BEFORE THE COMMISSIONERS
AT NEW PLYMOUTH

IN THE MATTER	of the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	an application for discharge consents associated with a composting operation at Uruti
BETWEEN	**Remediation New Zealand Limited** Applicant
AND	**Taranaki Regional Council** Consent Authority

LEGAL SUBMISSIONS
ON BEHALF OF DAWN & GLEN BENDALL AND JENNIFER BAKER
Dated: 25TH MARCH 2021

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INTRODUCTION

1. These submissions are made on behalf of Glen & Dawn Bendall, and Jenny Baker, Dawns mother (**the Baker/Bendall family**). All three submitters now reside in Glen and Dawns house at 1580 Mokau Road.

2. The Baker/Bendall family have been resident in the area since prior to Remediation New Zealand original application. The family appeared at 2010 hearings for renewal and as a family they have a long relationship with Remediation NZ and Taranaki Regional Council concerning non-compliance at the site.

3. These submissions primarily address issues regarding odour and health. The Baker/Bendall family have also raised issues with leachate and the legacy issues regarding the drilling pad, in that regard these submissions adopt the submissions and expert evidence of Ngāti Mutunga and Taranaki Energy Watch.

4. Legal issues which these submissions will address include:
    a. Statutory grounds of assessment;
    b. Caselaw on Odour;
    c. Adverse effects to odour and health;
    d. Weight to be given to the evidence;
    e. Permitted Baseline / Rural Odour;
    f. Proposed Changes to Operation Management; and
    g. Planning Framework.

5. The Baker/Bendall family seek a decline of the consent. The proposal is contrary to sustainable management and will result in offensive and objectionable odour beyond the boundary of the site, has the potential to result in dangerous and toxic effects to health and animal welfare beyond the boundary of the site, will result in significant adverse effects to individual and community well being and is contrary to objective and policies of the Regional Air Quality Plan for Taranaki (RAQP).

STATUTORY TEST

6. S124 RMA provides a mechanism by which an applicant can continue to operate while they apply for a "new consent"[1], thereby preventing a costly situation where activities would otherwise be required to stop operations. However, there is a reasonable limit to the amount of time an applicant can continue to operate under "outdated management regimes." Where the application is unduly delayed this can lead to an abuse of the RMA.[2]

7. Following consideration of an application for discretionary consent under s104 a consent authority may grant consent subject to conditions or decline consent[3]. It is incumbent on the applicant seeking consent to demonstrate how their proposed activity will (a) comply with any requirements, conditions, and permissions specified in the resource management act, regulations or relevant plan[4] and (b) avoid remedy and mitigate actual and potential adverse effects of the activity.

8. The application must be determined on the basis of what is before you as to the current state of the facility and its operations[5] (this includes a consideration of present management and any non-compliance issues not addressed) and subject to the range of mitigation measures which may be achieved by the imposition of conditions imposed by the Court and the consent authorities.[6]

9. Non-compliance is a serious matter[7]:

> "I am of the view that the breach of resource consent conditions of itself is generally a serious matter. The imposition of conditions intended to avoid, remedy or mitigate adverse effects lies at the heart of the resource consent process. Those who obtain

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[1] This can be constrasted with s125; application for an exptension to the period of consent and s127 application for a variation of consent conditions exluding the duration of consent.

[2] At [14] *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53.
"We consider that the use of s124 to enable wastewater treatment plants to continue operating for long periods under outdated management regimes (as has happened both at Feilding and Shannon) is an abuse of RMA which brings no credit on either the territorial authorities involved or the Regional Council."

[3] S104B RMA.

[4] S87A RMA.

[5] At [33] *Waikato Environment Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431.

[6] At [33] *Waikato Environment Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431.

