I Te Kōti Matua O Aotearoa | In the High Court of New Zealand
Te Whanganui-a-Tara Rohe | Wellington Registry
CIV-2022-485-000012

under the COVID-19 Recovery (Fast-track Consenting) Act 2020

in the matter of an appeal against the final decision of an Expert Consenting Panel under the Act to approve resource consents for the Kapanui "Green" Hydrogen Project

between

TE KOROWAI O NGĀRUAHINE TRUST
Appellant

and

HIRINGA ENERGY LIMITED AND BALLANCE AGRI-NUTRIENTS LIMITED
Respondents

and

ŌKAHU-INUAWAI ME ĒTEHI ATU HAPŪ, NGĀTI TŪ HAPŪ, NGĀTI TAMAAHUROA-TITAHI HAPŪ, NGĀTI HAUA HAPŪ

SUBMISSIONS OF GREENPEACE AOTEAROA

19 April 2022

ASSIGNED JUDICIAL OFFICER:
Ellis J

NEXT EVENT DATE:
Hearing 16-17 May 2022

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AND KANIHI UMUTAHI ME ĒTEHI ATU HAPŪ
First Interested Parties

and

GREENPEACE AOTEAROA INCORPORATED
Second Interested Party

and

TARANAKI MĀORI TRUST BOARD
Third Interested Party

SUBMISSIONS OF GREENPEACE AOTEAROA

MAY IT PLEASE THE COURT

INTRODUCTION

1. This appeal is likely to be the first heard under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**). It concerns the decision of an expert consenting panel (**Panel**) convened under the FTCA to grant resource consents to the respondents to enable them to develop the Kapuni "Green" Hydrogen Project (the **Project**).

2. Greenpeace Aotearoa Inc (**Greenpeace**) has filed a notice of intention to be heard on this appeal as a party,[1] and it supports the grounds of appeal pleaded by the Appellant. Specifically, Greenpeace submits that the Panel erred in law in the following respects:

    (a) By failing to properly take into account the environmental effects of the end uses of the urea fertiliser produced by the Project;

    (b) By failing to take into account the environmental consequences of the Project failing to transition from producing urea fertiliser to hydrogen fuel, or that transition being delayed;

    (c) By taking into account irrelevant considerations, being the benefits of transition to hydrogen fuel production without that transition being guaranteed or required to ever occur;

    (d) By finding that the Project was entirely consistent with Part 2 of the Resource Management Act 1991 (**RMA**) without considering the potential that the project would never transition to hydrogen fuel production or that transition would be delayed;

    (e) By failing to include a condition requiring the Project transition to hydrogen fuel for transport having decided to grant the consent on an assessment of effects on the basis that the Project would transition;

    (f) By unlawfully delegating decision-making relating to transition to the South Taranaki District Council under the RMA;

    (g) By failing to act consistently with the principles of the Treaty of Waitangi; and

[1] Greenpeace is one of the entities listed in cl 17(6) of sch 6 to the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**) as being required to be invited to comment on consent applications. Clause 45 of sch 6 provides that Greenpeace is to be served with any appeal and permits Greenpeace to appear (by filing a notice of intention to appeal) as a party to the appeal. For convenience Greenpeace Aotearoa has been described in the intituling as an "interested party". Strictly speaking, Greenpeace appears in this appeal as a party that is a statutorily recognised representative of the public interest in circumstances where the FTCA otherwise constrains public participation in the consenting and appeals processes.

(h) By finding that a hearing was not required.

3. Accordingly, Greenpeace supports the Appellant's position that the decision involves material errors of law and should be quashed.

The COVID-19 Recovery (Fast-track Consenting) Act 2020

4. The FTCA records its purpose as follows:[2]

> … to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

5. It does this in two ways:

(a) By mandating that decision-making on certain listed projects be appointed to an expert consenting panel for determination (**listed projects**);[3] and

(b) By allowing other projects or part-projects to be referred to an expert consenting panel by the Minister for the Environment[4] upon an application to the Minister (**referred projects**).[5]

6. The expert consenting panel considers applications and determines resource consent and designations on a fast-track basis. This includes:

(a) No public or limited notice of applications, with only specified persons required to be invited to comment on the applications (which includes Greenpeace), and a discretion to invite others;[6]

(b) No requirement to hold a hearing;[7] and

(c) A decision issued within (generally) 25 working days of the date the panel specifies for receiving comments on the application.[8]

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[2] FTCA, s 4. The explanatory note to the bill as introduced provided that the concept of sustainable management includes "supporting the transition to a low-emissions economy and improving resilience to climate change and natural hazards while supporting sustainable management": COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-1) (explanatory note) at 1.
[3] FTCA, s 14(a).
[4] And by the Minister of Conversation if any party of the project occurs in the coastal marine area: FTCA, s 16(1).
[5] FTCA, ss 16–27.
[6] FTCA, s 17.
[7] FTCA, s 21.
[8] With an ability to extend this timeline by up to 25 working days (unless the referral order says otherwise) if the scale or nature of the proposal is such that the panel is not able to make its decision in this timeline: sch 6, cl 37.

7. An appeal on a question of law may be made by certain persons to the High Court.[9] Errors of law include:[10]

   (a) Misinterpretation or misdirection as to statutory requirements;

   (b) Overlooking any relevant matters or taking into account irrelevant matters;

   (c) Where an ultimate decision of a fact-finder is so insupportable and untenable that the proper application of the law requires a different answer.

