

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TAMAKI MAKAUROA**

**Decision [2024] NZEnvC 094**

IN THE MATTER OF

an appeal under s 325 of the Resource  
Management Act 1991

BETWEEN

MICHAEL BARRACLOUGH

(ENV-2024-AKL-004)

Appellant

AND

GISBORNE DISTRICT COUNCIL

Respondent

Court: Environment Judge MJL Dickey  
Environment Commissioner MCG Mabin

Hearing: 21 February 2024, via Microsoft Teams

Appearances: N King for the Appellant  
A Hopkinson and R Zame for the Respondent

Date of Decision: 30 April 2024

Date of Issue: 30 April 2024

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**DECISION OF THE ENVIRONMENT COURT**

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A: The reasons for declining the application for stay of the abatement notice on 22 February 2024 are outlined in this decision.

B: Costs are reserved.



## **Introduction**

[1] This is an appeal against an abatement notice issued to Mr Michael Barraclough by the Gisborne District Council on 20 December 2023 in relation to a property at Wallis Road, Kaiti, Gisborne (**the property**).

## **Background**

[2] Mr Barraclough owns the property and is the sole director of Fearless Star Limited, which is carrying out earthworks on the property.

[3] Mr Barraclough began carrying out earthworks on the property (and on an adjacent property he also owns) in 2022 with the intention of developing two residential subdivisions and a Buddhist cultural and spiritual centre. All parties acknowledged that these earthworks were commenced without consent. An abatement notice was issued in November 2022 requiring that earthworks cease on both properties until a resource consent was issued.

[4] Fearless Star Limited obtained resource consent on 12 January 2023 for Stage 1 earthworks on the property (**earthworks consent**). An Erosion and Sediment Control Management Plan (**ESCMP**) was certified by the Council in February 2023.

[5] Since the consent was issued, Council enforcement officers have observed and documented ongoing contraventions of the conditions of the Earthworks Consent, including unauthorised earthworks and breaches of sediment and erosion controls.

[6] As a result, a second abatement notice was issued on 23 June 2023. That notice resulted in a Council approved remedial plan being implemented at the property on 4 September 2023.

[7] Ongoing compliance issues have continued to be a problem. The Council also has concerns regarding the geology of the property and its susceptibility to mass movement. These concerns prompted the Council to issue the current (and third) abatement notice. The notice requires Mr Barraclough to:

Rapidly stabilise all exposed areas of earthworks.

[8] Further conditions are imposed that require Mr Barraclough to:

... not carry out any further earthworks unless you provide a new erosion and sediment control plan to the Gisborne District Council and a Gisborne District Council enforcement officer provides written approval of that new plan.

[9] Compliance with the abatement notice was required no later than 21 January 2024.

### **Appeal and application for stay of the abatement notice**

[10] Mr Barraclough appealed the abatement notice on 11 January 2024 and sought that it be cancelled. The appeal was accompanied by an application to stay the abatement notice. The reasons provided for seeking a stay of the abatement notice are set out below:

- a) It is not reasonable or appropriate to rapidly stabilise earthworks at this point in the season, which means covering the site in mulch. To do so now would essentially prevent the already exposed earthworks from being completed this season, leaving the site exposed, eroding and producing sediment runoff for an extended period.
- b) Further, any rapid stabilisation done now, at the beginning of a dry summer, would make minimal difference in preventing sediment discharge, yet would have significant effects on what earthworks could be done this season and add significant costs and time to remove in order to complete any earthworks this season.
- c) It is unreasonable to rapidly stabilise the site now when the appropriate and simple solution at this time of year is to complete the earthworks in accordance with the resource consent and approved plans under the supervision of our approved expert.
- d) Gisborne District Council has already been provided an erosion and sediment control plan, which it approved on 3 February 2023.

The likely effect on the environment if the stay is granted is:

If the stay is granted and the applicant is allowed to undertake earthworks in accordance with its resource consent and approved plans, then earthworks can be completed with topsoil spread and seeded, thus permanently stabilising the site and preventing further erosion and sediment discharges.

[11] At the hearing, Mr Barraclough added to the likely effects; that the urgent earthworks needed to repair the existing erosion and sediment systems, which require significant work prior to winter, will not be completed.