[7] *Waste Management NZ Ltd v Auckland Council* [2015] NZEnvC 178.

and operate under resource consents must accept an obligation to comply with the conditions which are integral to those consents. **If a consent holder... had advised the Council at the time it applied for consent that it would inflict adverse odour effects on its neighbours it would almost certainly not have received the consent under which it operates."**

10. Previous non-compliance and the applicant's response to that non-complaince is a relevant consideration under s104 as to whether an applicant can now meet prescribed consent conditions so as to avoid remedy or mitigate adverse effects going forward:

> [33] ..... failure to take steps that could have reduced or eliminated non-compliance once opportunities existed **raises further questions in our minds as to the reliance we can place on the Applicant's commitment and ability to reliably and consistently meet consent limits in the future.** [8]

11. During the 2010 consideration for renewal the Applicant acknowledged that poor management had resulted in unacceptable conditions relating to odour.[9] The commissioners considered that "there remained a risk that full compliance would not be achieved" and responded to that finding that "granting longer terms is not appropriate under these conditions"[10]. Assertions were made that management plans would demonstrate specifically how the applicant would achieve compliance.[11] In the last ten years poor performance and lack of pro-active management has once again been acknowledged as the key reason for ongoing odour issues[12]. There is an evidential burden on the applicant to show how the proposed future activities will avoid remedy or mitigate potential adverse odour effects that may result from poor management so

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[8] At [33] *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53.
[9] At [38] 2010 Decision: *In response to the submitters concerns of odour, Mr O'Neill acknowledged that from time to time, poor management or insufficient attention to odour mitigation measures may have resulted in odour beyond the site boundary at an unacceptable level.*
[10] At [92] 2010 Decision.
[11] At [81] 2010 Decision.
[12] EIC of David Gibson and EIC Andrew Curtis that better management is the key mitigation measures that will address odour issues.

as to be granted a further consent. This burden requires more than an assertion that management plans will get us there.

RELEVANT CASELAW

12. This fact scenario is very similar *Waikato Environment Protection Society Inc v Waikato Regional Council*[13] (**NZ Mushrooms Ltd**). The Commissioners in the 2010 hearing for Remediation NZ were also directed to consider NZ Mushrooms Ltd. This case remains the most applicable case law with a similar fact scenario:
    a. the applicant had been operating at the site for some time;
    b. there was a history of odour complaints and unsatisfactory compliance with conditions;
    c. the applicant had undertaken "considerable improvements to upgrade the facility"; but
    d. the "extent to which the significant odour issues have been resolved is the subject of heated dispute.

13. The test in determining offensive and objectionable odour is whether or not an ordinary reasonable person would find the odour offensive or objectionable[14]. This includes consideration of an how an ordinary reasonable person exposed to such odours in similar circumstances might have responded."[15] Context of the environment into which the odour is being introduced and planning provisions[16] goes to reasonableness.

14. Caselaw confirms[17] the Good practice guide finding that's chronic odour effects can be regarded as offensive or objectionable. The Guides states:[18]

    > Cumulatively, the low-level odour may have an adverse effect even though no single odour event considered in isolation could reasonably be assessed as

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[13] [2008] NZRMA 431
[14] *Zdrahal v Wellington City Council* [1995] NZLR 700.
[15] Ibid.
[16] *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431 (EnvC), the Environment Court identified that: In assessing what is reasonable, one must look into the context of the environment into which the odour is being introduced, as well as the planning and other provisions (location).
[17] At [39] *Waikato Environment Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431.
[18] *Good Practice Guide for Assessing and Managing Odour.*

objectionable of offensive. **For chronic odour effects a longer-term assessment of the frequency and character of odour impacts is required.**

15. The Good Practice Guide is often referenced by caselaw[19], and is accepted as a relevant and helpful guide in determining air discharge consents. The Guide is regularly updated. In regard to odour the guide sets out:

> *"Unlike other sensory information, olfactory stimulation is the only sense that reaches the cerebral cortex without first passing through the thalamus. This can lead to intense emotional and behavioural responses to certain odours." (Good Practice Guide for Assessing and Managing Odour at [2.1])*

16. In *NZ Mushrooms Ltd* the Court placed weight on resident evidence that offensive and objectionable odour was reaching sensitive locators. The Court found as a bottomline that the facility could not continue to discharge offensive and objectionable odour[20].

ADVERSE ODOUR EFFECTS

17. The experts are in agreement that during katabatic conditions[21], odorous air can drain down the valley towards state Highway 3[22] and that this is the dominant cause of odour effects offsite. During evidence in Chief, Mr Curtis stated that the katabatic effects is unique to the site and would not occur if the site was flat. Mr Backshall comments on the topography of the site as being ill suited for these type of activities due to the Kabatic flows.