8. An appeal of the High Court may be made to the Court of Appeal, but that appeal will be the final appeal as the legislation ousts the jurisdiction of the Supreme Court.[11]

9. It is apparent that the core principles and environmental standards required under the RMA are intended to be carried across to the FTCA.[12] This includes the matters to which a panel must have regard:[13]

> (1) When considering a consent application in relation to a referred project and any comments received in response… a panel must, subject to Part 2 of the Resource Management Act 1991 and the purpose of this Act, have regard to—
>
> > (a) any actual and potential effects on the environment of allowing the activity; and
> >
> > (b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity; and
> >
> > (c) any relevant provisions of any of the documents listed in clause 29(2); and
> >
> > (d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.

10. That is, the referred project must be considered having regard to the list of factors in the FTCA (such factors mirroring those in s 104 of the RMA) and subject to the purposes and principles of the RMA (Part 2 of the RMA) and the FTCA. In this connection, it is also important to observe that the meaning of "effect" is defined by incorporating the extended definition in s 3 of the RMA.[14]

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[9] Being the applicant, relevant local authority, the Attorney-General, persons who were permitted to and did comment on the application, and any person who has an interest in the decision "that is greater than that of the general public": sch 6, cl 44.
[10] On the scope of appeals on questions of law, see for example, *Bryson v Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 at [24]–[28]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC138, [2012] 3 NZRL 153 at [50]; *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
[11] FTCA, s 44(3).
[12] See at [25]–[28] of the appellant's submissions.
[13] FTCA sch 6, cl 31(1).
[14] See s 7(1).

11. As the appellants observe, there is a significant difference between the RMA and the FTCA regarding the Treaty of Waitangi. Section 6 of the FTCA requires that all persons performing and exercising powers under the FTCA must do so in a manner consistent with the principles of the Treaty of Waitangi and Treaty settlements. By contrast, s 8 of the RMA only requires that the principles of the Treaty of Waitangi be taken into account. Accordingly, under the FTCA, the panel must apply higher substantive consistency requirements of s 6 of the FTCA instead of s 8 of the RMA.[15]

12. The consistency threshold in s 6 of the FTCA is a strong legal requirement, directing the decision-maker to substantively implement the principles of the Treaty of Waitangi,[16] not merely to take them into account. In this way the FTCA embodies the strong principles of the line of cases dealing with s 9 of the State-Owned Enterprises Act 1986.[17]

The Project

13. The Project consists of the construction and operation of four large wind turbines (maximum height of tips being 206m, with a rotor-diameter of 162m), an electrolysis plant and hydrogen production infrastructure (including storage, loadout and refuelling) in Kapuni, Taranaki.

14. The hydrogen produced will be combined and used with atmospheric nitrogen to produce ammonia and urea to be used as agricultural synthetic nitrogen fertiliser. This is significant as synthetic nitrogen fertilisers are a major source of agricultural greenhouse gas emissions (both directly, as through the emission of nitrous oxide, and by enabling more intensive livestock farming which produces methane). Synthetic nitrogen fertiliser is also a major contributor to the pollution of waterways and groundwater in New Zealand. The stated intention of the operators is that the hydrogen production is:[18]

> …planned to transition from 100% urea to the transport market over 5 year period as the fuel cell electric vehicles market increases, with the intention to increase electrolysis capacity once green urea productions falls below a minimum threshold.

15. That is, the Project is said to be premised on the basis that the output of the plant will transition so that 100% of the hydrogen will be used as fuel

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[15] FTCA sch 6, cl 31(2). Section 6 of the FTCA was retained notwithstanding the recommendation of the Select Committee that it be replaced with a provision replicating s 8 of the RMA: COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-2) (select committee report) at 4.

[16] The principles of the Treaty of Waitangi include: (1) partnership, embodying an obligation of utmost good faith and reasonableness; (2) the active protection of Māori interests to the fullest extent practicable; and (3) redress and reconciliation of grievances. See, for example, the discussion in Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 83.

[17] See, for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) (the "Lands" case) and *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (the "Mixed Ownership Model" case).

[18] Application for resource consent and assessment of environmental effects (**Application**) at **CB Vol 301 Tab 7 [301.0044]**.

for the transport sector (rather than to procedure fertiliser), supporting the development of a green hydrogen and transport hub for South Taranaki.

The process

16. Following the requisite application by the Respondents, the Project was referred to an expert consenting panel (the **Panel**) by the Hon David Parker, Minister for the Environment. The Minister referred the Project. The referral order provided, in relevant part:[19]

> **3 Description of project**
>
> (1) The scope of the project is to construct, install, and operate a renewable hydrogen hub.
>
> (2) The renewable hydrogen hub comprises—
>
> (a) 4 wind turbines and associated infrastructure; and
>
> (b) an electrolysis plant; and
>
> (c) hydrogen production infrastructure; and
>
> (d) hydrogen storage, loadout, and refuelling facilities; and
>
> (e) underground electricity cables and associated buildings and structures.
>
> **4 Description of activities involved in project**
>
> The project involves works such as the following:
>
> …
>
> (c) works to construct and operate hydrogen storage, loadout, and refuelling facilities:

17. The statement of reasons provided that the Minister had accepted the application for referral for the following reasons:

> • the project will help to achieve the purpose of the Act; and
>
> …
>
> • the project is likely to help to improve environmental outcomes for air quality and assist New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy (subject to a successful future transition to the use of green hydrogen as a fuel in the transport sector); and
>
> …
>
> • any adverse effects arising from the activities occurring in the project, and potential mitigation measures, can be tested by an expert consenting panel, having regard to Part 2 of the Resource Management Act 1991 and the purpose of the Act.