[12] The Council opposed the application for stay, raising Mr Barraclough's history of non-compliance, his failure to implement appropriate erosion and sediment controls, and the environmental impacts of that non-compliance.

[13] This decision is made on the basis of evidence filed in support of and opposing the application for stay. It has been necessary to make certain findings on the appropriateness of the requirements of the Abatement Notice, which is of course under appeal. To that extent, the findings are preliminary.

### **Section 325(3D)**

[14] Section 325(D) of the RMA requires that before granting the stay, the Court must consider:

- (a) what the likely effect of granting a 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 to hear—
  - (i) the applicant;
  - (ii) the relevant authority whose abatement notice is appealed against; and
- (d) such other matters as the Judge thinks fit.

### **Likely environmental effects of granting the stay**

[15] We received evidence from Mr Barraclough, who filed two affidavits essentially providing a chronology of events and dealings between himself and the Council.<sup>1</sup> Affidavits were also provided from Mr Bruce John Cameron, a chartered professional engineer, Mr Andrew Lawton, principal of Civil Assist Limited who provided advice on civil construction and earthworks matters and Mr Ross McPhail Muir, a planning consultant.

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<sup>1</sup> Affidavit of Michael John Barraclough, dated 11 January 2024 (**First Affidavit**) and Affidavit of Michael John Barraclough, dated 19 February 2024 (**Second Affidavit**).

[16] The Council called evidence from:<sup>2</sup> David John Sluter, environmental scientist at the Council; Gregor John McLean, environmental consultant; Sandra Maxine Ellmers, a neighbouring property owner; and Hwee Yang Poh, a technical director at Pattle Delamore Partners Ltd (**PDP**).

***Sediment control inadequate***

[17] The evidence presented on Mr Barraclough's behalf does not directly address the likely environmental effects of granting the stay. Rather, as Mr Hopkinson for the Council submitted, he appears to be arguing that if the Court allows him to continue his earthworks in the same manner as he has undertaken them to date, the sediment control measures will somehow resolve themselves as the earthworks progress.

[18] Mr Barraclough also argues:<sup>3</sup>

The site is currently stable with sediment and erosion controls in place and already approved sediment and erosion control plans. All that is required to address the issues is for Gisborne District Council to approve the plans and recommendations of our expert Andrew Lawton, which include flocculant, and so be able to complete the earthworks.

[19] However, Mr McLean<sup>4</sup> has determined that the current sediment control measures are not adequate. Rather, the area of earthworks and inadequacies of the two ponds mean that sediment-laden water will discharge to the receiving environment as a result of rainfall events. Significant works are required to bring the erosion and sediment controls at the site into compliance with GD05 (which the applicant's ESCMP for the site stated would be adhered to). Mr McLean considered that a new ESCMP should be prepared in accordance with GD05 to demonstrate how the site will comply with GDO5 before any further works are undertaken on the site. In relation to flocculation, which was raised as a potential solution to the sediment run-off issues, Mr McLean stated that flocculation could be considered in conjunction with GD05 compliant controls, but it "*is not the key to success, firstly the ESC [erosion and*

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<sup>2</sup> Also from Kevin Joseph Ford, senior investigator, Murray Peter Cave, principal geologist, Jamie Lee Bates, an investigator in the monitoring and enforcement team, and Jocelyne Tanya Allen, Consent Manager all of whom work at the Council.

<sup>3</sup> First Affidavit of Mr Barraclough, at [13].

<sup>4</sup> Affidavit of Gregor John McLean, dated 15 February 2024.

*sediment controls] need to be designed, constructed and maintained in accordance with the guidelines.’<sup>5</sup>*

***Effects on downstream watercourses and neighbouring property***

[20] For Mr Barraclough, Messrs Cameron and Lawton addressed the adequacy of the ESCMP and utility of requiring rapid stabilisation of earthworks on the site.<sup>6</sup> They did not address any of the associated effects already being experienced offsite, including sediment in downstream watercourses and the effects on the neighbouring property.

