

In the Environment Court of New Zealand
Christchurch Registry

I Mua I Te Kōti Taiao O Aotearoa
Ōtautahi Rohe

ENV-2022-CHC-022

Under the Resource Management Act 1991 (**Act**)

In the matter of an appeal under section 120 of the Act

Between **Nicola and Bryson Clark, David and Lynley Stevens, Justine and Philip Davis, Lois and Robin Greer, Lindsay Moore, and Douglas Cook to be known as "Amisfield Environment Protection Group"**

Appellant

And **Central Otago District Council**

First Respondent

Notice of Appeal

7 July 2022

Appellant's solicitors:
Maree Baker-Galloway | Rosie Hill
Anderson Lloyd
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348

p + 64 3 450 0700
maree.baker-galloway@al.nz | rosie.hill@al.nz

**anderson
lloyd.**

And

Otago Regional Council

Second Respondent

And

Cromwell Certified Concrete Limited

Applicant

To: The Registrar
Environment Court
Christchurch

- 1 The individual Appellants made submissions on resource consent applications 200343 and RM20.360 to Central Otago District Council (**First Respondent**) and Otago Regional Council (**Second Respondent**) (collectively, **Respondents**) (**Application** or **Proposal**) as follows:
 - (a) Nicola and Bryson Clark (**Clark**);
 - (b) David and Lynley Stevens as Trustees of the D.H. & L.M Stevens Family Trust (**Stevens**);
 - (c) Justine and Philip Davis (**Davis**);
 - (d) Lois and Robin Greer (**Greer**);
 - (e) Lindsay Moore (**Moore**); and
 - (f) Douglas Cook (**Cook**).
- 2 One of the Appellants, Amisfield Environment Protection Group, did not make a submission on the Proposal, but has been formed by the Appellants to represent the interests of the submitters forming that group.
- 3 The Appellants appeal against the decision of the Respondents to grant discharge permits, a water permit and land use consents relating to the expansion of an existing quarry at 1248 Luggate-Cromwell Road to Cromwell Certified Concrete Limited (**Applicant**).
- 4 The decision was made under delegated authority by an Independent Commissioner (**Commissioner**) appointed by the Respondents (**Decision**).
- 5 The Appellants received notice of the Decision on 5 May 2022.
- 6 The Appellants have a right to appeal the Decision under section 120 of the Act. The Proposal is not an activity excluded by section 120(1A) or (1B) of the Act.
- 7 The Appellants are not trade competitors for the purposes of section 308D of the Act.
- 8 The Appellants are appealing the Decision in its entirety.

- 9 The land affected is land at 1248 Luggate-Cromwell Road legally described as:
- (a) Lot 3 DP 301379 held in Certificate of Title 5965 (**Lot 3 or Expansion Land**);
 - (b) Lot 5 DP 301379 held in Certificate of Title 5967 (**Lot 5**); and
 - (c) Lot 8 DP 301379 held in Certificate of 5967 (**Lot 8**).
- (collectively, the **Application Site**).

Background

- 10 The respective Appellants own, occupy, or have an interest in land in close proximity to the Applicant's existing quarry at Lots 5 and 8. A number of them have experienced significant and ongoing adverse effects as a result of the existing quarry operations. There is a history of non-compliance with conditions of consents held and permitted activity discharge rules, ~~and of encroachment onto adjacent land.~~
- 11 The Proposal is to expand the existing quarry onto Lot 3 and to increase its annual production rate and groundwater take. The Appellants consider the adverse effects will be inappropriate and unable to be adequately mitigated by the Proposal in terms of spatial extent, intensity, and environmental effects.
- 12 The key aspects of the Proposal which are of concern to the Appellants are:
- (a) Increased adverse dust effects (to health, amenity, and commercial orchard operations);
 - (b) Inability for the Applicant to comply with required conditions on an ongoing and permanent basis;
 - (c) Insufficient conditions to adequately manage adverse effects on the environment and on neighbors, including but not limited to insufficient setbacks;
 - (d) Adverse economic effects on adjacent commercial ~~orchard~~ operations (through the immediate effect of adverse dust / air quality, and the long-term effect of increased frost due to landform change);
 - (e) Loss of productive soils / highly productive land as a matter of regional and national importance;

- (f) Effects of groundwater abstraction on reliability of water quality and quantity, including potential contamination of groundwater for domestic and stock supply, effects on aquifer health;
- (g) Adverse visual amenity and landscape character effects;
- (h) The potential precedent the Decision sets for other proposed quarries and consequent effects on productive land and human health;
- (i) Inconsistency with relevant planning instruments and Part 2 of the Act;
- (j) Insufficient notification to the public and / or parties likely to be affected to a minor (or greater) degree under s104(3)(d).