18. It is apparent that the basis for the referral was that:

    (a) The scope of the Project was the construction, installation and operation of a renewable hydrogen hub.

[19] Appendix N of the Application, **CB Vol 303 Tab 21, [303.0075]**.

(b) This hub was to include hydrogen refuelling facilities and the Project involved work to construct and operate those facilities;

(c) The Project would, on this basis help to achieve the purpose of the FTCA, which include to promote the sustainable management of natural and physical resources; and

(d) The Project was likely to assist New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy, subject to a successful future transition, to using the hydrogen for fuel for transportation.

19. The reasons for the Project's referral were listed as part of the rationale of the Project in the resource consent application and assessment of environmental effects submitted by the respondent (the **Application**).[20]

20. The use of the hydrogen produced for transport (and the associated necessary transition for this purpose) was fundamental to both the referral of the Project by the Minister and the Application submitted by the Respondents. No less than 24 references are made in the Application to the use of green hydrogen for transport and its benefits. The Application begins:[21]

> The applicant's objective is to both demonstrate New Zealand's capability in the de-carbonisation of the heavy industry and heavy transport sectors and to also provide infrastructure that will improve economic, employment and environmental outcomes.

21. The Project's commitment to decarbonisation of the transport sector is made on a positive "will" basis throughout. The Application relies on the transition to justify the Project's consistency with the purpose of the Act, including that the Project will:

(a) provide infrastructure in order to improve economic, employment, and environmental outcomes, and increase productivity by delivering "sustainable and reliable source of electricity to the Ballance Plant and hydrogen for vehicle refuelling and export from the site, increasing the resilience and productivity of Ballance as a large employer";[22]

(b) improve environmental outcomes "by actively lowering the level of emissions generated from combustion of natural gas and petrol or diesel through the provision of a renewable energy source and clean-burning hydrogen as a feedstock for the Ballance Plant and displacing diesel trucks operating in the area by providing for hydrogen refuelling facilities";[23]

(c) contribute to New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy as "production

[20] Application, **CB Vol 301 Tab 7 [301.0013]**.
[21] Application, **CB Vol 301 Tab 7 [301.0013]**.
[22] Application, **CB Vol 301 Tab 7 [301.0059]**.
[23] Application, **CB Vol 301 Tab 7 [301.0060]**.

is diverted to the transport market" and "offsets fossil fuel imports with locally produced green hydrogen for transport";[24]

(d) strengthen environmental, economic, and social resilience by creating the "basis for a hydrogen transport hub for green hydrogen at Kapuni, aiding in the transition from fossil fuels for the transportation sector and providing a diversified supply of fuel" and provide a "catalyst for uptake of hydrogen powered heavy vehicles" that will "enable transportation fuel to be generated from New Zealand renewable energy and reduce dependence on imported fossil fuels making New Zealand more economically resilient".[25]

22. Comments were invited from parties as required and/or permitted under the FTCA by letter 30 September 2021 and were due by 21 October 2021. These comments were provided to the Respondents, who responded in turn on 2 November 2021.[26] Draft conditions and an invitation to comment on these conditions were sent to the applicants, South Taranaki District Council and the parties who responded to the invitations to comment. Greenpeace Aotearoa commented on both the application and the draft conditions.[27]

23. The Panel issued its decision on 1 December 2021, following six Zoom meetings between 24 September 2021–30 November 2021 and a site visit by each member. No hearing was held as the Panel's decision was that "a hearing was not required on any issue".[28]

24. The Panel granted the application for a term of 35 years subject to conditions.

GROUNDS OF APPEAL

Failure to consider end use of urea and related environmental effects

25. Under sch 6, cl 31 of the FTCA, the Panel was required to have regard to:

(a) the actual and potential effect on the environment of allowing the Project; and

(b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the Project.

[24] Application, **CB Vol 301 Tab 7 [301.0061]**.
[25] Application, **CB Vol 301 Tab 7 [301.0062]**.
[26] Late comments were accepted from the Department of Conservation on 29 October 2021 and responded to on 4 November 2021: Decision report and conditions of consent (**Decision**) at [35] **CB Vol 101 Tab 3 [101.0008]**.
[27] **CB Vol 101 Tab 40.**
[28] Decision at [38] **CB Vol 101 Tab 3 [101.0009]**.

26. In this connection the Panel decided that because the Project would produce a relatively small amount of the total urea fertiliser consumed in New Zealand, and because it was intended that the Project would transition to the exclusive production of hydrogen fuel:[29]

> there is a danger that to disenable this proposal on the basis of the urea production end use would be to throw the baby out with the bathwater vis-à-vis the much more ambitious and significant greenhouse gasses / climate change reductions that will be achieved through the increasing use of hydrogen fuel in heavy transport. We therefore do not consider that this is a reason to deny the availability of fasttrack consenting, or to decline consent itself. However, it has some relevance to the process of transition.

