

**BEFORE THE TARANAKI REGIONAL COUNCIL**

*IN THE MATTER*

of an application by Remediation (NZ) Limited for resource consents under Part 5 of the Resource Management Act 1991

*AND*

*IN THE MATTER*

applications to obtain replacement consents for Consent Numbers 5838-2.2 and 5839-2 as summarised below:

Consent 5838-2.2 – to discharge of a) waste material to land for composting; and b) treated stormwater and leachate, from composting operations; onto and into land in circumstances where contaminants may enter water in Haehanga Stream catchment and directly into an unnamed tributary of the Haehanga Stream at Grid Reference (NZTM) 1731656E-5686190N, 1733127E-5684809N, 1732277E-568510N, 1732658E-5684545N and 1732056E-5684927N

Consent 5839-2 – to discharge emissions into the air, namely odour and dust, from composting operations between (NZTM) 1731704E-5685796N, 1733127E-5684809N, 1732277E-5685101N, 1732451E-5684624N and 1732056E-5684927N

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**LEGAL SUBMISSIONS FOR REMEDIATION (NZ) LIMITED**

**DATED 23 MARCH 2021**

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## Introduction

- [1] My name is John Maassen. I am a barrister specialising in resource management and local government law. I have over 30 years' experience in these speciality areas working throughout New Zealand.
- [2] I am representing the Applicant, Remediation(NZ) Limited (RNZ). It is a business based in Taranaki, operated by Taranaki people and servicing Taranaki businesses.

### *Pre-circulated and additional materials*

- [3] Kathryn Hooper is the lead consultant for the application, and Kathryn prepared the extensive application with 26 appendices. Kathryn also pre-circulated evidence on behalf of the Applicant under the standard timetable for evidence exchange under RMA, s103B.
- [4] Included in the pre-circulated material is a Graphics and Data Bundle comprising the following:
  - (a) Item 1 – an aerial plan at 1:15,000@A3 showing the site, surrounding dwellings and water sampling locations. Superimposed onto the map are isochrones at 1.0 and 2.0 km showing the distance from the sampling location HHG0000115, which was chosen as the notional centre of the site's operations. These isochrones provide an idea of the relative distance to sensitive receptor locations. For that purpose, the black dots in the Graphics and Data Bundle shows the residential dwellings. Land owners' boundaries are marked green where the landowner is neutral on the application, and sites marked with red borders are sites where the landowners are objecting to the application.
  - (b) Item 2 – shows the same information as item 1 but with 20m contours superimposed to show the site's landform.
  - (c) Item 3 – shows the farm map with the irrigation blocks and the various pads, irrigation ponds and vermiculture operation.
  - (d) Item 4 – shows the site layout.

- (e) Item 5 – the remainder of the bundle shows the data for physio-chemical parameters for various monitoring locations during the previous consent period.
- [5] RNZ's technical experts are available to answer questions except for Dr Fairgray, who gives evidence on economic effects.
- [6] Dr Fairgray's evidence is non-controversial, and there is no matching expert for any party. To avoid unnecessary cost, RNZ proposes that if the Panel has any questions, then Dr Fairgray can be joined by Microsoft Teams or answer any questions by email.
- [7] Concerning air quality, the RNZ's expert witness is Andrew Curtis. For contaminant management and loading, water quality, and effects on aquatic life, the relevant technical experts are Messrs Kay and Easton.
- [8] Kathryn Hooper provides evaluative evidence but does not repeat statutory assessments already included within the AAE in response to the RMA requirements, Schedule 4.
- [9] Kathryn Hooper has also pre-circulated a Microsoft Word document called "RNZ v1 Offer Conditions (Word version)". These are published on the Council website as a PDF, but the Council has a Word version. The changes are mainly stylistic rather than substantive. The primary point of difference between the Council and the Applicant concerns the term of the consent and the nitrogen application limit in Condition 25.
- [10] Some of the Applicant's witnesses have brief supplementary evidence, and they will also orally and briefly address the main points of their evidence.

*Activity and classification*

- [11] The Council and the Applicant agree that the application is for discharge permits to land and water and to air necessary to sustain the waste management activities occurring on the site. The Council officers and the Applicant agree that the activities should be assessed as discretionary activities.