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[19] *R v Interclean Industrial Services Ltd* DC Auckland CRI- 2011-092-16845, 2 August 2012 and *Waste Management NZ Ltd v Auckland Council* [2015] NZEnvC 178).

[20] At [187] and [199] *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431 (EnvC),

[199] *Although lesser mitigation measures would probably achieve some improvement and would certainly cost less than enclosure we were not satisfied that they would achieve the bottom line which we have identified at [187]*

[187] ...We consider that the bottom line in this case is that the composting facility may not continue to discharge offensive or objectionable odour.

[21] At [3.6] SOE Andrew Curtis.

[22] At [3.6] SOE Andrew Curtis.

18. There is no contest that odour is present at the entrance to the site, Mr Backshall describes the odour as "offensive and objectionable"[23]. Mr Curtis also accepted in evidence in chief that residents have been exposed to odour at their homes[24] but did not make a determination on whether this was considered offensive and objectionable.

19. Five of the residents complaints have been verified during the period from June 2020 to January 2021[25]. There is strong indication that the complaints occurred during periods of katabatic flow.[26] Mr Curtis commented that the inability of council to attend to every complaint in a timely manner is not unusual where you have these types of odour issues.[27] Given the difficulties in responding to these complaints, Backshall comments that this indicates " a significant level of non-compliance with the odour condition in the 2010 consent."[28]

20. If accepted the residents evidence establishes that there is currently offensive and objectional odours emanating from the site and travelling some distance either direction down the valley. This pattern has been continious for sometime, is ongoing and has gotten worse in the last few years.

WEIGHT TO BE PLACED ON EVIDENCE

21. Policy 1.2 RAQP directs a consideration of the reasonableness of a complaint of offensive and objectionable odour to include an assessment of hypersensitive. Hypersensitivity to odour and a higher degree of sensitivity are different. Hypersensivity is an abnormal reaction, i.e outside of the ordinary reasonable person and heightened sensitivity to an odour "is one of the potential effects of recurring exposure to it" that is "a normal reaction to such exposure"[29] and thus part of ordinary reasonable person assessment.

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[23] At [5.15] Duncan Backshall 2021.
[24] EIC, Andrew Curtis, 24 March 2021.
[25] At [71] Duncan Backshall.
[26] At [5.19] Duncan Backshall.
[27] EIC, Andrew Curtis, 24 March 2021.
[28] [5.28] Duncan Backshall.
[29] At [145] Mushrooms.

22. Individuals who have become hypersensitised to odour will find even the mildest manifestation of such odour or other nuisances to be offensive.[30] The Court in NZ Mushrooms Ltd found that they were not able to determine whether or not residents had hypersensitivity without expert advice[31] and found "it is a very long bow to draw to conclude that all of the residents have become hypersensitised".[32] No assertion of hypersentivity has been made. Expressions of frustration at the lack of acknowledgment or the process does not demonstrate residents were hypersensitised but is part of the normal responses[33]. In *Mushrooms Ltd* the Court found that neighbours who are regularly exposed to odours may have a "higher degree of sensitivity" to such odours than persons who are not subject to odours on a recurring basis[34] and for the majority of residents in those proceedings that was the case.

23. Residents in Uriti valley who have been exposed to ongoing or on and off odour issues for nearly twenty years will likely have a higher degree of sensitivity. Dawn Bendall is able to smell odour regularily but can discriminate between the odour from the site and other rural odours as well as discrimate between the "wall of stench" occuring during evening and morning periods, when the deoderiser is on and when it is not, as compared to smelling odour from the site on a day to day basis which is of lesser intensity.

