

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

**Decision No. [2022] NZEnvC 110**

IN THE MATTER of the Resource Management Act 1991

AND an application under sections 116 and  
291 of the Act

BETWEEN T D W LANG, C A LANG, T S  
GANE, S T KEPPEL, L A WILSON,  
G G F NICHOLSON AND  
WALLACE DIACK TRUSTEES  
LIMITED

(ENV-2022-CHC-23)

Appellants

AND BULLER DISTRICT COUNCIL

Respondent

AND WESTLAND MINERAL SANDS  
CO. LIMITED

Applicant

Court: Environment Judge J E Borthwick

Hearing: On the papers

Last case event: 16 June 2022

Date of Decision: 28 June 2022

Date of Issue: 28 June 2022

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**DECISION OF THE ENVIRONMENT COURT  
ON APPLICATION UNDER S 116(1) OF THE ACT**

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GANE & ORS v BULLER DISTRICT COUNCIL – S116(1) DECISION



- A: Under s 116 of the Resource Management Act 1991, resource consent RC210051 granted by the Buller District Council may, in accordance with the conditions of consent as modified by Appendix 1 (attached to and forming part of this decision), commence immediately.
- B: This order shall remain in place pending the resolution of the substantive appeal.

## REASONS

### Introduction

[1] This appeal concerns a decision of Buller District Council granting an application for resource consents<sup>1</sup> by Westland Mineral Sands Co. Limited to establish and operate a mineral sand mine and associated activities at Okari Road, Nine Mile, Cape Foulwind.

### Background

[2] Mr Timothy Diedrick William Lang, Mrs Christine Anne Lang, Ms Suzanne Thora Keppel, Mr Terrence Sydney Gane, Ms Lorree Wilson, Mr Geoffrey Glynn Ford Nicholson and Wallace Diack Trustees Limited (‘the appellants’) appealed the Council’s decision to the court on 1 June 2022.

[3] The appellants’ properties neighbour the application site to the west and the north.<sup>2</sup> As a result, they appeal the following resource consent conditions:<sup>3</sup>

- (a) Conditions 11.1 relating to operating hours; and

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<sup>1</sup> Resource consent number RMA RC210051.

<sup>2</sup> 1/179 Okari Road, legally described at Lot 5 DP 354487 (owned by Timothy and Christine Lang); 1/189 Okari Road, legally described as Lot 7 DP 354487 (owned by Suzanne Keppel and Terrence Gane); 135 Okari Road, legally described as Lot 3 DP 13269 (owned by Lorree Wilson, Glynn Nicholson and Wallace Diack Trustees Limited).

<sup>3</sup> Notice of appeal, dated 1 June 2022.

- (b) Conditions 16.3 and 16.5 relating to noise and noise monitoring.

### **The application under s 116 of the Act**

[4] On 16 June 2022, the court received a notice of motion from the applicant seeking an order for commencement of the resource consent prior to the resolution of the substantive appeal pursuant to s 116 of the Act. Affidavits of Nigel Slonker and Jon Farren were also filed.

[5] The applicant submits that the proposed order for commencement is appropriate on the following grounds:<sup>4</sup>

- (a) the Consent, and its commencement, meet the objectives and policies of the relevant plans;
- (b) the Appellants' Appeal is limited to conditions of consent and does not appeal the granting of the Consent;
- (c) the Appeal is isolated to conditions relating to hours of operation and noise effects;
- (d) the Appeal of the conditions relating to hours of operation is on the basis of noise effects;
- (e) the Appeal seeks additional and amended conditions, and specifically:
  - (i) mining Activities be restricted to the more limited hours of operation sought by the Appeal of between 0800-2200 Monday to Friday and 0800-1800 on Saturdays, and no operations during Sundays and Public Holidays;
  - (ii) operational noise limits of 50dB  $L_{aeq(15\ min)}$  for the day-time noise limit and 45dB  $L_{aeq(15\ min)}$  after 6pm on Saturdays and at any time on Sundays and public holidays;
  - (iii) noise monitoring, and additional matters to be included in a review condition relating to noise levels.
- (f) the Applicant's evidence (Affidavits of Nigel Slonker and Jon Farren) is that the Applicant can feasibly operate in the interim with the above requested restrictions for noise limits and hours of operation. In particular, the proposed operational noise limits will not be breached until the mine

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<sup>4</sup> Notice of Motion dated 16 June 2022 at [5].

progresses to approximately 250m from the northern boundary; and it will take at least 3.5-4 years for mining to reach within 250m of the northern boundary;

- (g) the Applicant is willing to undertake additional 6 monthly monitoring along the residential properties on the western boundary, and in particular at the boundary of 1/189 Okari Road (Lot 7 DP 354487) and 1/179 Okari Road (Lot 5 DP 354487); as such
- (h) there is no prejudice to the Appellants, any section 274 party, Buller District Council or any other party if the Consent commences.