27. Greenpeace submits that Panel erred in law by:

(a) failing to properly consider the end use of the urea fertiliser produced by the Project and the environmental effects associated with that end use; and

(b) failing to specifically consider the environmental effects of the urea fertiliser produced by the Project and the environmental effects associated with that end use in the event that the Project never transitions to production of hydrogen fuel or that is substantially delayed beyond the intended 5 year target.

Urea production

28. At the outset the Project will see all of the hydrogen produced used as feedstock for the production of urea to be sold for use as fertiliser. The respondents say that their plan for the Project is that over a period of five years the hydrogen produced will be used as fuel in the transport sector. The transition from fertiliser to fuel was viewed as critical to the application by the Panel, which went so far as to suggest that it was only basis on which the Project would have qualified for a fast-tracked process.[30]

29. The most recent estimate before the Panel was that 607,000 tonnes of urea were used in New Zealand in 2019. Ballance currently operates the only urea manufacturing plant in New Zealand and generates approximately 265,000 tonnes annually. [31] The remainder is imported. It is said that the hydrogen generated by the Project will produce an additional 7,000 tonnes of urea per year.[32]

30. The respondents assert they "anticipate" that the urea produced from the Project will displace imported urea.[33] The economic impact assessment provided with application suggested that domestic urea production would displace the need to import urea,[34] but it did not state that it would do so entirely. Moreover, the economic impact assessment made no effort to model the effect of what it acknowledged would be more affordable urea of

[29] Decision at [62] **CB Vol 101 Tab 3 [101.0016]**.
[30] Decision at [238] **CB Vol 101 Tab 3 [101.0052]**.
[31] Economic impact assessment at [8.2] **CB Vol 303 Tab 27 [303.0246]**.
[32] Economic impact assessment at [8.2] **CB Vol 303 Tab 27 [303.0246]**.
[33] Response to comments from invited parties **CB Vol 304 Tab 34 [304.0209]**.
[34] Economic impact assessment at [6.4] **CB Vol 303 Tab 27 [303.0238]**.

domestic fertiliser use, nor did it attempt to explain these effects in the context of consistent upward trend of urea use in New Zealand.[35]

Environmental harms of synthetic nitrogen fertilisers

31. A major concern for Greenpeace is that the fast-tracking of the Project under the FTCA will result in an expansion of the production (and/or a reduction in price) of urea fertiliser which will then result in an increased use of this harmful agricultural pollutant. The end uses of urea fertiliser have significant adverse environmental and climate related effects that must be taken into account when considering the actual and potential effects on the environment of allowing the Project to proceed.

32. Synthetic nitrogen fertilisers (including urea) are a major agricultural climate pollutant because they emit nitrous oxide and carbon dioxide when applied to land. These direct emissions have increased 512% since 1990 and are greater than the direct emissions from the entire domestic aviation industry. Synthetic nitrogen fertiliser also results in indirect emissions by enabling the intensification of agriculture (because they allow land to carry more livestock), in turn increasing methane and nitrous oxide emissions from dairy herds. Agriculture is responsible for 48% of New Zealand's emissions and has increased 17% since 1990. The Ministry for the Environment credits this increase in agricultural emissions to the increase in the national dairy herd and an increase in the application of synthetic nitrogen fertiliser of 670% since 1990.[36]

33. Synthetic nitrogen fertilisers are also a major cause of freshwater and drinking water pollution, both as a result of their direct application and indirectly from the intensive farming they facilitate.[37]

Consideration of end use and associated effects by the Panel

34. The Panel described Greenpeace's position as follows:[38]

> … the point being made was that urea production as an end use outweighed the claimed environmental benefits of the project unless or until the end use of green hydrogen production was entirely for the transport market.

35. The Panel accepted that the assessment of "whether an end use that is otherwise lawful is a disenabling adverse effect" has its complexities, and that in this application it required a "careful review of what is proposed and the profiles of the current and intended production."[39] The Panel considered:[40]

[35] Economic impact assessment at [8.2] **CB Vol 303 Tab 27 [303.0246]**.
[36] Comments in response to consultation **CB Vol 101 Tab 40 [401.0065]** and onwards.
[37] Comments in response to consultation **CB Vol 101 Tab 40 [401.0067]** and onwards.
[38] Decision at [56] **CB Vol 101 Tab 3 [101.0014]**.
[39] Decision at [57] **CB Vol 101 Tab 3 [101.0015]**.
[40] Decision at [59]–[61] **CB Vol 101 Tab 3 [101.0015]**.

(a) The current plant is the only ammonia manufacturing plant in New Zealand and relies on electrify from the grid and natural gas from nearby gas fields.

(b) The respondents' assertion that urea produced locally offsets urea that would otherwise be imported from production methods that have higher emissions.

(c) The 7,000 tonnes of urea produced annually by this project from green hydrogen would be only 1.15% of the total urea used in New Zealand.

(d) "Critically", the proposal for transition for the hydrogen from 100% urea to fuel over a 5 year period.

36. As noted, the Panel concluded that in light of the small percentage of annual urea used immediately attributable to the Project and the intended transition, to disable the application on the basis of the end-use of urea would be to "throw the baby out with the bathwater" relative to environmental gains connected with fuel production.[41]

Failure to take into account relevant considerations: *Environmental effects connected with the end use effect of urea production was relevant to determination of application*

37. Greenpeace submits that the Panel failed take into account relevant considerations required by Sch 6, cl 31 of the FTCA, because it failed to properly have regard to the environmental effects of the synthetic nitrogen fertiliser produced by the project being used on farms.