Reasons for the Appeal

13 The reasons for the appeal are set out below:

Insufficiency of meteorological data

- 14 The decision was based on insufficient data and thus underestimated the scale of adverse effects, including dust and air quality effects, of the Proposal.
- 15 The Applicant's meteorological evidence and effects predictions relied on modelled assumptions, rather than actual meteorological ground monitoring or analysis at the Application Site. While modelling provides an estimate of effects, it does not give a sufficiently reliable determination on which to base decisions affecting human health and quality of life. The requisite information needed to assess effects under s 104 of the Act, and to justify the granting of the consent, was not available to the Commissioner.
- 16 The Applicant's interpretation of its modelled data was also erroneous and likely under-represents unique climatic conditions for the Application Site, including by under-representing precipitation and wind conditions.
- 17 Had the Applicant collected actual meteorological data at the Application Site and undertaken ambient dust monitoring at its boundary, this likely would have led to a conclusion that the adverse effects of the Proposal were more than minor on the environment, warranting public notification, and significant to the extent it should not have been granted consent.

Incorrect application of permitted baseline and future receiving / anticipated environment

18 The Decision erred with respect to permitted activities anticipated in the vicinity of the Application Site, including further cherry planting. The Appellants have incurred considerable expense installing infrastructure and purchasing water rights for this purpose in locations which are now within the proposed setbacks of the Decision. The consented setbacks fail to consider permitted planting areas. In particular, the setbacks at the boundary of Lot 3 effectively nullify adjacent land and its permitted economic productive potential.

Amenity values

19 The Decision did not adequately consider the adverse effects of the existing quarry and the Proposal on the surrounding landowners and occupiers.

20 The Appellants have experienced ongoing and significant adverse effects as a result of the existing operations. In particular, dust and noise emissions and visual amenity effects from the quarry have regularly interfered with their quiet enjoyment of their land. The dust effects are well documented and have been shared with the Respondents. The Second Respondent's independent air quality expert described these dust discharges as "substantive and not consistent with emissions which would be expected from a quarry which is implementing industry standard dust mitigation measures".¹

21 The landscape expert evidence relied on in the Decision was deficient in that it failed to:

- (a) Consider the views from the Clarks existing dwelling; and
- (b) Failed to take into account amenity effects (as opposed to landscape character).

22 The Decision inappropriately considered permitted earthworks activities in assessing the potential landscape effects. Comparison of the Proposal to potential permitted bunding was fanciful.

23 The Decision placed insufficient weight on lay witness amenity evidence, failed to consider cumulative amenity and landscape effects, and interim effects against a realistic permitted baseline.

Precedent effects

¹ Otago Regional Council Technical Air Discharge Review NZ Air Ltd, 12 January 2021 at 6.

- 24 The Decision sets an inappropriate precedent for future quarrying activities by allowing quarrying excavations to be setback as little as 25 metres from sensitive receptors, including 50 metres from residential dwellings and crops sensitive to dust. This is contrary to the Second Respondent's independent air quality experts' opinions that adverse effects from dust emitting activities are greatest within 100 metres of off-site sensitive receptors and that quarrying operations should be setback at least 100 metres from cropping operations.²
- 25 The Decision inappropriately took account of the nearby Fulton Hogan Parkburn Quarry without any meaningful understanding of:
- (a) The actual setback of Parkburn Quarry from residential development - the decision described these setbacks as "relatively small" and "in the order of 50m".³ In reality, the setback of the Parkburn Quarry from residential development is larger than this and no evidence was provided to support this conclusion;
 - (b) The timing of the establishment of the Parkburn Quarry - the Parkburn Quarry was established prior to the subsequent residential subdivision of the nearby land, meaning residents appreciated the risk of effects prior to residing there. Dissimilarly, the Proposal is to expand the existing quarry in the vicinity of existing residential development and lawfully established activities;
 - (c) The actual and likely dust effects currently being experienced by residents close to the Parkburn Quarry – the Decision placed insufficient weight on expert evidence which showed potentially significant air quality effects on those residents; and
 - (d) The majority of expert evidence, which supported a setback of 100 to 150 metres from cropping operations.
- 26 The Decision erred in its inconsistency with other recent national quarry proposals and their associated setbacks, including by providing no analysis as to the particular silica levels of this local environment.