### ***Affidavit of Nigel Slonker***

[6] Mr Slonker is a Mining Mechanical Engineer (among other relevant qualifications) and currently contracts to Westland Mineral Sands Co. Limited to provide oversight and advice in relation to Health and Safety and Operational Management Plans. He explains that the applicant is both willing and able to operate within the restrictions sought by the appellants until the appeal is resolved, in particular:<sup>5</sup>

- (a) The initial pre-mining and construction activities to be undertaken through the Consent will take approximately 3-4 months and are not affected [by] the Appeal;
- (b) Mining Activities can be restricted to the more limited hours of operation sought by the Appeal of between 0800-2200 Monday to Friday and 0800-1800 on Saturdays, and no operations during Sundays and Public Holidays (with respect to Conditions 11.1 and 16.5);
- (c) Mining and Processing Activities will comply with the more restrictive daytime noise limit of 50dB  $L_{aeq(15\ min)}$  and night-time noise limit of 45dB  $L_{aeq(15\ min)}$  (and otherwise in accordance with Condition 16.5) at the Appellants' properties;
- (d) Changes requested to Condition 11.2 (regarding public holidays) which relate to when mining is in the northern most area will not be impacted; and
- (e) Noise monitoring at the Appellants' property as requested will occur during this interim period of operation:

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<sup>5</sup> Affidavit of N Slonker dated 14 June 2022 at [6].

- (i) Prior to the commencement of night-time activities on site, a report from a suitably qualified and experienced acoustic specialist will be submitted to Council's Planning Department confirming that the proposed processing plant complies with the noise limits (in accordance with Condition 16.1). The Applicant will also at this time confirm compliance within the more restrictive night-time noise limit in paragraph (c) above and provide a copy of this report to the Appellants.
- (ii) The Consent Holder must undertake noise monitoring to demonstrate compliance with the noise limits within 30 days of mining and processing operations occurring in accordance with Conditions 16.3 and 16.5. At this time confirmation of compliance with the proposed interim noise limits in paragraph (c) above will be undertaken.

[7] He also notes that the start of mining and processing is also not expected to begin for approximately three to four months after the consent commences. When this begins, Mr Slonker explains that the applicant will progress from the southernmost point northward with progressive rehabilitation being undertaken.<sup>6</sup>

### ***Affidavit of Jon Farren***

[8] Mr Farren, acoustic consultant, affirms that the site can operate in the interim within the restricted hours of operation being sought by the appellants. It is his opinion that mining and processing activities will comply with the more restrictive daytime noise limit of 50dB LAeq (15 min) and night-time noise limit of 45dB LAeq at the appellants' properties until mining occurs within approximately 250m of the northern boundary.<sup>7</sup> Moreover, he considers the noise monitoring required by consent conditions 16.1 and 16.3 are appropriate to confirm the restrictive limits can be achieved.<sup>8</sup>

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<sup>6</sup> At [9]-[10].

<sup>7</sup> Affidavit of J Farren dated 16 June 2022 at [19].

<sup>8</sup> At [20].

## Parties' views on the s 116 application

[9] Both the District Council and the appellants advised by email on 16 June 2022 that they do not oppose the application for early commencement, provided that the orders are made in accordance with the proposed interim conditions.

## Section 116 of the Act

[10] Section 116 of the Act states:

### 116 When a resource consent commences

- (1) Except as provided in subsections (1A), (2), (4), and (5), or sections 116A and 116B, every resource consent that has been granted commences—
- (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
  - (b) when the Environment Court determines the appeals or all appellants withdraw their appeals—
- unless the resource consent states a later date or a determination of the Environment Court states otherwise.

[11] The approach taken to an application under s 116 is summarised in *NCI Packaging (NZ) Ltd v Auckland Council* as follows:<sup>9</sup>

[7] In *Walker v Manukau City Council* it was confirmed that there are two tests under s 116(1). The first is whether allowing the consent to commence pending an appeal will serve the purpose of the Act. The second is whether prejudice arises from either allowing or disallowing the consent to commence.

[8] The Court is able to authorise a limited exercise of a consent, which is still subject to appeal, provided those parts of the consent that commence do not go to the core of the matter to be determined by the Court.

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<sup>9</sup> *NCI Packaging (NZ) Ltd v Auckland Council* [2013] NZEnvC 40.