38. The extent to which the end use of the products produced by an activity subject to an application for consent are relevant to that application is a developing area of law. It is a question of fact and degree[42] and requires consideration of nexus and remoteness:[43]

> Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision.

39. The nexus between the Project and the environmental effects of synthetic nitrogen fertiliser in New Zealand is clear and close. The Project will result in an increase in urea production in New Zealand. That urea will be used as synthetic fertiliser on New Zealand farms. Urea is a climate, and environmental, pollutant and accordingly the production of urea from the Project will result in the release of greenhouse gases and the pollution of waterways and aquifers.

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[41] Decision at [62] **CB Vol 101 Tab 3 [101.0015]**.
[42] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87;[2014] 1 NZLR 32 at [119].
[43] See, for example, the comments in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Counci*l [2020] NZHC 3388 (appealed and awaiting a decision from the Court of Appeal) and *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002.

40. As to remoteness, the end use of the resource will be used by the Respondents, which include Ballance Agri-Nutrients (one of the main retailers of synthetic nitrogen fertiliser in New Zealand), for their own (commercial) purposes being the retail sale of fertiliser to farmers. There are no issues as to the nexus between the Project and the effect, nor the proximity of this nexus.

41. While the Panel did consider that the urea would be used for fertiliser—and so did consider what the end use would be—it failed to properly assess the environmental effects connected with those end uses. Indeed, there dearth of evidence on these issues, including climate change effects and water pollution. The Panel reached, in a conclusory fashion, the view that the environmental benefits to transition to hydrogen fuel would outweigh any environmental harms connected to the use of urea fertiliser produced by the factory. However, there was an insufficient evidential basis to reach that conclusion because the was an absence of evidence on the relative amount of environmental harm associated with urea fertiliser use compared to the benefits of hydrogen fuels.

42. There is also an irrationality to the Panel's conclusion on this issue. While the respondent claimed that it intended to transition to fuel supply completely within five years, there was no commitment to that effect, only vague evidence on the potential market for such fuel, and no consent condition requiring transition. On that basis it was logically impossible for the Panel to meaningfully weigh the environmental benefits of hydrogen fuel use against the environmental harms of urea use because it has no way to know which of those uses would dominate the life of the project.

Errors of law arising from consideration of an intended transition to hydrogen fuel production

43. Greenpeace submits that four errors of law arose in the Panel's treatment of the Respondents' intended transition of the Project to the production of hydrogen fuel:

(a) Absent a condition requiring transition, the effects of transition were irrelevant considerations in the Panel's assessment of the Project against the statutory criteria;

(b) Alternatively, having considered the effects of transition and relied on them to grant the consent, it was incumbent on the Panel to require the transition to occur and irrational to fail to do so;

(c) It was not open to the Panel to effectively delegate the regulation on transition to the District Council; and

(d) The Panel wrongly concluded that the application was "entirely consistent" with Part 2 of the RMA.

Taking account of irrelevant considerations: *Consideration of intended transition to hydrogen fuel use*

44. Schedule 6, cl 31 of the FTCA required the Panel to take into account both the environmental effects of the Project but also "any measure proposed or agreed to by the consent applicant to ensure positive effects on the

environment to offset or compensate for any adverse effects that will or may result from allowing the Project."

45. Both the application and the Panel's decision focused on the transition to hydrogen fuel as a measure to ensure positive effects to the environment. That was explicit in the Panel's "baby out with the bathwater" conclusion. When considering the condition relating the transition from urea to fuel, the Panel acknowledged that the justification for the Project being fast-tracked was "squarely premised" on the transition to utilising the hydrogen in the transport industry.[44] The Panel was of the view that:[45]

> Absent that transition (i.e. if the proposal were simply to continue producing urea) it is difficult to see how the fast-track consenting could be justified. The proposal may or may not have succeeded as an ordinary application under the Resource Management Act. Therefore, given the reliance on transition to justify fast-tracking, it is appropriate to ensure that any consent matches that justification, and is reflected in the appropriate conditions.

46. Despite this reasoning, the conditions imposed by the Panel do not require or "ensure" the transition to hydrogen fuel production will occur within five years, or indeed at all. Rather, the conditions only require (see conditions 112 to 114) written reports on progress and permit the South Taranaki District Council to review the condition from 2028 and, in its discretion, to vary the conditions under s 128 of the RMA.

47. It is accepted that should the Project fully transition as intended, the use of renewably generated hydrogen to replace fossil fuels may well contribute to a reduction in transportation emissions and associated environmental benefits. However:

    (a) There was an insufficient evidential basis for the Panel to conclude that this transition would ever occur, or that it would occur soon enough to cause the Project to result in overall environmental benefits compared to the harms associated with the production and use of urea fertiliser.

    (b) There is no guarantee that the transition from fertiliser production to fuel production will occur promptly or at all. While an intention to transition is expressed by the respondents, there is no requirement that such a transition actually occur. Indeed, the application was explicit that "the purpose of the Ballance Plant is to produce ammonia for urea" and that transition to fuel use would depend on the development of a market for the same.[46]

    (c) By contrast, an increase in urea production is guaranteed because that will be initial and primary output of the Project. As noted earlier, the argument that 'local urea' has a low emissions profile compared from importing urea overseas is overly and artificially narrow. It ignores the significant adverse environmental impacts of urea being used at all, regardless of where it is sourced.

