BEFORE A COMMISSIONER APPOINTED BY THE OTAGO REGIONAL COUNCIL AND THE CENTRAL OTAGO DISTRICT COUNCIL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	application by Cromwell Certified Concrete Limited for resource consents to expand the existing Amisfield Quarry

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SYNOPSIS OF OPENING LEGAL SUBMISSIONS FOR CROMWELL CERTIFIED CONCRETE LIMITED

Dated: 15 December 2021

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MAY IT PLEASE THE COMMISSIONER:

Introduction

1 Amisfield Quarry is an existing quarry which has been operating since 1994. It is a significant supplier of concrete aggregates in Inland Otago, supplying half of all such aggregates[1]. Consents are sought to deepen the existing quarry and expand it onto adjacent land.

2 The existing quarry is a significant physical resource within the local environment. It is this existing environment which sets the baseline for considering the effects of this proposal. Those effects have been carefully considered, and mitigation measures are proposed to ensure that effects will not be more than minor. Any risk of adverse dust effects on horticultural land uses is acceptably low and has been appropriately minimised by the consent conditions proposed.

Consents

3 The existing quarry has been consented several times over the past 27 years, most recently in 2015 and 2016. It is authorised by a district land use consent and two regional consents[2], including a water take consent authorising the take and use of 46 l/s. It does not currently require an air discharge permit, given it complies with Rule 16.3.5.2 and 16.3.5.3 of the Otago Air Plan in relation to the extraction of minerals and the crushing and screening of materials.

4 The existing regional consents expire in July 2036. The duration of the District land use consent is unlimited.

5 The following new consents are sought:

(a) An air discharge permit;

(b) A regional land use consent to excavate below groundwater level;

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1 Evidence of Dominic Sutton at [3.8]

2 RM16.108.01 – To take and use groundwater for the purpose of gravel washing and dust suppression; RM16.108.02 – To discharge contaminants to land for the purpose of gravel washing and dust suppression

(c) A further water take consent (to take 24 l/s);

(d) A new (replacement) discharge permit (to authorise the continued discharge of water from gravel washing and dust suppression); and

(e) A new (replacement) district land use consent.

6 When these applications were lodged, Plan Change 7 to the Otago Water Plan (PC7) did not apply. On that basis, the applicant intended to surrender RM16.108.01 (for 46 l/s) on the grant of a new take consent for 70 l/s. However given the outcome of PC7[3], which limits the duration of all water take consents to 6 years[4], surrender of RM16.108.01 is no longer proposed. The effects of the total take remain the same, therefore this amendment is within the scope of the applications.

7 A 6 year duration for the additional water take is not an impediment to the granting of these consents. The applicant's water use calculations are conservative, and water use can be reduced through the use of polymers. If necessary, processing capacity can be limited in order to maintain water supply for dust control. Any risk associated with obtaining a new water take consent in 6 years' time lies with the applicant, however in my submission such risk is limited given the extent of allocation remaining in this aquifer and also the ability to take water under permitted activity allocations (assuming that these do not change).

Historic Encroachment

8 For the reasons identified in my memorandum dated 8 December 2021, whether or not the bund material located on Lot 2 DP 508108 is to remain (or is to be removed) is yet to be resolved between the applicant and the owner of that land (Hayden Little Family Trust). Once that issue has been resolved, any consents can be sought as required. Section 91 issues do not arise.

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3 The Environment Court's final decision on PC7 was released on 17 December 2021. No appeals been lodged. Council staff have advised that the Council intends to make the plan change operative on 5 March 2022. While PC7 is not yet operative, it has legal effect and significant weight should be afford to its provisions

4 Policy 10A.2.2

9 Rather than rely on the grant of any required retrospective consent(s) should the relevant part of the bund remain, the applicant has proposed a condition requiring that a new section of 3m high bund be formed within the quarry's legal boundary. This is shown on the plan attached to my memorandum dated 8 December 2021 and is reflected in the applicant's proposed conditions. Those conditions have been updated following expert conferencing and discussions with Amisfield Estate Society (AES).

The Existing Environment

10 Section 104(1)(a) of the RMA requires consideration of *"any actual and potential effects on the environment of allowing the activity".*

11 When assessing those effects, the environment is the environment as it exists at the time of hearing these applications, including all operative district land use consents, overlain by those future activities which are permitted activities. A consent authority can also (at its discretion) have regard to any unimplemented consents which have been granted and are likely to be implemented[5].

12 Therefore the effects of the existing quarry (as authorised by the existing land use consent) must be disregarded when considering the effects of this proposal[6]. I agree with Mr Whyte that it is the differences in effect between the existing operation and this proposal which are relevant for the purposes of s104(1)(a).

13 I also agree with Mr Whyte that the existing environment is limited to the duration of the current ORC consents which expire in 2036[7]. The amount of time it takes to remove the remaining consented resource will vary depending on a range of factors, therefore you are not required to make any finding as to how long that would take. Such an approach would not be appropriate when examining the existing environment.

