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High Court sets high bar for renewing discharge permits

A recent High Court decision[1] setting aside a discharge permit granted by Environment Canterbury, could have significant implications for replacing expiring discharge consents.

Introduction

The Environmental Law Initiative (**ELI**) filed legal proceedings against Environment Canterbury (**ECan**) over their 2021 decision to reconsent the discharge of nitrogen from farming, across an area served by Ashburton Lyndhurst Irrigation Limited's (**ALIL**) irrigation scheme.

The consent, replacing the expiring consent, authorises the discharge onto or into land, where contaminants may enter water arising from farming land use activities into a "Discharge Area" between the Rakaia River and the Hakatere/Ashburton River.[2] Importantly, the consent provides for a Nitrogen Discharge Allowance (**NDA**); requiring NDA to be reduced from 1 January 2025 by 10% from the current 2020 nitrogen leaching load; and from January 2030 by 20% from the current 2020 load.[3]

In their application ELI alleged three errors of law formed their grounds for judicial review:

1. Misapplication of the requirements of section 107 of the Resource Management Act (**RMA**);
2. Failure to consider and apply, in accordance with section 104 of the RMA, relevant provisions of the New Zealand Coastal Policy Statements (**NCPS**), the Regional Coastal Environmental Plan (RCP) for the Canterbury Region and the Land and Water Regional Plan (**CLWRP**); and
3. Failure to consider whether special circumstances existed, warranting public notification or wider limited notification.[4]

A misapplication of s 107

The Ecan decision found that there is widespread degradation in the groundwater receiving environment, and associated degraded surface water quality and declining ecological values in the lower Hakatere/Ashburton River and its hāpua, such that, even with proposed reductions in nitrogen discharges, the consented activity would continue to contribute to the significant adverse cumulative effects.[5]

ELI submitted section 107(1)(g) of the RMA therefore prohibited granting the consent, as the discharged nitrogen would continue to contribute to the existing "significant adverse effects on aquatic life" – this being an effect that is prohibited by section 107 (1) (g). The Court agreed, finding the "current state of the environment a product of the legacy of unsustainable discharge of contaminants" – a legacy that would continue to give rise to the maintenance of ongoing adverse effects.[6]

The Court concluded the grant of the discharge permit was premised on compliance with section 107(1), unless ECan could prove statutory exceptions applied. Justice Mander determined Parliament would not have intended the section be avoided, by a consent authority granting a discharge permit on terms that would likely continue 'prohibited effects', in anticipation that, by the permit's end, there would be compliance. This was especially relevant due to the consent's anticipated NDA timeline.

[1] Environmental Law Initiative v Canterbury Regional Council [2024] NZHC 612
[2] Paragraph 8
[3] Paragraph 14
[4] Step 4 of ss 95A(9) and 95B(10).
[5] Paragraphs 20 - 25
[6] Paragraph 43.

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Failure to consider and apply relevant coastal policies

ELI alleged the decision erred in failing to consider the NZ Coastal Policy Statement (NZCPS), the Regional Coastal Environment Plan (RCEP), and policy 4.81 of the Canterbury Land and Water Regional Plan (CLWRP), as "mandatory" considerations when considering the consent.[7]

The Court determined that, as the past and current land use practices of the irrigation scheme were found by the Commissioner to have contributed to significant adverse effects on the Hakatere/Ashburton River and hāpua (and specifically on aquatic life of the coastal environment) the Commissioner should have considered the NZCPS and RCEP. Failure to consider these policy instruments, and their directive provisions, was an error of law. Even though the consented activity was not within the coastal environment, the activity will have adverse effects in the coastal environment, and that requires an integrated approach across the relevant instruments.

No 'special circumstances' found to warrant notification

As the relevant rule in the CLWRP effectively precluded limited or public notification (with the exception of Ngāi Tāhu), the only statutory step that could warrant notification is if 'special circumstances' are found.

The Court defined special circumstances, "outside the common run of things which are exceptional, abnormal, unusual, but less than extraordinary or unique."[8] However, whilst a combination of circumstances considered collectively could amount to "special circumstances", it was also necessary for the "exceptional, abnormal or unusual" threshold be met at the time Council officers made their notification decision[9] to warrant parties other than Ngai Tāhu, from being notified.

ELI unsuccessfully argued the scale and effect of the activity,[10] the application being made before the NPSFM came into force,[11] adverse effects on community drinking water supplies,[12] significant public interest,[13] a "Matrix Method"[14] used to aggregate nitrogen discharge allowances and an "overseer-equivalent nitrogen loss model";[15] as features of the consent, gave rise to special circumstances. The Court rejected these arguments and found that when taken individually or taken together, the circumstances did not warrant public or further limited notification.

Conclusion

The Court set aside the decision granting the discharge consent, on the findings that there was a material error of law in the approach to the application of section 107 of the RMA and the failure to consider mandatory statutory requirements; while also determining there was no error in only notifying Ngāi Tāhu. ALI's application remitted back to ECan for consideration.[16]

The decision has potential far-reaching implications for replacing discharge consents on expiry in circumstances where the receiving environment remains significantly degraded.

Want to know more?

Please contact our Resource Management team if you want to better understand the implications of this decision.

[7] Paragraph 81.
[8] Para 188
[9] Paragraph 189
[10] Paragraph 191
[11] Paragraph 197
[12] Paragraph 200
[13] Paragraph 203
[14] Paragraph 207
[15] Paragraph 209
[16] Paragraph 215

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