[44] Decision at [237] **CB Vol 101 Tab 3 [101.0052]**.
[45] Decision at [238] **CB Vol 101 Tab 3 [101.0052]**.
[46] Application **CB Vol 301 Tab 7 [301.0047]**.

48. In considering environmental effects, and in weighing the effects of urea production against fuel production, the Panel proceeded on an assumption that the intended transition would actually occur, and large parts of the Panel's decision are premised on that assumption.

49. Greenpeace submits that in applying sch 6, cl 31 and the other tests under FTCA, the possibility of a transition of the Project to producing hydrogen fuel was an irrelevant consideration. Once the Panel decided not to include a condition requiring transition it ought to have proceeded to analyse the statutory tests on the basis that the Project would only ever produce urea fertiliser because that was the only certainty. There was no rational basis to consider that the Project on the basis that it would ever produce hydrogen fuel because that was nothing more than an asserted "intention" of the respondent that might or might not ever eventuate.

50. Specifically, it was not open to the Panel to treat a potential transition to hydrogen fuels as a mitigating measure under sch 6, cl 31. Accordingly, the Panel erred when it considered that denying the Project on the basis of urea production end use would be disproportionate as against the greenhouse gas and climate change reductions that "will be achieved" through the increasing use of hydrogen in heavy transport.[47] The Panel had no basis to conclude that these reductions "will be achieved". There was no requirement, nor commitment, that a transition to fuel would occur. On that basis, the potential for a transition to different end use was not relevant to a consideration of the effects of the Project.

Error of law: *Failure to require transition*

51. If the Panel wished to consider the effects of the Project on the basis that it would involve the transition to hydrogen fuel then it was incumbent on the Panel to require that to occur.

52. This submission bookend ends the prior submission regarding irrelevant considerations. To act lawfully, the Panel had two choices:

    (a) If transition would not be required, then it was not open to the Panel to assess the Project on the basis that transition would occur; or

    (b) Having assessed the Project on the basis that transition would occur, it was incumbent on the Panel to require transition to occur as a condition of the consent.

53. The approach of the Panel, which was to assess the Project as if transition would occur, but without requiring transition to occur, was unlawful and irrational because it created a disconnect between the reasoning supporting the decision and the decision itself. As noted earlier, the Panel recognised a need to "ensure that any consent matches that justification [i.e. a transition from fertiliser to fuel production over a 5 year period]" yet it failed to do that.[48]

[47] Decision at [62] **CB Vol 101 Tab 3 [101.0015]**.
[48] Decision at [238] **CB Vol 101 Tab 3 [101.0052]**.

Error of Law: *Delegation of decision-making to the South Taranaki District Council under s 128 of the RMA*

54. The illegality in the approach of the Panel was not remedied by the conditions it did impose, which, following reporting requirements, give the South Taranaki District Council a discretion to review the conditions of the consent as to transition under s 128(1)(a)(iii) of the RMA. That effective delegation of decision-making relating to arguable the most crucial consideration in the Panel's decision—the transition of the Project to hydrogen fuel production—was itself unlawful.

55. First, in effectively devolving decision-making on conditions relating to transition to the District Council the Panel failed to place any parameters around the District Council's decision-making. The result is that whether, and what, conditions to be might be imposed if transition does not occur by 2028 is entirely a matter for the District Council to consider for itself under the RMA.

56. There can be no guarantee that the District Council will see transition as a central consideration in relation to the Project. It might be content, for highly localised reasons, for the Project to continue producing urea for the length of the consent and never to transition. Yet, as noted, transition to hydrogen fuel was central to:

    (a) The application;

    (b) The referral by the Minister; and

    (c) The Panel's reasoning including its assessment of environmental effects, and ultimately its decision to grant the consent.

57. Parliament, having given the Panel power to assess effects and impose conditions, intended those powers to be used by the Panel.[49] One can infer, that by giving the Panel, rather than local councils, the decision-making role under FTCA Parliament intended the decision-maker to take a broader view. The approach of the Panel in this case undermines the scheme and intention of the FTCA by failing make conditions addressing the premise of the application and consent decision (transition) and effectively delegating that decision-making role to the District Council under a different legislative regime.

58. There are additional problems with the approach of the Panel:

    (a) Whether to review the conditions under s 128(1)(a)(iii) is a discretionary decision for the District Council. There is no guarantee that it will chose to review the conditions, even if transition does not occur.

[49] The Panel's power to make conditions was discretionary. However, it is well established that the failure to exercise a discretion can be unlawful where it frustrates Parliament's intention and the object of the legislation conferring the discretion: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *RM (AP) v The Scottish Ministers* [2012] UKSC 58 at [46]-[48].

(b) Any review or variation under s 128(1)(a)(iii) will involve the decision-making criteria in the RMA which are not co-extensive with the decision-making requirements of the FTCA (including Sch 6, cl 31 and s 6).

(c) The notification and participation provisions in the FTCA will not apply. Instead, notification and participation will be a matter for the District Council to determine under the RMA, and there is no guarantee that the review process will be on a notified basis or that there will be any public participation. This is material as the FTCA provides for notification to, and participation by, a range of identified entities in the decision-making process (including Greenpeace).