Effects on loss of highly productive land

² Otago Regional Council Technical Air Discharge Review Response NZ Air Ltd 12 March 2021 at 3 and 5.

³ Report and Decision of Hearing Commissioner in the matter of applications by Cromwell Certified Concrete Limited dated 5 May 2022 at [77].

- 27 The Application Site itself, and adjacent land, is highly productive and high quality for growing regionally and nationally recognised produce (cherries). There are few sites in the New Zealand which can produce this quality product.
- 28 The Decision failed to appropriately consider the effects on loss of highly productive land and regionally and nationally significant product on both the subject site and adjacent land resulting from long term frost effects and restricting further permitted planting.
- 29 The Decision did not adequately consider long term frost effects of the Proposal on adjacent sites. It placed insufficient weight on expert evidence for the Appellants as to adverse frost and dust effects long term as a result of the Proposal. In particular:
 - (a) The Applicant's redesign for frost flow is not considered to adequately mitigate effects and there was no expert evidence called on this matter/ no modelling done.
- 30 The Decision placed inadequate weight on the evidence of Mr Weaver; a specialist in frost and cherry horticulture with significant local experience. Highly productive land is land that is not just of a particular soil quality, but exhibits characteristics unique to a particular site and to support economic production of particular produce. The policy weighting for the region recognises the importance of sustaining this unique and finite resources, as does proposed national policy (proposed NPS- Highly Productive Land), and Part 2 of the Act.

Regional planning instruments and Part 2 of the Act

- 31 The Decision erred in its interpretation of relevant planning instruments, including the District Plan, the Regional Plan: Water, Regional Plan: Air; the Partially Operative Regional Policy Statement (**RPS**), the Proposed RPS, and thus, Part 2 of the Act. Overall, the Decision failed to apply the clear policy weighting in higher order policy which placed a primacy on the protection of productive land. In particular:
 - (a) CODC District Plan – the Decision failed to place adequate weight on the Plan's emphasis to maintain amenity values and sustain productive soils;
 - (b) Regional Plan: Water – the Decision failed to adequately consider the risks of groundwater contamination effects on existing and planned water supply;

(c) Proposed RPS and partially operative RPS – the Decision failed to place adequate weight on the significant policy shift between these documents which now proposes a planning hierarchy to decision making such that a natural resource is to be sustained in the first instance and as a 'bottom line'. The Decision also incorrectly weighted regional mining provisions as against highly productive land and soil provisions.

32 The incorrect weighting and interpretation of the above planning instruments lead to an incorrect conclusion in respect of Part 2 of the Act.

Proximity of drinking water bores and effects on groundwater

33 The Decision's groundwater quality programme failed to include other nearby drinking water bores. The potential effects of groundwater contamination to drinking water could be catastrophic.

34 The Proposal's effects on groundwater are likely to be significant and adverse, and unable to be adequately mitigated by conditions.

Overstatement of economic benefits

35 The Decision overstated the economic benefits of the Proposal. The economic evidence available to the Commissioner was based upon the demand of all types of aggregate across the wider district rather than just the particular concrete aggregate to be quarried under the Proposal.

36 Further, the Decision failed to take account / place adequate weight on the negative economic effects of the Proposal including from:

(a) Loss of adjacent existing productive land and as a result of long-term frost effects by re-contouring the Application Site;

(b) Loss of productive potential of land within setback areas (where that is a permitted activity); and

(c) Loss of the Application Site itself as regionally significant and highly productive land, in perpetuity.

37 The Decision therefore erred in considering economic effects in its planning assessment and in its conclusions as to overall effects.

