the wholesale removal of CCS injection from the RMA is an issue that is beyond the scope of this paper, and involves consideration of much broader factors.

## VIII. AREAS FOR FURTHER RESEARCH

This paper has focused on a potential barrier to CCS injection posed by the prohibition in s 104E of the RMA. A similar prohibition is contained in s 59(5)(b) of the recently enacted Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. This provision has some curious features that are not present in the RMA context and warrants further discussion.

Similarly, the broad purpose of the 2004 amendments presents a risk that suitable enforcement jurisdiction under the RMA may not currently exist to control escapes of CO<sub>2</sub> from a subsurface storage formation after injection has occurred. Such emissions may not cause any environmental

---

59 Barton, Jordan and Severinsen, above n 2, at 253.

60 In fact, the issue explored in this paper and summarised in ch 2 of the report was treated in the report as one reason (among others) to implement the solution of removing CCS injection from the RMA.

harm other than a proportionately small impact on the global climate, but would be essential for the success of a CCS project. Enforcement powers would therefore be important.