59. It will be open to the District Council to decide not to review the consent, or to make no variation to the consent in 2028, or ever, even if transition is not on the horizon. Should that happen, the effect of the Panel's decision will be to have consented a Project that produces a synthetic nitrogen fertiliser, a major environmental pollutant, for 35 years based on the mere *intention* of the respondent to transition to hydrogen fuel and on consideration of the benefits said to arise from that transition should it ever occur. This cannot be an application of the FTCA intended by Parliament.

Taking into account irrelevant considerations and failing to take into account relevant considerations: *Consideration of consistency with Part 2*

60. A related error was the Panel's conclusion that the application appeared to be "entirely consistent" with various provisions including Part 2 of the RMA.[50] In reaching this conclusion, the Panel appears to have relied on assessments of Part 2 matters in the Application, all of which were premised on transition actually occurring. For example:

(a) As to s 7(ba) the efficiency of the end use of energy:[51]

> **Assessment**: The proposal provides for an efficient use of energy. The proposal utilises a world class renewable wind resource located in close proximity to existing infrastructure. The energy generated will be used for a number of purposes i.e. electricity for the Ballance Plant or to the grid, creation of hydrogen for use in the Ballance Plant or for refuelling heavy vehicles. …

(b) As to s 7(f) maintenance and enhancement of the quality of the environment: [52]

[50] Decision at [241] **CB Vol 101 Tab 3 [101.0053]**. Greenpeace says the Panel was correct to consider Part 2, as was intended when the bill was introduced. The explanatory note made clear that a panel "must apply the purpose of the Bill alongside Part 2 of the RMA" and further that "the decision-making criteria that apply to resource consents and designations in the RMA will also apply to referred projects, except that panels must apply the purpose of the Bill alongside Part 2 of the RMA": COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-1) (explanatory note) at 3.

[51] Application, **CB Vol 301 Tab 7 [301.0052]**.

[52] Application, **CB Vol 301 Tab 7 [301.0052]**.

> **Assessment**: The proposal maintains and enhances the quality of this mixed-use rural-industrial environment, and the freshwater environments of the streams that cross it through such measures as enhancement of fish passage and proposed landscape mitigation and riparian planting. The proposal also makes a contribution to reducing greenhouse gas emissions.

(c) As to s 7(j) the benefits to be derived from the use and development of renewable energy.[53]

> **Assessment**: The benefits to be derived from the use and development of wind energy from the turbines are significant and multi-layered for this Project and are detailed throughout the application.

61. In reaching the conclusion that the application was consistent with part 2 the Panel premised its decision on transition actually occurring and failed to take into account the implications under Part 2 of there being no transition. Those matters were material to an assessment of the Project against Part 2 of the RMA, and would have an impact on at minimum (based on the respondents' own analysis) the efficiency of the end use of energy, the maintenance and enhancement of the quality of the environment, and the benefits to be derived from the use and development of renewable energy.

62. Second, the Panel failed to properly take into account the effects of climate change under s 7(i). When assessing the effects of climate change the Application simply recorded that:[54]

> Particular regard has been had to climate change in the design of many aspects of the Project such as the threat from natural hazards and design of infrastructure such as the culvert.

63. That is, the Application considered the potential effects of climate change on the physical infrastructure of the Project. Greenpeace submits that the Application, and the decision, failed to adequately assess the impacts of the Project on climate change in circumstances where the Project never transitions from fertiliser production to fuel production. There was also a related failure to have regard to the impacts a failure to transition for New Zealand meeting its domestic and international emissions reduction obligations.

64. Relatedly, the Panel failed to consider associated consequences including the impact of a failure to transition on the life-supporting capacity of water and ecosystems and damage their ability to provide for future generations in accordance with s 5. There was a failure to recognise that the effects of urea use on freshwater ecology might be inconsistent with Part 2 of the RMA should the transition never take place. Instead, the Panel considered only the risk to such freshwater ecology during site development and earthworks, concluding in that connection that there were "no or minimal adverse effects on freshwater ecology".[55] Greenpeace submits that the Panel's approach to freshwater ecology was unduly and incorrectly narrow in light of the requirements under Part 2 of the RMA to avoid, remedy, or mitigate any adverse effects of activities on the environment, and

[53] Application, **CB Vol 301 Tab 7 [301.0052]**.
[54] Application, **CB Vol 301 Tab 7 [301.0052]**.
[55] Decision at [87] **CB Vol 101 Tab 3 [101.0021]**.

specifically in relation to the effect of urea produced by the Project polluting water resources.

Failure to act consistently with the principles of the Treaty of Waitangi

65. Section 6 of the FTCA required the Panel to exercise is powers in a manner that was consistent with the principles of the Treaty of Waitangi. One of those principles is active protection. That principle was first recognised by the Court of Appeal and extends to "active protection of the Māori people in the use of their lands and waters to the fullest extent practicable".[56]

66. Greenpeace supports with the submissions of the appellant at [118]. Greenpeace submits that the Panel failed to implement s 6 of the FTCA as a *substantive* rather than merely procedural threshold for decision-making, and that this is an error of law of itself.

67. Greenpeace submits that the Panel substantively failed to substantively actively protect Māori interests in at least two material ways, in addition to the matters raised by the appellant. These matters overlap with errors of law already identified, but arise from a distinct juridical basis being s 6 of the FTCA.