[21] Mr Hopkinson argued that the evidence from Mr Barraclough on this point is not particularly clear, but appears to be based on an assumption that this matter is not relevant. For example, in his affidavit, Mr Barraclough stated that reference to adverse effects on watercourses within the property “... *is not relevant, rather, the focus is on cross boundary discharges as noted in the terms of condition 15 of the Stage 1 earthworks consent where conveyance of sedimented water within internal drainage systems is specifically authorised.*”<sup>7</sup> Mr Barraclough set out his view on how sampling should be undertaken, and argued that the abatement notice fails to acknowledge the Council’s “*statutory duty to account for reasonable mixing*”.<sup>8</sup>

[22] Mr Hopkinson submitted it is not clear how Mr Barraclough’s interpretation of legal and planning matters is relevant, but in any case his discussion of these matters does not explain how reasonable mixing constitutes a defence to his ongoing contraventions of s 15 of the RMA.

[23] Mr Hopkinson submitted that this is not a case where the adverse environmental effects of granting the stay will only be minor. Nor is it a case where there would be no irreversible effect on the environment and that effect could be remedied at any time. The effects of discharges of sediment laden water on the

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<sup>5</sup> Affidavit of Mr McLean, at [23](e)(ii).

<sup>6</sup> Affidavit of Andrew Lawton, dated 30 January 2024, at [36] and [39] and Affidavit of Bruce John Cameron, dated 31 January 2024, at [32].

<sup>7</sup> First Affidavit of Mr Barraclough, at [69].

<sup>8</sup> First Affidavit of Mr Barraclough, at [73].

downstream environment are ongoing and compounding.<sup>9</sup>

[24] Mr Sluter addressed the actual and potential adverse environmental effects of the activities occurring to date on the property. He noted that it has had a moderate to high impact on the downstream environment. The primary concern is the impact from increased sedimentation due to the area of disturbed ground on the property as well as inadequate sediment controls. He noted that a significant amount of sediment has discharged from both exit points from the property at the western and eastern valleys respectively. Sampling undertaken at four occasions between December 2022 and the end of October 2023 shows that levels of total suspended solids discharging from the property remain consistently high.

[25] Mr Sluter noted that sediment as a stressor has particularly negative consequences for aquatic ecosystems as it smothers aquatic species and habitats as well as reducing oxygen levels, thereby creating stress on the ecosystem by generally making it more difficult for aquatic species to survive. The particular concern with the discharges from the property is that not only are high sediment discharges occurring during relatively small rainfall events, but every time it rains more and more sediment is discharging, resulting in a cumulative effect.<sup>10</sup> Mr Sluter concluded that the effects on the environment if the stay application is granted will be much the same as were identified in his evidence and summarised above, and will compound the environmental harm that has occurred to date. The extensive cut and fill earthworks undertaken have already caused significant sediment discharges, and it is likely those will continue.<sup>11</sup>

[26] The effects on a neighbouring property are set out in the affidavit of Ms Ellmers, a neighbouring property owner. Ms Ellmers stated that she and her husband have owned their property for more than 16 years and that prior to the earthworks occurring at the Barraclough property had never had to clean out the drains on their property. However, since those earthworks commenced there has been a massive increase in the discharge coming off the Barraclough property onto

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<sup>9</sup> Affidavit of David John Sluter, dated 15 February 2024, at [61].

<sup>10</sup> Affidavit of David Sluter, at [59] and [60].

<sup>11</sup> Affidavit of David Sluter, at [61].

her property and into her drains. Ms Ellmers outlined the stress she and her husband are suffering from arising from the inadequacy of the sediment controls. She also described the financial costs arising from having to replace a culvert in the main drain and to clean out silt. Ms Ellmer also described concerns about ongoing damage to their land and the environment.

[27] We are in no doubt that sediment has and will continue to discharge from the property and onto, at least, the Ellmers' property if no steps are taken to address the issues on the property. The effects of those discharge are adverse and, on the evidence we have, continuing.

**Is it unreasonable for Mr Barraclough to comply with the Notice?**

[28] Mr King reiterated the grounds outlined in the application relating to reasonableness and the likely effect on the environment of granting the stay.

[29] The essence of Mr Barraclough's argument is that work urgently needing to be undertaken to repair the erosion and sediment system is prevented by the requirements of the abatement notice. He asserts that it is not "*reasonable or appropriate*" to rapidly stabilise earthworks at this point in the season, because that would prevent earthworks being completed before the winter earthworks period and would leave the site exposed. He argues that he should be allowed to continue with his current earthworks "*in accordance with the resource consent and approved plans under the supervision of its approved expert*".<sup>12</sup> In other words, that he should be allowed to resume his earthworks and continue his previous activities in the same way and in accordance with the approved ESCMP.