(footnotes omitted)

## Decision

[12] Messrs Farren and Slonker confirm that the applicant can operate within restricted hours and comply with noise limits proposed by the appellants. The applicant proposes commencement orders being made on this basis and will, in addition, undertake monitoring along the residential properties on the western boundary, in particular at the boundary of 1/189 Okari Road and 1/179 Okari Road.

[13] Unopposed by the appellants and District Council, I am satisfied that the commencement of the consent will not prejudice the resolution of the appeal. Cognisant that this is an appeal against the conditions of resource consent, I am satisfied that the purpose of the Act will continue to be served if the orders are made. I conclude, therefore, that it is appropriate to allow commencement of the consent in accordance with the interim conditions relating to noise and hours of operation in Appendix 1, as proposed by the applicant.

[14] This order shall remain in place until a decision has been issued on the appellants' appeal.

Jane S.



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**J E Borthwick**  
**Environment Judge**

## Appendix 1 – Interim Buller District Council Conditions

### Condition 11.1

The mining and processing activities must comply with the following hours of operation:

- Mining Activities– must only occur between the hours of 0800-2200 Monday to Friday and 0800-1800 Saturday (excluding public holidays).
- ~~0800-2200~~
- Processing Plant Activities - 24 hours a day / 7 days a week

*Advice Note: In addition to condition 11.1, further restrictions on transport operations are contained in Condition 17.0 Transport.*

### Condition 11.2

When mining reaches a point 80m from the northern property boundary (the point at which Condition 16.9 also requires the temporary noise bund to be constructed):

- o Mining activities must only occur between the hours of 0800-2200 Monday to Friday and 0800-1800 Saturday .
- o Mining is not permitted to occur on Sundays for the period when mining is occurring within 80m of the northern property boundary.

*Advice Note: Condition 11.2 only applies if a dwelling is constructed and a Certificate of Code Compliance has been issued on Lot 3 DP 13269 BLK III Steeples SD as per Condition 16.3(b).*

### Condition 16.1

Prior to the commencement of any night-time activities on site, a report from a suitably qualified and experienced acoustic specialist must be submitted to Council's Planning Department confirming that the proposed processing plant and associated equipment that operates at night does not exceed the following noise levels:

- Cumulative noise from all static processing plant: 60 dB  $L_{aeq}$  (15 min) at 50 metres from the north and west side of the enclosures, measured at a height of 1.5m above the existing ground level.

### Condition 16.2

Cumulative noise from the processing plant may only be permitted to exceed the above noise level if it can be demonstrated that noise levels received at the property boundaries will not exceed the limits provided in Condition 16.5.

### Condition 16.3



The Consent Holder must undertake noise monitoring to demonstrate compliance with the noise limits in Condition 16.5:

- a) within 30 days of mining and processing operations occurring;
- b) following (a), every six months along the residential properties at the western boundary, and in particular at Lot 7 DP 354487 and Lot 5 DP 354487; and
- c) ~~b)c)~~ when mining operations first occur within 100 metres of any dwelling at Lot 3 DP 13269 BLK III Steeples SD, if a dwelling is constructed and a Certificate of Code Compliance has been issued under the Building Act 2004;

If compliance is not achieved, the Consent Holder must investigate and implement additional mitigation required to achieve the noise limits as soon as practicable. The consent holder must submit a report to Council within 60 working days of the relevant monitoring report detailing the mitigation measures that will be implemented and must undertake a further compliance monitoring report within 10 working days of any mitigation measure being implemented to demonstrate the effectiveness of that mitigation.

#### **Condition 16.4**

All noise monitoring results undertaken in accordance with Condition 16.3 must be provided to Council within 5 working days of completion of each monitoring visit.

#### **Condition 16.5**

Mining and processing activities must comply with the following noise limits at the property boundary of any dwelling existing at the date consent is granted (excluding any dwelling on the site), and at the property boundary of Lot 3 DP 13269 BLK III Steeples SD if a dwelling is constructed and a Certificate of Code Compliance has been issued under the Building Act 2004

- Daytime (0800-2200): ~~55~~ 50 dB  $L_{aeq(15\ min)}$
- Night-time (2200-0800): 45 dB  $L_{aeq(15\ min)}$  and 75 dB  $L_{AFmax}$

Noise must be measured and assessed in accordance with New Zealand noise standards: NZS 6801:2008 "Acoustics – Measurement of Environmental Sound" and NZS 6802:2008 "Acoustics - Environmental Noise", respectively.

*Advice note: A dwelling is proposed to be constructed on Lot 3 DP 13269 Blk III Steeples SD, however the date at which this may or may not be constructed is uncertain due to additional approvals being required for this activity. The consent condition ensures that if this dwelling is constructed, the noise limits will apply at the property boundary at that time as with other existing dwellings.*