24. In *Mushrooms Ltd* the Court considered that "the effect caused by chronic odour is a slow accumulated stress which can make people subjected to the reaccurring odour more sensitive to it". "In other words the increase in sensitivity of some persons is a direct effect of the recurring nature of the odour and ordinary reasonable persons may be subject to that effect."[35] Curtis acknowledge in evidence in chief that residents may be experiencing stress from ongoing odour effects.[36]

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[30] At [141] Mushrooms
[31] Ibid.
[32] At [142] Mushrooms.
[33] Good practice guide.
[34] [145] Mushrooms.
[35] At [159] Mushrroms
[36] Andrew Curtis EIC

25. A lack of complaints does not indicate that an effect is not occuring.[37] It is not surprising that feelings of frustration may lead to people deciding not to complain as is the case with Mr Oxenham or that complaints may increase prior to a hearing because complainants are aware that the issue of odour will be once more looked at by a decision making panel, i.e they become hopeful that the situation may be addressed. Choosing to complain in the lead up to a hearing does not equate to a finding that there was a lack of odour issues occuring prior to that period or an indication of unreliability on behalf of the complainants. The entire picture must be looked at.

26. A common argument in odour cases is that residents complain about odour when they are also offended by other nuisances emanating from a site. This is because odour is the easiest nuisance to complain about and is the most common complaint to regulatory authorities[38]. However, in this case there is no other reason for residents to complain, i.e residents cannot visually see the site, there is no evidence of issues arising with traffic or other nuisances.

27. Weight should placed on residents evidence of offensive and objectionale odour and the evidence of Mr Backshall. Curtis ackowledges that while he accepts that odour is occuring at residents houses, he does not understand how this is physically possible[39]. In supplementary Backshall has attached a photo which provides some explanation as to how odour would travel both directions up Mimitangiatua Valley[40]. Investigations by AECOM and Curtis has focused on conditions onsite and paid little attention to offsite residential complaints. There has been an overattention of Curtis and AECOM to the distance of residents from the remediation site as conclusive that odour effects could not be ocuring rather than exploring the question of: If odour is occuring at residents propoerties, how and why is this occuring?

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[37] The *Good Practice Guide for Assessing and Managing Odour* refers to people getting frustrated with lack of response to compaints as being common.

[38] *Good Practice Guide for Assessing and Managing Odour.*

[39] Curtis EIC.

[40] Photo identifies a hill opposite the entrance to the site which has the effect of splitting the katabatic flow as it enters Mimitangiatua.

PROPOSED CHANGES TO SITE MANAGEMENT

28. Experts agree that the bund and deoderiser are "ambulance at the bottom of the hill" measures and will not address the odour effects. Curtis makes a number of recommendations which he states if applied will result in there being "low potential for off-site odour effects."

29. Backshall agrees that recommendations if "fully and properly implemented" will signficantly reduce the potential for "**offsite, intermittent odour**"[41]. Mr Backshall was careful to add "intermittent" (operations which release odour such as turning of the windrow). Mr Backshall has not stated that proposed recommendations will fully address odour effects that arise from katabatic conditions, such as odour from drillings muds.

30. The proposed recommendations do not provide any certainty that the actual odour effects currently being experienced by residents will be addressed, in that:

    a. Odour is being generated from several different sources.[42] Specific causes of the increase in odour complaints has not been identified.[43] Backshall comments that without knowing the source of odour we do not have any certainty that the measures will be effective[44].

    b. Odours mask each other.[45] Curtis acknowledged that only after recommendations are put in place and operating effectively can we know if there are other odour sources not yet identified. These would then be identified and addressed[46]. How long this may take to first implement the recommendations, investigate further complaints, indentify other sources of odour and apply further measures to avoid, remedy or mitigate these effects are unknown.

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[41] At [4.17] Duncan Backshall 2021.
[42] Curtis.
[43] At [5.32] SOE Duncan Backshall 2021.
[44] At [5.32] SOE Duncan Backshall 2021.
[45] Curtis EIC.
[46] Curtis EIC.

31. Little reliance can be placed on the applicant's proposed odour management plan as being sufficient to ensure compliance with recommedations so as to address offsite odour effects:

    a. it is unclear how long the implementation of these processes will take. Gibson stated that the "new odour management plan" has been in operation for the past two years"[47], yet odour effects are still being felt at resident houses and poor management of the site is ongoing[48]. Gibson acknowledge that addressing existing management issues will take time.[49] In the meantime offensive and objectionable odour will be experienced by residents offsite.
    b. We have not seen a copy of the odour management plan and therefore cannot comment on its adequacy;
    c. Compliance history indicates that a mere assertion that an odour management plan will be developed and future odour issues pro-actively responded to has not resulted in effects being avoided, remedied or mitigated. More certainty is neccesary of how the applicant will ensure complaince.