*Nature of the enterprise on the site*

- [12] The Panel must consider the enterprise occurring on the site holistically to understand the Applicant's aims and the over-arching environmental purpose of the activities.
- [13] The site was acquired by RNZ when it was in an environmentally compromised state through hill country pastoral farming and deforestation with poor soil condition on the flat. However, the 'bones' of the site provided an excellent opportunity to operate a composting and vermiculture facility to receive waste streams from various Taranaki business activities and the food waste streams from the New Plymouth population. The site is comparatively remote, has good buffer areas and has an internal waterway, the Haehanga Stream. The gradient and arrangement of the flat areas provide for treatment as part of the site operations.
- [14] The long-term aim is to revegetate the hill country, improve the flats' soil condition, and improve riparian planting as shown in Appendix K1. The site environment is substantially better than when the composting and vermiculture activities commenced. The site's longer-term trajectory should lead to significant improvements within the Haehanga Stream catchment that will benefit the Mimitangiata River.
- [15] Central to the enterprise's business elements is the concept of recycling organic waste and (in the past) remediating drilling waste containing hydrocarbons. The idea of recycling and remediation of waste is central to the idea of sustainability. These concepts, for example, find their expression in the 1987 Brundtland Report "Our Common Future," which was the precursor to the United Nations Rio Earth Summit in 1992. That United Nations report was the international context for the introduction of the RMA in 1991.
- [16] As McChesney noted in *The Brundtland Report in Sustainable Development in New Zealand*<sup>1</sup>, Canada in response to the Brundtland Report, expressed a goal for waste reduction by encouraging the development of a national recycling programme as part

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<sup>1</sup> McChesney "The Brundtland Report in Sustainable Development in New Zealand" February 1991, Information paper No 25, Centre for Resource Management, Lincoln University and the University of Canterbury.

of the goal to “*promote sustainable development practices in the field of waste management with an initial focus on residential and commercial waste management*”.

- [17] The Brundtland Report recognises that waste recycling facilities improve the resilience of communities and support local economies. The Brundtland Report acknowledges that economic activity is an essential component of human life and can be mutually reinforcing in achieving sustainable development goals in a “circular economy”. Using waste streams for pasture improvement is also a crucial element of sustainable development in the Earth Summit literature.
- [18] Similarly, remediation of contaminated product such as drilling waste bi-product is entirely consistent with the idea of sustainable management of human activity, as noted in the Brundtland report.
- [19] Central Government in New Zealand, at around the same time as these international initiatives, also aimed to minimise waste by encouraging recycling and remediation. In 1990 the Labour Government announced the National Waste Management Policy. That produced national guidelines (Ministry for the Environment, 1992(c) 1992(d)). The National government revised that waste policy (Ministry for the Environment, 1992(b)). Six practical ways to control waste in that policy included recycling waste materials to make new products and treating waste with processes that remove or reduce their impact. In August 1996, the Local Government Act was amended to require every territorial authority to adopt a waste management plan incorporating the waste management hierarchy. The *New Zealand Waste Strategy: Towards Zero Waste and a Sustainable New Zealand (MfE) 2002* was developed as a partnership between central and local government. A core component of the strategy was to create a sound legislative basis for waste minimisation that led to the Waste Minimisation Act 2008. The purpose of that Act is to encourage waste minimisation and decrease disposal to *protect the environment from harm* and provide environmental, social, economic and cultural benefits.<sup>2</sup>

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<sup>2</sup> Waste Minimisation Act, s 3.

- [20] To reduce carbon emissions and build regional resilience, waste management facilities must be locally situated.
- [21] Therefore, the Uruti facility is a critical component in the implementation of national strategies and environmental legislation in Taranaki. That is a relevant matter under RMA, s 104(1)(c).
- [22] In all its dimensions, the enterprise for which RNZ seeks consent is consistent with the ethic of sustainability. RNZ accepts that in performing its services, RNZ must implement best practice in the composting and remediation arena and minimise adverse effects on the Haehanga Stream.

*Beneficial effects of the activity*

- [23] The beneficial effects of allowing the discharge activities is a matter that must be considered under RMA, s 104(1)(a).
- [24] The previous section sets out the beneficial environmental features of the enterprise. Dr Fairgray has framed the commercial benefits that flow from the discharge activities by applying economics to quantify the degree of regional economic activity that depends on the facility's continuation. The availability of a supply of waste management services is comparatively inelastic for obvious reasons.
- [25] In the TRC officers' report in paragraph 340, the officers make the somewhat surprising statement that:

*"Although RNZ has pointed out the positive effects associated with the operation, we do not consider there to be any positive effects of the discharges, which is what these consents are authorising. The positive effects referred to by RNZ above relate to the use of land for composting, which is regulated by the new Plymouth District Plan".*

- [26] The fact that the officers have turned a blind eye to the positive benefits perhaps explains the limited term of consent that they have recommended.