[30] Mr Barraclough also argued that rapid stabilisation would make a minimal difference to preventing sediment discharge, but would prevent or have significant effects on, what earthworks could be done this season and add significant costs in time in removing them before any earthworks could be undertaken.

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<sup>12</sup> Application for stay of abatement notice at (c)



[31] Mr Hopkinson observed that this argument does not acknowledge that Mr Barraclough's previous earthworks and approach to erosion and sediment controls have resulted in significant, ongoing issues at the property, including numerous off-site discharges of sediment laden water. In terms of weighing up any adverse effect on the environment against the adverse effects on the applicant (potential delay to his earthworks project), counsel submitted that the environmental considerations outweigh the impacts on Mr Barraclough.

[32] Further, that argument does not acknowledge the inadequacy of both the current ESCMP and the remedial works proposed by Civil Assist set out in the affidavit of Mr McLean.<sup>13</sup>

[33] We address first the allegations about the ESCMP.

#### ESCMP

[34] Mr Cameron reviewed the ESCMP and the implementation documents. He noted that the ESCMP referenced and utilised the Erosion and Sediment Control Guide for land disturbing activities in the Auckland region (June 2016) (**GDO5**). He recorded that the earthworks required to be undertaken for the development have been considered in the ESCMP in some detail to ensure they are sufficient for the intended purpose of future residential subdivision development. He noted that, as a result of the monitoring review of the erosion and sediment control measures, further refinement and improvement of those measures is to be implemented. That has been identified in subsequent documents.

[35] He said that as the erosion and sediment controls are used to manage dynamic landforms, regular and somewhat continuous maintenance of the controls is required – particularly following large storm events.<sup>14</sup> Based on his document review and knowledge of the local area where the development is being undertaken, he considers that the ESCMP and subsequent monitoring and remedial/maintenance documents are appropriate. He supports the implementation of the recommendations of the

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<sup>13</sup> Affidavit of Mr McLean, Exhibit GM1 at [24]-[25].

<sup>14</sup> Affidavit of Mr Cameron, at [29].

ESCMP as developed by Civil Assist for the proposed residential subdivision development. He makes no comment on the abatement notice or the effect of granting a stay.

[36] Addressing the requirement for a new ESCMP, Mr Lawton does not agree that a new plan should be provided, or that the current ESCMP is inadequate if his recommendations are implemented. He considers that GD05 is a guideline, but that what needs to be recommended is what is best for the site and the situation.

[37] He also observed that flocculation should be approved for use. He considered that it is needed at this property as the suspended solids in the water remain in suspension for long periods of time. It will assist in improving the efficiency of sediment retention devices by speeding up the natural settling process of particles that otherwise settle very slowly.<sup>15</sup>

[38] In response, Mr McLean considered that GD05 tools can be accommodated into erosion and sediment control plans for all scales and complexities of land disturbance; that an erosion and sediment control plan for a project needs to be best fit for the site conditions and construction methodology. In that regard, the ESCMP needs to be adjusted as construction progresses. He considers that such a plan should be produced and submitted to Council for certification prior to implementation. In his opinion, the original ESCMP did not comply with GD05 and nor do the current erosion and sediment controls installed on the site. He considers that continuing to tweak and undertake remedial actions on site will not ensure that the site complies with GD05. Finally, Mr McLean addressed flocculation, and stated quite simply that it is not the key to success. First, the erosion and sediment controls need to be designed, constructed and maintained in accordance with the guidelines. Flocculation is one of the tools available.<sup>16</sup>

[39] Mr Hopkinson addressed Mr Barraclough's assertion that it is unreasonable to comply with the abatement notice pending a hearing of the appeal because the Council

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<sup>15</sup> Affidavit of Mr Lawton, at [42].