THE RECEIVING ENVIRONMENT

32. Under s105, consideration must be given to the nature of the receiving environment. Backshall states:

> *While the area would be considered rural, background levels of odour will be low given the predominant activity is pastoral farming. AECOM has identified the receptor types in Table 1 as residential, and I agree that this is an appropriate sensitivity for the houses in the area.*

33. Planning evidence of the Applicant has raised a permitted baseline argument in regard to odour: "It is feasible that in the absence of the subject activities, farming activities involving some of these types of discharges would occur". *Mushrooms Ltd* identified two characteristics of rural odours:

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[47] Gibson, EIC.
[48] In EIC, Gibson acknowledged current poor management issues in questioning by commissioners of issues noted during their site visit.
[49] EIC Gibson.

a. These odours tend to occur only at some times of year and for short periods and have low potential to cause a long term accumulated stress.
b. The farmers also have control to some extent over when and where the odours occur, and can minimise the odour impact upon dwellings.

34. Resident evidence supports that the odour can be distinguished from other odours experienced in the area, once smelt you are unable to move away from it and occurs on a regular basis during katabatic conditions. It is a stretch to say that a activity of this nature which involves ongoing activities and can be described as rural.

HEALTH EFFECTS

35. A key concern for the residents is the effect of air discharges on health and wellbeing. The health survey produced by the Urenui and District Health Group lists a number of common health effects being experienced by more than one resident in the area. These effects align with those set out by Jonathan Jarman, as potentially being associated with offensive odour.[50] Evidence also demonstrates responses in animals during periods of odour suggesting adverse effects to animal wellbeing are also occurring.

36. In his letter[51] Jonathan Jarmon drew the following conclusions:

> Our health risk assessment based on this evidence is that it is **unlikely** that toxic emissions from Remediation Limited are making your family unwell (moderate level of certainty).
>
> However the evidence suggests that the odours beyond the boundary of Remediation Limited are **unnecessarily offensive** at times (high level of certainty).
>
> ...and that "it is **likely** your symptoms are being caused by odour pollution from Remediation Limited. Your doctor said that your health improves when you are out of the area on holiday."

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[50] Appedix B to SOE of Duncan Backshall
"Offensive odours are known to be capable of causing a variety of non-specific multi-system adverse health effects which include headaches, nausea, gastro-intestinal distress, retching, reduced appetite, fatigue, eye irritation, throat irritation, shortness of breath, runny nose, sleep disturbance, inability to concentrate,depression, tearfulness and classical stress response"

[51] Appendix A to evidence of Duncan Backshall.

37. Potential toxic effects to human and animal wellbeing have been reasonably raised by the residents in their evidence.

38. Jarmon suggested that Remediation NZ "engages an air quality specialist who can provide independent evidence-based advice on the odour issues and provide a high level of certainty that toxic gases are not being injurious to health." This has not occurred.

39. Mr Curtis accepts that the presence of odours can result in a wide range of symptoms in some people[52] and accepts that residents have been exposed to odour which has resulted in stress.[53] Mr Curtis has explored whether or not there would be toxic effects but the assessment is limited. Once again Curtis places emphasis on the distance of residents dwelling from the site. He has not investigated the full list of toxins potentially present onsite and the characteristics of toxins in how they may respond differently from odour to katabatic conditions. Backshall finds "there may be potential for toxic compounds to be present at higher concentrations than would normally be expected"[54]. There is insufficient information to draw any conclusions that exposure to toxic emissions has not occurred or will not occur going forward.