- [27] The RMA requires the Panel to consider the positive effects of *allowing the activity* under RMA s 104(1)(a). Discharge permits are an essential requirement to enable the waste management activities on the site, and the benefits of providing these waste management services is a positive effect that must and should have been weighed by TRC's officers following well-established case law.<sup>3</sup>

#### **National Policy Statement and Freshwater Management 2020**

- [28] The National Policy Statement for Freshwater Management 2020 was gazetted in August 2020. It provides the most contemporary statement of national policy on freshwater resources. It provides a useful lens for the sustainable management of freshwater resources and the pathway the community must now travel. While there are no planning provisions relevant in this case that govern the application in a regulatory sense, the principles, aims and standards for freshwater management are relevant to applications affecting freshwater while recognising that the specific implementation of freshwater proposals by councils must pass through the Schedule 1 process and respond to local conditions and requirements when setting attributes and action plans.
- [29] The overarching concept is Te Mana o te Wai.
- [30] NPSFM 2020 clause 1.3(3) identifies that Te Mana o te Wai encompasses six principles relating to the roles of tangata whenua and other New Zealanders in freshwater management. Those principles reflect a bi-cultural perspective. That is, both the perspective of tangata whenua and all other New Zealanders about the appropriate management of freshwater.
- [31] Combined with the *mana whakahaere* principle of power and authority conferred on tangata whenua comes the correlative principle of *manaakitanga*, which requires

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<sup>3</sup> In *Beadle v Minister of Corrections* EnvC A074/02, the Environment Court held that, in deciding resource consent applications for earthworks and streamworks required to construct a corrections facility, they were able to have regard to the intended end-use of that facility, and any consequential effects on the environment that that might have, if not too uncertain or remote.

respect and generosity in the care of freshwater and for others to serve the common good.

- [32] The Pakeha concept of stewardship in the NPSFM 2020 is the sister principle of *kaitiakitanga* with a different cultural lens.
- [33] To achieve water body restoration as the end of the journey that the NPSFM requires, the Policy Statement's hierarchy of obligations prioritises the health and wellbeing of water bodies with freshwater ecosystems. That does not require all waterbodies to be returned to a pristine state. The concept of 'stewardship' that recognises that human life involves trade-offs and that human impacts can occur in appropriate places to appropriate degrees.
- [34] While the phrase Te Mana o te Wai emerges from the culture of tangata whenua, its principles under NPSFM 2020 are cross-cultural and universal, and that reflects the reality of the principles of Te Tiriti o Waitangi and also the rationality of recognising that all people share a common home and a common responsibility to care for it.
- [35] In making informed decisions, the NPSFM 2020 mandates that robust scientific data is to be used where practicable. It thereby establishes that science is an important tool for verifying, measuring, and monitoring waterbodies' health and well-being.

#### **Previous consent non-compliances**

- [36] The TRC officers' report considers issues of non-compliance with the original consent. The purpose of this section is to contextualise and scale the impacts of those non-compliances to ensure a degree of perspective. The Applicant submits that these non-compliances, while regrettable, are not as significant as the officers suggest. They certainly do not demonstrate a pattern of disregarding the consent requirements.
- [37] It should be noted that RNZ has been the subject of a sustained campaign of misinformation since it applied for consent in social media and sometimes public media. The information about the scale and effects of the operation has often been wildly inaccurate. RNZ does not wish to dwell on these matters other than to say that

such activity is against the long-standing standard of human conduct that one does not bear a false witness against one's neighbour.

- [38] RNZ welcomes the opportunity in an independent forum to address its application.
- [39] The water quality outcomes for the site have been more or less those that were anticipated at the time the current consent was granted. What has shifted is the aspirations for freshwater management since then, and RNZ is responding to those matters. Most non-compliance with consent conditions affecting water quality were management errors with no significant water quality impacts. It is for that reason that they were dealt with as infringement notices.
- [40] Concerning the odour complaints, the improvement in the odour situation in the last consent period has been dramatic, with only five verified complaints. Of those, the period of non-compliance appears to be relatively limited and associated with katabatic conditions in the valley. Compared to the total number of hours of operation over the consent period of 10 years, that established impact is small.
- [41] Even without the intensive management proposed under the new consent conditions, the small scale of these impacts demonstrates the site has the robust characteristics to absorb the waste streams required to service the Taranaki region.
- [42] RNZ agrees with the Council officers that the non-compliances are irrelevant to assessing this application for a new consent and consideration of those matters will also operate as double jeopardy against the New Zealand Bill of Rights Act. The Council made a proportionate response to those non-compliances, and the Applicant has met that response.
- [43] The compliance history may provide insight into where conditions can be improved to manage the operation better. That is more or less how the Council officers and the Applicant use that information.