<sup>16</sup> Affidavit of Mr McLean, at [23](e).

approved the **ESCMP** in February 2023<sup>17</sup> (pursuant to condition 9 of the Earthworks Consent). He submitted that assertion fails to acknowledge that:

- (a) the approved ESCMP has not avoided or minimised discharges of sediment laden water from the earthworks on the property – indeed the opposite has occurred;
- (b) the approved ESCMP has never been fully or correctly implemented by the appellant. The evidence of Mr Gregor McLean<sup>18</sup> outlines a number of ways in which the approved ESCMP was not being complied with, including that both of the sediment retention ponds were serving excessively large catchments.
- (c) despite the approved ESCMP, there have been ongoing issues with the sediment control measures at the property, which led to the issuing of a further abatement notice in June 2023 that required the applicant to obtain and implement a remedial plan.

***Will rapid stabilisation assist?***

[40] Mr Lawton recorded that in July 2023 he provided the Council with a remedial plan for the sediment and erosion controls on the property. The Council had that plan peer reviewed by PDP, and in September 2023 advised that the reviewer had approved the plan but requested further details.<sup>19</sup>

[41] On 23 November 2023, Mr Lawton advised the Council that work in accordance with the initial remediation plan was completed on 17 November 2023, and that subsequent works arising from rain events would be normal maintenance operations. He recommended that the most appropriate means of reducing any ongoing sediment issues was to advance the bulk earthworks. The Council did not agree.<sup>20</sup>

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<sup>17</sup> First Affidavit of Mr Barraclough, at [7].

<sup>18</sup> Affidavit of Mr McLean at [21]-[23] and Exhibit GM1 at [21]-[22].

<sup>19</sup> Affidavit of Mr Lawton, at [15].

<sup>20</sup> Affidavit of Mr Lawton, at [23].

[42] Mr Lawton addressed the requirements of the abatement notice regarding rapid stabilisation of the site, outlining that:

- (a) he considers that rapid stabilisation, by mulch for example, would essentially prevent the already exposed earthworks from being completed this season, leaving the site exposed, eroding and producing sediment run-off for an extended period in another winter;
- (b) temporary stabilisation methods may not be fully effective due to the steep grades, size of the property and nature of the soil. Applying mulch or hay on the steeper sections may result in large quantities of the material being washed into the sediment devices;
- (c) applying a geotextile across the wide expanses of the site would be highly costly and wasteful;
- (d) applying topsoil and grass would effectively be reverting the site to the state prior to starting and would then require careful removal of the topsoil and grass prior to starting the bulk earthworks, significantly extending the works' timeframe and scope unnecessarily. Stabilisation of this type should be used as a treatment prior to winter on areas that are not completed during the summer period – not as an action to close down the property during summer as suggested by Southern Skies and the Council.<sup>21</sup>

[43] In response, Mr McLean observed that rapid stabilisation would significantly reduce the ongoing sediment discharges while a [new] ESCMP was prepared in accordance with GD05 and certified by the Council.<sup>22</sup> He agreed with Mr Lawton that stabilisation of the site should be used as a treatment prior to winter on areas that are completed during the summer. However, he considers it should also be used to stabilise the site during the winter period, to avoid any unnecessary sediment discharges.<sup>23</sup>

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<sup>21</sup> Affidavit of Mr Lawton, at [36].

<sup>22</sup> Affidavit of Mr McLean, at [23](c)(ii).

<sup>23</sup> Affidavit of Mr McLean, at [23](c)(ii).

[44] On the evidence available to us at this time, we conclude that the ESCMP is inadequate and should be amended. We also conclude that rapid stabilisation of the site is required.

***Resource consent***

[45] Mr Barraclough also called evidence from Mr Muir, a consultant planner. Mr Muir primarily addressed the consenting and enforcement background to this matter. This has not assisted the Court in considering the application for stay.

[46] Mr Muir did, however, helpfully annex to his affidavit a copy of the Earthworks Consent. Relevant consent conditions include:

- (a) condition 7 – that earthworks shall only occur between 1 October – 31 April;
- (b) conditions 9-12 which address what needs to occur with regard to the preparation of an erosion and sediment control plan prior to the works;
- (c) conditions 13-14 which address erosion and sediment control during works.

