

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2023] NZEnvC 213

IN THE MATTER of the Resource Management Act 1991

AND an appeal under s325 of the Act

BETWEEN CLUTHA DISTRICT COUNCIL

(ENV-2023-CHC-95)

Appellant

AND OTAGO REGIONAL COUNCIL

Respondent

Court: Environment Judge P A Steven
Sitting alone under s309(1) of the Act

Hearing: In Chambers at Christchurch

Last case event: 26 September 2023

Date of Decision: 29 September 2023

Date of Issue: 29 September 2023

**DECISION ON APPLICATION TO STAY AN
ABATEMENT NOTICE**

A: The stay of the abatement notice is granted, pending the outcome of the appeal.

B: Costs are reserved, to be costs in the substantive proceeding.



- C: Leave is reserved for any party to apply for further or other orders at any stage until the substantive appeal is determined.

REASONS

Introduction

[1] Clutha District Council has lodged an appeal against an abatement notice issued on 28 August 2023 by an enforcement officer of the Otago Regional Council.¹ At the same time, the District Council made an application to stay parts of the abatement notice² supported by the affidavit of Mr Steven Hill, Clutha District Council's Chief Executive Officer.³

The abatement notice

[2] The abatement notice relates to the Phoenix Dam, near Lawrence, Otago, which dates back to the 1860s. Concern as to the dam's integrity has been raised since at least 2006 but has been heightened by the dam's recent classification as having "a high potential impact" and from expert inspections. The abatement notice is based on recommendations made by Riley Consultants Limited ('RCL') to the District Council.⁴

[3] The abatement notice requires the District Council to take steps necessary to:

- (a) ensure compliance with its resource consent; and
- (b) avoid, remedy or mitigate any actual or likely adverse effect on the environment resulting from the damning activity.

¹ Abatement notice EN.RMA.23.0111.

² Dated 18 September 2023 (updated 21 September 2023).

³ Affirmed 21 September 2023.

⁴ Memorandum of counsel for the Otago Regional Council dated 26 September at [3]-[4].

[4] In particular the abatement notice requires specific actions to be undertaken to achieve compliance with conditions 1 and 4 of the water permit.⁵ Specifically, action points 1(b), (c) and (d) which state:⁶

- (b) Carry out preliminary geotechnical investigations using low-impact techniques, i.e. hand augers. These should focus on gaining an understanding of the dam fill material with regards to material composition, strength and permeability. On completion, install standpipe piezometers into the auger holes for ongoing monitoring of water levels. The geotechnical data obtained be used in the following assessments.
- (c) Perform preliminary stability and spillway capacity analyses to determine whether the dam is considered ‘dangerous’, ‘earthquake-prone’ or ‘flood-prone’ under Section 153A of the Building Act and/or ORC’s policy on dangerous, earthquake-prone and flood-prone dams (2011).
- (d) Explore the feasibility of maintaining the reservoir at a lower level, either via the installation of siphon pipes or the low-level outlet. Options will depend on:
 - i. Estimated catchment yields/flows;
 - ii. The nature and condition of the dam structure such as how the suspected ‘puddle clay’ core may respond to drying out; and
 - iii. Whether functionality of the low-level outlet can be proven.

The application for stay

[5] The District Council has complied with or is in the process of complying with the requirements of the abatement notice which it considers appropriate, or which reflect its obligations under its resource consent.⁷ The District Council

⁵ Resource consent RM12.137.03 to dam water in Bluejacket Creek for the purposes of storing water for the Lawrence community water supply.

⁶ Application for stay dated 18 September 2023 (updated 21 September 2023), Annexure A.

⁷ Affidavit of S Hill, affirmed 21 September 2023 at [4].

however seeks to stay the parts of the abatement notice it considers are unreasonable to comply with, specifically:

- (a) action points 1(b), (c) and (d) of the notice; and
- (b) the compliance date in section 3 of the notice which requires that matters in paragraphs 1(a)(i) and (ii) are to be complied with within 10 working days of the receipt of the notice.

[6] The District Council explains the identified requirements are unreasonable as despite the District Council holding resource consent to take water from the dam for the Lawrence Community Water Supply, it does not own, or have legal interest in, the dam or the land surrounding it. It states the obligations the abatement notice seeks to impose are not the District Council's responsibility.⁸ Rather, it records the owner of the dam and the surrounding land, Port Blakely Limited ('PBL'), has engaged RCL to undertake the actions required by action points 1(a)(iii), (b), (c) and (d).⁹

[7] Further to this the District Council explains, action points 1(b), (c) and (d) of the notice are not necessary to ensure compliance with its resource consent. Such requirements go beyond the scope of the consent, it notes instead action points 1(b), (c) and (d) of the notice relate to compliance with other legislation and are therefore *ultra vires* the Act.¹⁰

[8] The timeframe for complying with the requirements of paragraphs (1)(a)(i) and (ii) is considered unreasonable having regard to the circumstances giving rise to the notice and the need for the services of suitably qualified professionals to be procured. Nevertheless, the application for stay records District Council staff have undertaken training conducted by RCL to develop that capacity and that senior staff involved in the training have identified hazardous access conditions at the site

⁸ Application for stay dated 18 September 2023 (updated 21 September 2023), at [5](a)-(b).