## Evidence for Ngati Mutunga

- [44] Ngati Mutunga has expressed their position on the importance to tangata whenua of the Mimitangiatua River and its tributaries. RNZ recognises and respects these views. The Proposals contained within the application and the improved conditions are practical measures to respond appropriately to tangata whenua.
- [45] The causes for the decline in the water quality in the Mimitangiatua River that tangata whenua identify are complex and multi-faceted and arises mainly from catchment-wide land clearance and land use. Declines in fish species for mahinga kai at the mouth of the river are likely to be the result of fishery management failures.
- [46] An appropriate response to the concerns of Ngati Mutunga is to identify the causes for the degradation within the Mimitangiatua catchment and to require proportionate improvements from contributing activities to the restoration of healthy freshwater conditions.
- [47] Paragraph 10 Ms McKay's evidence shows that the objective of Ngati Mutunga is to:
- (a) Cease vermiculture and composting operations at the site;
  - (b) Only grant a short term consent as part of an exit strategy.
- [48] That stated objective is not reasonable or proportionate and is not consistent with Te Mana o te Wai's principles that include appropriate stewardship of the existing natural and physical resources associated with the composting and vermiculture operation.
- [49] Ms McKay appears to misunderstand the nature of *mana whakahaere*. All power and authority derives from obedience to the application of the principles of rationality, proportionality and legality while recognising the priorities of the overarching concept of Te Mana o te Wai. There is no *tikanga* that offends these universal values that is authorised by the NPSFM 2020.
- [50] It is also unhelpful for Ms McKay to say at [17] of her evidence that the 'compass tool' was designed to convey information to a "colonial audience" thereby implying all Pakeha are colonialists.

*RMA, s 107 and Ms McArthur's evidence*

[51] RMA, s107 places certain restrictions on discharge permits, including restricting discharges that cause significant adverse effects on aquatic life after reasonable mixing.<sup>4</sup> The Council's officers and the Applicant agree that the application does not cause significant effects on aquatic life. Ms McArthur claims that it does. Ms McArthur's claims rest on the following propositions:

- (a) That the dataset shows that ammonia concentrations exceed the bottom-line value in NPSFM 2020.
- (b) A 25% reduction in the QMCI between upstream monitoring sites and downstream monitoring sites based on the 2019 bio-monitoring data set.

[52] It is submitted that Ms McArthur's assessment is both legally wrong and scientifically unsafe.

[53] Legally speaking, the application of the standard in s 107 only applies after reasonable mixing, and Ms McArthur has not undertaken any reasonable mixing analysis as part of her evidence. That is also difficult to use in the context of what is mostly diffuse contaminant transport. Reasonable mixing is best applied to point source discharges. Furthermore, a "significant" effect usually is an effect where a high level of scientific consensus would be expected. Ms McArthur is an outlier in claiming a significant impact on aquatic life. That suggests the threshold is not met since a jurisdictional bar should have an obvious scientific pedigree and not lie in the opinion of one individual.

[54] The scientific weaknesses of Ms McArthur's analysis are the following:

- (a) RMA, s 107 requires the discharge to be the cause of the significant effect. There is no safe assumption that the primary or dominant cause for any reduction in species, presence or incidence is the Applicant's discharge. For example, reductions in species prevalence between more pristine natural

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<sup>4</sup> Refer to RMA, s 107(g).

conditions and highly modified pastoral areas are reasonably common and not attributable to discharges.

- (b) As the application demonstrates the longer-term bio-monitoring record has average and, at times, good functional health within the Haehanga Stream within the site. The 2019 data set was a particular point in time when the waterway was under stress because of climatic conditions. It is not safe to rely on a single data point to make statements about effects, and indeed, it is against the long term monitoring and robust data set collection concept described in the NPSFM 2020 at clause 3.18.
- (c) The McArthur assessment is backward-looking rather than forward-looking based on prediction effects in light of the new management regime as required by the new conditions and summarised by Mr Easton's evidence.
- (d) The bottom line values in NPSFM 2020 for ammonia are not established as a proxy for assessing the scale of effect. Because of the absence of significant numbers of sensitive species, it is also a major leap to say that the current levels of ammonia are sufficient to demonstrate a significant effect.

- [55] RNZ has accepted a bottom-line standard for ammonia to be achieved by 2026, and that is an appropriate response to that issue.
- [56] The species in the Haehanga are resilient and as water quality and habitat improves further species abundance will increase. It is submitted that riparian planting and other measures are likely to have the greatest positive impact.