[47] Relevant to sediment and run-off are the following conditions:

- 15. Except where conveyance or run-off is required as part of sediment control works or for internal drainage systems, run-off controls shall be installed around any area of disturbance to prevent concentration of run-off causing erosion or scour, and so that sediment contaminated water does not directly discharge to a waterbody or discharge from the site to an adjoining property.
- 16. Sediment removed from a sediment retention device shall be placed where it cannot re-enter a device or enter any waterbody.
- 17. Stockpiled material shall be relocated in a suitable site where it cannot be moved by stormwater. Stockpiled material shall be effectively isolated and effectively stabilised to prevent surface erosion and sedimentation or debris entering into waterbodies.
- 18. Run-off controls from all disturbed areas of land resulting from the activities shall not directly discharge run-off onto fill material, unstable land or unprotected material.

[48] The Earthworks Consent was granted by the Council on the basis that the conditions of the consent would be complied with, and that the erosion and sediment control plan approved under the consent would “*ensure the activity avoids adverse effects on the environment*”.<sup>24</sup> The Council is entitled to (and indeed must) assume that consent conditions will be complied with, and that erosion and sediment control measures will be constructed in accordance with certified plans and will be consistent with both the application and relevant resource consent conditions in order to avoid ongoing discharges of sediment laden water to downstream properties and watercourses.

[49] On the evidence we have, the discharge of sediment breaches the above conditions of the Earthworks Consent. Those ongoing breaches are relevant to our assessment of the stay application.

### ***Other points***

[50] The Council advised that there are a large number of points raised in Mr Barraclough’s evidence that it did not address save for those relating to the Council’s response to information requests and the involvement of an independent third party to determine the appropriateness of erosion and sediment controls. Addressing those matters does not assist us in determining the stay application.

### **Evaluation**

[51] In previous cases the Court has held that there must be evidence to establish the threshold for granting a stay, and the reasonableness of requiring compliance is a matter of fact and degree. The Court has held that if the factor causing environmental damage can be remedied at any time, it may be unreasonable to require compliance pending an appeal, and the grant of a stay would then be justified.<sup>25</sup>

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<sup>24</sup> Council’s decision granting consent dated 12 January 2023, annexed as Exhibit “23” to First Affidavit of Mr Barraclough.

<sup>25</sup> *Robertson v Queenstown Lakes District Council* EC, C201/2001, 12 November 2001; *Humphrey v Queenstown Lakes District Council* EC, C10/2002, 29 January 2002; *46 South Investments Ltd v Southland Regional Council* EC, C193/01, 9 November 2001.

[52] Mr Hopkinson submitted that Mr Barraclough's stay application is akin to the stay application in *Neil Construction Ltd v Canterbury Regional Council*.<sup>26</sup> In that case an abatement notice required discharges of stormwater from a subdivision to cease unless Neil complied with the resource consent. Neil Construction Ltd appealed the notice on the basis that the relevant condition of resource consent related to construction activities, and as there were currently no activities on site there was no breach of the consent conditions; and the run-off was from land Neil had on-sold and did not own or control.

[53] Canterbury Regional Council opposed the stay, noting that the run-off was in breach of the resource consent and an offence under the RMA. It also argued that if the Court granted the stay it would effectively sanction non-compliance with the conditions of consent and would result in adverse effects on the environment, that is, ongoing sediment discharges to the relevant drain and stream. The Court determined that the stay should not be granted due to the evidence of real downstream risk from increased sediment if the conditions of consent were not complied with. The Court's decision was also influenced by the fact that Neil's arguments were an attempt to avoid responsibilities in circumstances where it had earlier accepted those responsibilities in its own consent application.

[54] Mr Hopkinson submitted that the present case is similar in a number of respects to the *Neil Construction* case. The Council's evidence, particularly that of Mr David Sluter, sets out the actual and potential effects on the environment if the application for stay is granted. They include the downstream effects of increased sedimentation from the earthworks on the property as a result of ineffective stormwater controls. Further, the adverse effects on the neighbouring property from the earthworks are set out in the affidavit of Ms Sandra Ellmers, one of the owners of that property.

[55] The remedial measures the Council contends are required are to ensure that the site can be stabilised in the interim while a revised erosion and sediment control plan is prepared and implemented to address the underlying issues.

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<sup>26</sup> *Neil Construction Ltd v Canterbury Regional Council* EC, C127/07, 20 September 2007.

[56] Mr Hopkinson submitted that enabling Mr Barraclough to continue with his operations in the same manner pending the outcome of the appeal will not address the required remedial measures, nor the ongoing adverse effects. Allowing the works to continue as before (by granting the stay) will simply perpetuate the issues and discharges at the property.