⁹ Application for stay dated 18 September 2023 (updated 21 September 2023), at [5](f).

¹⁰ Application for stay dated 18 September 2023 (updated 21 September 2023), at [5](c)-(d).

of the dam which could place staff at risk of serious harm. Action 1(a)(i) of the abatement notice requires the District Council to complete a weekly inspection of the dam but, given the identified safety issues a site-specific safety plan must be developed by a suitably qualified professional, including a review and update of the current Emergency Action Plan (as required by a consent condition). It anticipates three months is required to have these plans developed, approved, and operationalised to ensure the safety of the District Council's staff.¹¹

[9] The District Council observes the notice of abatement appears to be issued for the improper purpose of effectively amending the conditions of the consent, which should be achieved through s127 of the Act or a review of consent conditions.¹²

[10] The District Council states the likely effect on the environment if the stay is granted would be negligible given that:

- (a) the landowner has engaged consultants to address the matters in Actions 1(b)(c) and (d) of the notice;¹³
- (b) while the dam has recently been reclassified as a High Potential Impact Classification ('PIC') dam under the Building (Dam Safety) Regulations 2022, it has been in place since c1863 and there is both low risk and no likely effect on the environment of the weekly inspections not being completed for a three month period;¹⁴
- (c) as part of its dam surveillance programme, the District Council has undertaken regular inspections designed for the former low PIC, with the latest being completed 16 June 2023;¹⁵ and

¹¹ Application for stay dated 18 September 2023 (updated 21 September 2023), at [5](g)-(j).

¹² Application for stay dated 18 September 2023 (updated 21 September 2023), at [5](e).

¹³ Application for stay dated 18 September 2023 (updated 21 September 2023), at [6](a). Affidavit of S Hill, affirmed 21 September 2023 at [41].

¹⁴ Application for stay dated 18 September 2023 (updated 21 September 2023), at [6](b). Affidavit of S Hill, affirmed 21 September 2023 at [42].

¹⁵ Application for stay dated 18 September 2023 (updated 21 September 2023), at [6](c). Affidavit of S Hill, affirmed 21 September 2023 at [43].

- (d) the training recently undertaken by District Council staff, with a check programme designed for a high PIC rating, formed the first inspection of the new planned inspection regime and any identified risks that are properly the District Council's responsibility under the consent will be appropriately addressed.¹⁶

The Regional Council's position

[11] The Regional Council does not oppose the making of a stay, pending determination of the appeal or other order of the court, but seeks directions for speedy resolution of the appeal.¹⁷

[12] ORC perceived that the "three parties have a shared interest in the safety of the Dam and maintaining its structural integrity", and that this "can be addressed by court-facilitated mediation" which the District Council is willing to participate in and counsel for PBL is seeking instructions".¹⁸

Port Blakely Limited

[13] The Regional Council records that the District Council has served the proceedings on PBL, the owner of the land upon which the dam is situated. The application for stay and supporting affidavit state PBL is responsible for the actions required by paragraphs (1)(a)(ii), (b), (c) and (d) of the abatement notice and that it is attending to those matters.

[14] At present, PBL does not have any formal standing in this proceeding. The court anticipates PBL would qualify to join the proceedings as persons with an interest greater than the general public under s274, RMA. If necessary, a waiver for late joining would not be unduly prejudicial and would be appropriate in the

¹⁶ Application for stay dated 18 September 2023 (updated 21 September 2023), at [6](d). Affidavit of S Hill, affirmed 21 September 2023 at [44].

¹⁷ Application for stay dated 18 September 2023 (updated 21 September 2023), at [8].

¹⁸ Application for stay dated 18 September 2023 (updated 21 September 2023), at [11]-[13].

circumstances.

Consideration

[15] Section 325(3D) of the Resource Management Act 1991 ('RMA') provides that before granting a stay, an Environment Judge must consider:

- (a) what the likely effect of granting the stay would be on the environment; and
- (b) whether it is unreasonable for the person to comply with the abatement notice pending the decision on the appeal; and
- (c) whether the parties should be heard; and
- (d) such other matters as the Judge thinks fit.

[16] Given the circumstances described by the District Council I am satisfied that it would be unreasonable for it to comply with the abatement notice in full, pending the decision on the appeal. Further I accept the District Council's assessment that the grant of the stay as sought is not likely to give rise to any material adverse effect on the environment while the appeal proceeds.

[17] The Regional Council consents to the stay and is amenable to utilising court-assisted mediation to find a way to resolve the appeal. The District Council has also confirmed it is willing to attend court-assisted mediation.

[18] Leaving reserved all findings on the appeal, I grant the stay against part of the abatement notice as sought and will refer the file to mediation.

Outcome

[19] The application for stay of the abatement notice is granted, pending the outcome of the appeal.

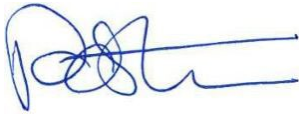
Directions

[20] By **Monday 9 October 2023** PBL are to file a s274 party notice if they wish to join the appeal.

[21] The file is otherwise referred to court-assisted mediation to be set down promptly. Parties are to confer and advise the court as to available dates.

[22] Leave is reserved for any party to apply for further (or other) directions, ideally in consultation with the other parties.

[23] Any issues as to costs can be dealt with following the substantive appeal being determined.



P A Steven
Environment Judge