40. A precautionary approach is valid when considering effects of low probability but high potential impact to human health.[55]

REGIONAL PLANNING INSTRUMENTS

41. Relevant planning instruments have been accurately identified in the AEE and applicants planners evidence. I draw your attention here to relevant policy regarding odour and health effects the Regional Air Quality Plan:

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[52] At [7.12] SOE Andrew Curtis.
[53] EIC Andrew Curtis.
[54] At [5.46] Dunca Backshall.
[55] The Resource Management Act does not expressly prescribe the adoption of a precautionary approach. However, consent authorities are directed to have regard to potential effects on the environment (s 104(1)(a)) and the meaning of the term "effect" includes any potential effect of low probability which has a high potential impact (s 3(f) RMA), the consideration of effects is therefore precautionary in substance. Courts have consistently found that the precautionary principle is inherent in the Act's provisions. Rotorua Bore Users Association Inc v Bay of Plenty Regional Council NZEnvC Auckland A 138/98, 27 November 1998 at 49. Shirley Primary School v Christchurch City Council (1999) NZRMA 66 (EnvC) at [114]. Golden Bay Marine Farmers v Tasman District Council EnvC Christchurch W42/2001, 27 April 2001 at [421]-[423].

42. Policy 1.1 states:

Discharges to air of contaminants should avoid, remedy or mitigate adverse effects of potentially hazardous, noxious, dangerous or toxic contaminants ***by ensuring*** *that any such discharge* ***does not*** *occur at a volume, concentration or rate or in such a manner that causes or* ***is likely to cause*** *a hazardous, noxious,* ***dangerous*** *or toxic effect on human or animal health, significant ecosystems or structures.*

"by ensuring any such discharge does not occur" is directive language establishing a bottom line in terms of dangerous or toxic effects to human or animal health.

43. Section 4.2.3 of the RAQP states "there is no standard definition to these terms because of the need to take account of case law precedent as it develops"[56] but then describes that, **Dangerous** means – "able or likely to cause harm or injury."

44. Policy 2.6 states that discharges of contaminants to air **should not occur** at a rate or in a manner that contributes to **a cumulative effect** which over time, or in combination with other effects, **is likely to have an adverse effect on human health** and safety, ecosystems, property or other aspects of the environment.

Should not occur is another directive policy which sets a bottomline line for cumulative effects over time which result in adverse effects on human health

45. The evidence before you establishes that odour has been experienced at residential homes which has resulted in adverse health effects such as stress. Mr Jarmon also finds that it is "likely" other symptoms experienced by residents (such as headaches, nuisea tiredness, skin/throat irritation, son experiencing a skin rash) are the result of exposure to odour pollution. Odour effects have occurred over a twenty year period and can be described as cumulative in relation to their effect on human health and wellbeing.

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[56] At 4.2.3 of RAQP.

46. On the evidence, odour effects at residential homes are ongoing and the applicant accepts that implementation of proposed recommendations will take time.[57] Offensive and objectionable odour and their related health effects will continue therefore the applicant is unable to comply with policies in the RAQP and relevant bottom-lines contained therein.

47. Other relevant policies include:

    a. Policies 1.2 and 1.3 aim which ensure that any discharges to air of odorous contaminants and/or dust, smoke and other particulate matter beyond the boundary of the property are not offensive or objectionable, and do not result in adverse effects that are hazardous, noxious, or dangerous.

48. Policies 5.1 – 5.3 require discharges of contaminants to air from waste management processes to be managed to ensure that any significant off-site adverse effects are avoided, remedied or mitigated.

CONCLUSION

49. As primary relief, the Baker/Bendall family seek that these consents be declined and the applicant be directed to seek separate consents for remediation of site.

50. Ongoing issues regarding the ability of regional council to attend to site when complaints are made have been consistently raised by residents[58]. Measures should be investigated into how this monitoring issue can be addressed. This could include:
    a. Training of monitors who reside closer to Uruti valley and can attend instead of a council officer;
    b. Procedures in the MfE good practice guide should be adopted and followed by any independent monitor.

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[57] Gibson EIC.
[58] Letter attached to Dawn Bendall Supplementary evidence dated 26 Feb 2021.

51. Where consents are granted the Baker/Bendall family seek that consent conditions:

    a. require strict compliance with recommendations of Mr Curtis;
    b. a condition requiring remediation of the existing drilling muds within 2 years or removal if this cannot be achieved; and
    c. monitoring includes regular assessment of what comes is coming onto site;
    d. remediation NZ to ensure trained independent monitors are available at all times.

Witnesses:

    a. Dawn and Glen Bendall;
    b. John Oxenham;
    c. Trent and Kim; and
    d. Duncan Backshall.

Dated 25 March 2021

R Haazen

Counsel for Dawn and Glen Bendall and Jenny Baker