[57] The Council recorded that it has now been dealing with compliance issues at Lot 2 (and Lot 4) for more than 12 months. Mr Hopkinson submitted that it is notable that Mr Barraclough:<sup>27</sup>

- (a) has not installed erosion and sediment controls consistent with GD05, despite the ESCMP stating at Section 3.1 that “*All erosion and sediment control devices will be installed in accordance with the Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland Region (June 2016)*”;
- (b) has failed to fully implement the remedial measures agreed with Council officers at a site inspection in December 2022;
- (c) has never fully implemented the remedial plan prepared by Civil Assist dated 20 July 2023;
- (d) continues to criticise Council for his own lack of compliance at the property, despite failing to implement agreed measures and/or effective sediment control measures at the property;
- (e) does not acknowledge that the earthworks at the property are continuing to have an adverse effect on the environment; and
- (f) continues to insist that earthworks should simply be allowed to resume despite the site’s sediment control measures clearly being ineffective and the ongoing discharges from the site.

[58] Mr Hopkinson submitted that in the current circumstances it is not unreasonable for Mr Barraclough to undertake the measures required by the

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<sup>27</sup> Council’s legal submissions, dated 20 February 2024, at [41].



abatement notice, pending the resolution of the appeal. To do so will not result in his suffering irreparable injustice or irrevocable loss. Although declining the stay application and requiring compliance with the abatement notice may result in delays to Mr Barraclough's earthworks at the property, once he has stabilised the earthworks site and prepared and fully implemented a revised erosion and sediment control plan, earthworks can resume in accordance with the Stage 1 Earthworks Consent on the evidence presently available.

[59] We find none of the arguments raised in support of allowing earthworks to continue as previously and ahead of rapid stabilisation of the site to be persuasive because the evidence does not support them.

### **Conclusions**

[60] In addressing the merits of this application it seems to us that sight may have been lost of the Earthworks Consent requirements, in particular condition 15, to ensure there is no discharge run-off from the property. Section 15 of the RMA is, of course, clear in its requirements as to discharges, but the consent contains specific conditions requiring there be no direct discharge of sediment contaminated water to a waterbody or from the site to a neighbouring property. We do not understand there to be any difference between the parties as to whether discharges are occurring. The differences relate to how they might best be addressed so as to ensure that there are no further discharges.

[61] Mr King focussed in part on the lawfulness of the discharges, noting that the Council had issued a consent for the earthworks but did not require a discharge consent because it was satisfied that the works, with the sediment controls in place, would be adequate. That may be so, but we were provided with evidence, which we accept, to the effect that the works did not comply with the ESCMP and/or that the plan is inadequate. That requires something to be done, and the evidence we have is that it should be done urgently. We do not take the applicant's witnesses to disagree that work should be undertaken to prevent further discharges, or that it is urgent. Quite simply, Mr Barraclough advocates to be allowed to complete the earthworks and, by so doing, says that would resolve the problem.

[62] Mr King spent some time in his written submissions outlining the history of this matter and the correspondence between Mr Barraclough and the Council. That does not assist us with this application.

[63] We find that the effects on the environment of granting the stay are clear. The existing situation will continue, with its associated adverse effects on both the neighbouring property and the downstream watercourses.

[64] We do not accept that Mr Barraclough can effectively manage and remedy the existing situation with the sediment control measures he currently has in place. This is particularly the case when his solution appears to be to continue in much the same manner, despite those previous measures clearly being insufficient. Effectively, he is asking the Court to condone the status quo and its consequential effects. That is not appropriate. We are satisfied, from the information we have, that erosion and sediment control at the property is inadequate.

[65] It is not unreasonable for Mr Barraclough to comply with the requirements of the abatement notice until the appeal against the abatement notice is heard and determined.

### **Outcome**

[66] Having regard to the matters we are obliged to consider in s325(3D) of the RMA we determine it is not appropriate to grant the stay. The application was refused on 22 February 2024 with reasons now provided in this decision.

[67] Costs are reserved. Any application for costs are to be filed within 20 working days; any reply 10 working days after that and any final reply, if any, 5 working days thereafter.



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**MJL Dickey**  
Environment Judge