Error of law: *Inconsistency with the principles of the Treaty of Waitangi by failure to require transition*

68. First, at a minimum, the Panel needed to consider what would happen to Māori interests in the event that transition to fuel production did not occur or was delayed. That is because the continued production of synthetic nitrogen fertiliser under the consent has the potential to damage Māori interests through the contribution of that fertiliser to the harmful effects of climate change[57] and through water pollution.[58] In failing to directly consider these matters, including in relation to effects on Māori, the Panel's decision was not consist with the principles of the Treaty of Waitangi because it failed to actively protect Māori and Māori interests.

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[56] In *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

[57] It is submitted that the Court can take judicial notice of the particular vulnerability of Māori to the effects of climate change. This proposition is accepted across government and the literature. See, for example, the report of the Ministry for the Environment's Climate Change Adaption and Technical Working Group *Adapting to Climate Change in New Zealand* (MfE, 2017); Shaun Awatere et al "A changing climate, a changing world" (2021) 7 Te Arotahi 1; Darren Ngaru King et al "The climate change matrix facing Māori society" in RAC Nottage et al (eds) *Climate change adaption in New Zealand: Future scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, Wellington 2020); Hayley Bennett et al "Health and equity impacts of climate change in Aotearoa-New Zealand, and health gains from climate action" (2014) 127 (1406) NZMJ 16.

[58] Similarly, it is submitted that judicial notice can be taken of the effects of the pollution of New Zealand's water resources on Māori. This, too, is widely recognised by the government and in the literature. See, for example, Ministry for the Environment *Our Freshwater 2020* (MfE, Wellington, 2020). The significance of rivers to Māori is also recognised in numerous Waitangi Tribunal decisions and Treaty settlements.

69. A further failure of active protection was the Panel's decision not to include a condition requiring the Project to transition to fuel production within 5 years. Instead, and as discussed earlier, the Panel left open the possibility that no transition would ever occur or that it would be substantially delayed, in which case the Project would continue to primary produce an environmental pollutant. The inclusion of a condition requiring transition would have mitigated the risks to Māori interests connected to the ongoing use of the Project to produce fertiliser.

70. Greenpeace submits that having identified transition from urea to fuel as the crucial feature of the Project it was incumbent on the Panel to, at a minimum, require that transition occur in order to actively protect Māori interests. Rather than protecting Māori interests to the fullest extent practicable by placing the risk of a failure to transition on the respondents, the Panel chose to instead place that risk on Māori and the wider community.

Error of law: *Inconsistency with the principles of the Treaty of Waitangi by effective devolution of decision-making to District Council under RMA*

71. The effect of the conditions was to take decision-making about the important aspect of the Project—transition to fuel use—outside the FTCA and to instead leave those decisions to be made by the District Council in accordance with s 128 of the RMA. This is highly problematic because it means that decisions relating to transition will be made under a regime (the RMA) which does not require decision-makers to act consistently with the principles of the Treaty of Waitangi.

72. The Panel's decision to effectively devolve decision-making connected with transition to the District Council:

    (a) was in and of itself a failure of active protection, because it took decision-making connected to transition (or a lack thereof) outside the protective FTCA framework, which requires decision-makers to act consistently with the principles of the Treaty of Waitangi, and situated that decision-making in the RMA which does not impose the same requirements on decision-makers; and

    (b) exposes Māori interests to prejudice, in a manner inconsistent with active protection, because in the event that there is no transition, or where transition is delayed, decisions about consent conditions will be left to a decision-maker who is not required to substantively implement the principles of the Treaty of Waitangi in its decision-making.

73. These matters are material because it will be open to the District Council chose not to review the conditions even in the event of a failure to transition, or to make a decision on whether to vary of the consent conditions, in a manner that is substantively inconsistent with the principles of the Treaty of Waitangi so long as it has regard to the matters in s 8 of the RMA. That is inconsistent with Parliament's requirement, and intention, in s 6 of the FTCA, that the Panel act consistently with the principles of the Treaty of Waitangi because it does not protect the interests of Māori to the fullest extent practicable. Those interests would have been protected had the

Panel actively implement measures requiring the transition to occur, or had placed requirements or parameters on any future review process.

Determination that a hearing was not required

74. The FTCA did not require the Panel to hold a hearing. While the decision whether to hold a hearing is a matter of discretion, no discretion is unfettered.

75. The Panel's reasoning on the issue was a simply declaration that "a hearing was not required on any issue".[59] Greenpeace supports the appellants' submission that the decision not to hold a hearing is problematic because it contains insufficient reasons to allow this Court to determine whether it was made lawfully.[60] It is not clear, for example, what the Panel considered in making that decision, including why the Panel considered a decision not to hold a hearing was consistent with the principles of the Treaty of Waitangi in a case where the interests of Māori were highly material. By not holding a hearing the Panel took an unacceptable risk that material matters would not be property tested and considered.

CONCLUSION

76. Greenpeace submits that the decision contains several errors of law and supports the position of the appellant that the decision should be quashed.

Dated 19 April 2022

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This document is filed by David Bullock solicitor for the Second Interested Party of the firm LeeSalmonLong.

Documents for the Second Interested Party may be served at the offices of LeeSalmonLong situated on Level 16, Vero Centre, 48 Shortland Street, Auckland, or may be posted to P O Box 2026, Shortland Street, Auckland.

[59] Decision at [38] **CB Vol 101 Tab 3 [101.0009]**.
[60] See, for example, *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, (2019) 21 ELRNZ 107 at [48] and [58].