

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under the clause 14 of the First
Schedule of the Act
BETWEEN OTAGO REGIONAL COUNCIL
(ENV-2018-CHC-290)
Appellant
AND DUNEDIN CITY COUNCIL
Respondent

Environment Judge J E Borthwick – sitting alone pursuant to section 279 of the Act

In Chambers at Christchurch

Date of Consent Order: 21 May 2020

**CONSENT ORDER
DCC Appeal Point 63
Earthworks Rules**

A: Under section 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

- (1) the appeal is allowed subject to the amended provisions marked in Annexure 1, attached to and forming part of this consent order; and
- (2) the appeal is otherwise dismissed.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.



REASONS

Introduction

[1] Otago Regional Council lodged an appeal seeking, amongst other relief, a new performance standard to provide for dust control and to require earthworks not cause nuisance effects beyond the boundary of the site.

[2] The parties have agreed to settle this point of appeal of the Otago Regional Council and seek that the court give orders amending the proposed District Plan.¹ Those orders include a new performance standard for dust control (Rule 8A.5.12) and consequential amendments to Policy 8A.2.1.2 and Rules 8A.3.2 and 8A.6.3.

[3] Dunedin City Council policy planner Ms Hickey, in support of the application for consent orders, deposes the proposed performance standard does not duplicate any provisions in the Regional Plan: Air for Otago and that the amendments allow a consenting pathway for activities that are not able to meet the performance standard.²

Other matters

[4] Federated Farmers of New Zealand Inc and Oceana Gold New Zealand Limited are s 274 parties to this appeal and have signed the consent memorandum.

[5] Dunedin City Council City Development Manager, Dr Johnson has assured the court that the proposed amendment to Policy 8A.2.1.2 is drafted in line with the 2GP drafting protocol set out in the *2GP Style Guide April 2019 – incorporating change made through 2GP decisions*.³ Dr Johnson notes however the new performance standard (Rule 8A.5.12) represents an effects-based standard. Such standards are rarely used throughout the district plan, consequently there is no specific guidance in the style guide on their drafting.⁴ Dr Johnson has assured the court this provision is well drafted and considered appropriate, and that the consequential amendments in relation to the amended policy and the new rule (performance standard) are correctly drafted.⁵

¹ Consent memorandum, dated 15 October 2019; revised 20 May 2020.

² Affidavit of Sarah Catherine Hickey, affirmed 15 October 2019 at [19] – [20].

³ DCC memorandum, dated 20 May 2020.

⁴ DCC memorandum at [6].

⁵ DCC memorandum at [6].





[6] I record the parties' attestation that they are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction and conform to the relevant requirements and objectives of the Resource Management Act 1991, including Part 2 and on that basis request that the amendments shown in strikethrough and underline in Annexure 1 are made.

[7] The parties agree that costs should lie where they fall and accordingly no order for costs is sought.⁶

Outcome

[8] The court will only make orders if it is satisfied it is appropriate to do so and where there is no relationship between the provision as proposed to be amended by consent orders and other appeals before the court. Ms Hickey does not identify any other appeals on related provisions (including higher order provisions)⁷ and on that basis I am prepared to grant the orders sought.

[9] All parties to the proceeding have executed the memorandum requesting the orders. Based on the information before me, I am satisfied pursuant to s 32AA of the Resource Management Act 1991, that the amendments proposed are the most appropriate way to achieve the relevant objectives and that the orders will promote the purpose of the Act I will make the orders sought.

J E Borthwick
Environment Judge

⁶ Consent memorandum, at [8].

⁷ Affidavit of S C Hickey, at [15] – [16]; memorandum of counsel, dated 20 May 2020 at [6].

Annexure 1

1. Amend Policy 8A.2.1.2 as follows:

Policy 8A.2.1.2

Require earthworks and any associated retaining structures, to be designed, located and undertaken in a way that minimises, as far as practicable, adverse effects on surrounding sites and the wider area, including from:

- a. sediment run-off onto any property, or into any stormwater pipes, drains, channels or soakage systems; and
- b. dust nuisance on the amenity of surrounding sites.

2. Include the following performance standard below Rule 8A.5 Earthworks Performance Standards:

8A.5.12 Dust Control

1. Earthworks must be undertaken in a manner that avoids or minimises, as far as practicable, creating a dust nuisance beyond any property boundary, by using best practice dust control management. For the sake of clarity dust nuisance includes:
 - a. suspended solids in the air beyond the site boundary; or
 - b. suspended solids traceable from a dust source settling on the ground, building or structure on a neighbouring site, or water.
2. Activities that contravene this performance standard are restricted discretionary activities.

3. Amend Rule 8A.3.2 to include the new performance standard:

8A.3.2 Activity status table - earthworks activities

1.	Performance standards that apply to all earthworks activities	<ol style="list-style-type: none"> a. Archaeological sites b. Batter gradient c. Setback from property boundary, buildings, structures and cliffs d. Setback from National Grid (earthworks) e. Setback from network utilities f. Sediment control g. Removal of high class soils h. NZ Environmental Code of Practice for Plantation Forestry i. Setback from scheduled tree j. <u>Dust control</u>
Activity	Activity status	Performance standards
2.	Earthworks – small scale	<ol style="list-style-type: none"> a. Earthworks - small scale thresholds



3.	Earthworks – large scale	RD	a. Setback from coast and water bodies
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4. Amend Rule 8A.6.3 (Assessment of performance standard contraventions) by amending the policy reference in 8A.6.3.3.a.ii and adding a dust control assessment matter:

8A.6.3 Assessment of performance standard contraventions			
Performance standard		Matters of discretion	Guidance on the assessment of resource consents
3.	Sediment control	a. Effects on surrounding sites	<i>Relevant objectives and policies:</i> i. Objective 8A.2.1 i. Earthworks and any associated retaining structures are designed, located and undertaken in a way that minimises, as far as practicable, adverse effects on surrounding sites and the wider area (Policy 8A.2.1.2.a).
		b. Effects on biodiversity values and natural character values of riparian margins and coast	See Rule 10.5
		c. Effects on the efficiency and affordability of infrastructure	See Rule 9.5
<u>9.</u>	<u>Dust control</u>	<u>a. Effects on amenity of surrounding sites</u>	<i>Relevant objectives and policies:</i> i. <u>Objective 8A.2.1</u> ii. <u>Earthworks and any associated retaining structures are designed, located and undertaken in a way that minimises, as far as practicable, adverse effects from dust nuisance on the amenity of surrounding sites (Policy 8A.2.1.2.b).</u>