Inadequate conditions to manage adverse effects

38 The conditions are inappropriate and not sufficient to adequately manage the significant adverse effects of the Proposal. In particular:

- (a) The setbacks from crops and from sensitive receptors (as above) are deficient;
- (b) The history of non-compliance suggests the conditions are unlikely to be complied with on a consistent basis. Further, they exceed best practice and therefore raise concerns regarding the ability of the Applicant to practically undertake all of the requirements;
- (c) The conditions do not adequately mitigate interim effects from initial quarrying, excavation and building of bunds in close proximity to neighbours;
- (d) The conditions do not include a prospective annual plan requirement allowing Council and the Community Liaison Group to have more effective oversight of likely activities to be occurring, including importing of clean fill; and
- (e) The conditions do not include light-scattering equipment and requirements to calibrate PM10 monitors

Receiving environment

- 39 The Decision incorrectly assessed the future receiving environment to include the existing quarry operations stretched out to 2038. This was contrary to established case law that the receiving environment is to be considered with 'realism'.
- 40 The existing operations have a finite resource remaining that would end in 2026 under current abstraction operations. There was no evidence to base a finding that this could be extended over a longer period.
- 41 Accordingly, the effects assessment of the proposed expansion area in particular should have been assessed against an environment which did not include quarry operations after 2026. Consequently, the true effects of the Proposal are underestimated.

Notification – s104(3)(d)

- 42 The Application should have been notified to a greater radius of landowners and occupiers in the vicinity of the Application Site and was not. The notification decision was based upon insufficient meteorological data (as discussed above) which under-represented adverse effects, and was an arbitrary radius. The Appellants are aware of landowners who were not notified, who are currently experiencing adverse effects from existing operations.

- 43 The loss of regionally significant / highly productive land is a matter of regional and national concern, thus it should have been publicly notified, and limited notified to industry representative groups.
- 44 The Decision should therefore have declined consent in accordance with section 104(3)(d) of the Act, and should have been notified to a greater ambit of affected persons, if not publicly notified.

Relief Sought

- 45 The Appellant seeks the following relief:
- (a) That the notification decision be set aside in its entirety and the Proposal be refused consent under s104(3)(d) of the Act;
 - (b) That the Decision be set aside in its entirety and the Proposal be refused consent;
 - (c) Any alternative, consequential or necessary additional relief to give effect to the matters raised generally in this appeal; and
 - (d) Costs incidental to this appeal.

Attachments

- 46 The following documents are attached to this Notice:
- (a) Attached as **Amended Appendix A** are copies of the Appellants' original submissions;
 - (b) Attached as **Appendix B** is a copy of the Decision being appealed; and
 - (c) Attached as **Appendix C** is a list of names and addresses of persons to be served with a copy of this Notice.

Dated this 7th day of July 2022



Maree Baker-Galloway/Rosie Hill
Counsel for the Appellant

Address for service of Appellant:

Anderson Lloyd, Level 2, 13 Camp Street, Queenstown, 9300

Telephone: +64 3 450 0700

Contact person/s: Maree Baker-Galloway, Partner; Rosie Hill, Associate

Advice to recipients of copy of notice of appeal

How to become a party to proceedings

You may be a party to the appeal if, –

- (a) within 15 working days after the period for lodging a notice of appeal ends, you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see from 38)

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Appendix A – Copies of the original submissions

Page	Document
1	Nicola and Bryson Clark Submission to Central Otago District Council
15	Nicola and Bryson Clark Submission to Otago Regional Council
25	David and Lynley Stevens Submission to Otago Regional Council
63	Philip and Justine Davis Submission to Central Otago District Council
66	Robin and Lois Greer Submission to Otago Regional Council
69	Lindsay Allan Moore and Rosemary Kate Sidney Submission to Otago Regional Council
71	Douglas Cook Submission to Otago Regional Council

Appendix B – A copy of the decision being appealed

Appendix C – A list of names and addresses of persons to be served with this notice

Name	Address for service
Central Otago District Council	info@codc.govt.nz
Otago Regional Council	resource.consent@codc.govt.nz
Cromwell Certified Concrete Limited	monique@greenwoodroche.com
Irrigation and Management	highbannockburn@xtra.co.nz
Kevin Joyce	PO Box 101618 NSMC Auckland
William and Phillipa Labes	bill@poplarestate.co.nz
Stephen and Olivia Morris	stbathansvineyard@gmail.com
Pisa View Cherries	jmiscisco@gmail.com
Towyn Trust and Lake Terrace Cherries Limited	90 Smiths Way Cromwell
Peter Lang & Amisfield Bay Vineyard	amisfieldbay@gmail.com
Anthony Agate	agates@extra.co.nz
Amisfield Estate Society Incorporated	bridget.irving@gallawaycookallan.co.nz
Department of Conservation	ayoung@doc.govt.nz
Aukaha	pamela@aukaha.co.nz
Waka Kotahi	helen.dempster@nzta.govt.nz