#### Air discharge – odour

- [57] There appears to be a high level of consensus by the experts on odour.
- [58] Mr Backshall, engaged by Mr Bendall and Ms Baker, states in paragraph [5.31] and [5.49] that the measures recommended by Mr Curtis will reduce odour omissions. There appears to be general agreement that control of the source of the compounds

by controlling the waste stream is an effective measure, and the proposed conditions significantly increase the reporting and monitoring of these waste streams.

- [59] A factor in Mr Backshall's residual concern is the increase in complaints since June 2020. This is at the same time as residents knew that RNZ sought a new consent. It is possible that the anxiety associated with that application may have caused the increase in complaints rather than an increase in effect.
- [60] Mr Backshall expresses a reservation about the effectiveness of conditions at paragraph [7.9] and [7.10] of his evidence. The reservation has two bases. First, an alleged *poor compliance history*. The compliance history is not poor and is significantly improved from the first consent that predates the existing consent. There have been instances of non-compliance but given the scale of the operation and the consent period it is wrong to suggest that the compliance history is poor.
- [61] The second ground that Mr Backshall gives is the absence of routine monitoring under the old conditions so that it is unclear whether the site has been able to meet the new conditions. That is illogical. The new conditions set new regime and predictions of effect can and should be based on them.

#### **Water quality**

- [62] Mr Kay has provided a Statement of Evidence supporting the detailed assessments in the application including the Nitrogen Balance Assessment, Soils Analysis (Appendix AB), Wetlands Treatment Plan (Appendix E1), Leachate and Stormwater Management Plan (Appendix F1) and Irrigation Models (Appendix F2 and F3). Mr Kay has also identified in his supplementary evidence a further irrigation area. Mr Kay is convinced that the management plans will ensure that all contaminants of interest will be managed appropriately and that nitrogen losses will be negligible using the Overseer model.
- [63] In response to Ngati Mutunga's concerns, RNZ engaged Mr Easton at Pattle Delamore Partners to undertake a full review of the treatment devices and methods with the purpose of identifying their appropriateness and any required enhancements. Mr

corrected. Also, the risks from those contaminants are not of a scale to cause a major environmental impact. That means adaptive management is not precluded. Adaptive management is a valuable a recognised tool to achieve appropriate environmental management. Adaptive management is described by the Supreme Court in *Sustain Our Sounds v. New Zealand King Salmon Company Limited*<sup>5</sup> as a type of precautionary approach to respond to risks where there is a degree of uncertainty that can be resolved by an adaptive management. Especially where adaptation will ensure unanticipated significant adverse effects are avoided. The combination of monitoring, management plans and baseline conditions in the proposed consent conditions are a 'belts and braces' approach to ensure contaminants are managed appropriately.

#### **Term of consent**

- [67] The Council officers recommend a term of 10 years. The Applicant seeks a term of 24 years.
- [68] The assessment of consent term has always been based on the matters in s. 104(1) and considering what best serves the Act's purpose. These principles were first set

Easton's report is attached 'warts and all' to his Statement of Evidence. Mr Easton concludes that the devices are appropriate but that improvements to their operation and management are required. These are outlined in section 4 of the report. In addition, in response to concerns by Ms McArthur, Mr Easton has recommended measures such as testing of the permeability of the pond linings. To monitor the effectiveness of these measures in reducing contaminants and in particular TAN, Mr Easton recommends parallel monitoring. Further improvements may be required to achieve the standards contained in the proposed conditions and these are outlined in section 5 of PDP report dated 8 March 2021.

- [64] Mr Easton also addressed the claim by Ms McArthur that stormwater is uncontrolled on the site. The Panel will notice the extensive experience that Mr Easton has in the fields of stormwater management and hydrology. Ms McArthur does not have those qualifications.

- [65] Ms Beecroft addresses contaminant management on behalf of Ngati Mutunga. Ms Beecroft does not challenge directly the opinions provided by experts for the Applicant. At [15] of Ms Beecroft's SOE her central thesis is stated as follows:

*"RNZ receives a number of high risk waste streams. Operating a vermiculture and composting facility of this type requires a robust set of consent conditions and management plans above and beyond a typical greenways composting facility. At the Uruti site failing to comply with consent conditions and/or management plans creates a relatively high risk to the environment, due to the potential contaminants, soil types and indications of contaminant connectivity between soils, ground water and the Haehunga Stream".*

- [66] These assertions are largely unverified and implausible. Ms Beecroft's evidence attempts to create a cloud of unknowing suggesting that there is a high level of uncertainty. In fact, contaminant treatment of the contaminants of interest is well understood and relatively standard interventions apply. It is true that higher levels of management are required but this is a reality with every waste management facility. What the instances of non-compliance demonstrate is that these are relatively easily