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5 *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299
6 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 at [66]
7 Section 42A report (CODC) at [12.9.19]

The Receiving Environment

Activities on Lots 1 and 2 DP 508108

14 On 20 August 2020, following consultation in relation to the quarry deepening and expansion proposal and the lodging of these applications, an application for two building platforms (one each on Lots 1 and 2 DP 508108) was lodged by Hayden Little Family Trust (the Trust). That application was granted by the District Council non-notified, on the basis that the Trust considered no reverse sensitivity effects from the existing quarry would arise. In relation to reverse sensitivity effects, which are a matter of discretion in the Plan, the application states:

> *As noted above, the effects associated with the existing orchard operations on the applicants'/owners' properties, and the effects associated with the existing neighbouring quarry operation, are all well understood. The proposed residential building platforms will not change anything in this regard and, as such, the potential for reverse sensitivity is not considered to be an issue. Any on-site measures to mitigate the effects of the existing activities will be appropriately decided/implemented by future residents on the proposed platforms*[8].

15 On 29 July 2021, Amisfield Orchard Limited (AOL) lodged an application for resource consent for a dwelling (comprising of two self-contained units) on the consented building platform for Lot 1 DP 508108. That application also states that no methods to avoid, remedy or mitigate reverse sensitivity effects are required or proposed[9] and was granted by the District Council on a non-notified basis.

16 Given the information contained in the applications by AOL and the Trust, it is unclear whether those parties are opposed to the proposal in its entirety, or only excavation of the expansion land.

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8 At page 16
9 At pages 6 – 7

17 Consents are required to establish a dwelling on the platform authorised for Lot 2 DP 508108, and for any seasonal workers camps. Such camps are referred to in the evidence of Mr Little[10] and Mr Stacey for the Trust[11]. Such activities are not permitted activities and therefore cannot be considered to form part of the future receiving environment.

Commercial Storage

18 Mr Stacey also identifies the environment as including a commercial storage business at 1308 Luggate-Cromwell Road, where people work on their vehicles[12]. Mrs Clark refers in her evidence to an intention to expand the storage business[13]. It is unclear whether such activities are permitted by the District Plan.

Permitted Baseline

19 Under s104(2), when forming an opinion for the purposes of s104(1)(a), you may disregard an adverse effect of the activity on the environment if a Plan permits an activity with that effect. This recognises that if an environment is already affected by (or could be affected by) activities which are permitted by a Plan, this level of effect is considered to be appropriate within the context of the receiving environment. If you apply the permitted baseline, you need only consider effects over and above that baseline.

20 In the context of this proposal, there is a strong permitted baseline in relation to a range of effects (including air quality effects, vegetation removal on the expansion land and visual amenity effects).

Air Quality

21 Mr Whyte acknowledges that there is a permitted baseline for the discharge of contaminants to air, albeit at a lesser rate than is proposed[14].

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10 At [47] –[49]
11 At [27]; [40(i)] and [40(iii)]; [125]; [141]; [147]
12 Evidence of Peter Stacey at [42]
13 Evidence of Nicola Clark at [31]
14 Section 42A Report (ORC), page 23

22 Rule 16.3.5.2 of the Air Plan allows (as a permitted activity) the discharge of contaminants into air from the sorting, crushing, screening, storage and conveying (including loading and unloading) of sand, aggregates and other powdered and bulk products, where:

(a) The total capacity of outside storage of bulk materials is less than 1,000 m3 if located on a site in Air Zone 1 or 2; and

(b) The crushing and screening of bulk materials is at a rate less than 100 tonnes an hour; is a permitted activity

Providing any discharge of odour, or particulate matter is not offensive or objectionable at or beyond the boundary of the property

23 Rule 16.3.5.3 of the Air Plan allows (as a permitted activity):

(a) The extraction of minerals from the surface or from an open pit at a rate less than 20,000 cubic metres per month and 100,000 cubic metres per year; or

(b) The crushing and screening of minerals at a rate less than 200 tonnes an hour;

Provided any discharge of particulate matter is not noxious, dangerous, offensive or objectionable at or beyond the boundary of the property.

Vegetation Removal

24 The CODP permits the removal of 5000m² of indigenous vegetation. Given the extent of indigenous vegetation on the expansion site is well below 5000m², in my submission the effects of the proposed indigenous vegetation removal can be disregarded.

Visual Amenity

25 The District Plan does not appear to control fence heights in the Rural Resource Area, and permits buildings in the Rural Resource Area up to 10m in height with no restriction on area provided they are not used for residential purposes and they comply with the relevant standards, which include being set back from site boundaries by 10m. A fence along the boundary of the expansion

land or a permitted building (with a 10m setback) on that land would have a greater visual amenity effect on 1308 Luggate-Cromwell Road than the proposed bunds which are limited to 3m in height and are set back 50m in the vicinity of the Clark dwelling.

Exercise of the Discretion

26 While application of the permitted baseline is discretionary, in my submission it should applied when considering this proposal given it is far from fanciful and the quarry currently operates in reliance on Rule 16.3.5.3 of the Air Plan.

27 The Environment Court[15] has identified a number of possible questions to guide the exercise of your discretion:

- *Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?*
- *Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?*
- *If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?*
- *Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?*
- *Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not be invoked?*

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15 *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* [2006] NZRMA 559

- *Might application of the baseline have the effect of overriding Part 2 of the RMA?*

28 The above matters are not a threshold to be passed, nor a 6-fold test, but in my submission indicate that it is appropriate for you to have regard to the permitted baseline when considering any adverse effects that might arise from this proposal.

Assessing Risk under the Resource Management Act

29 The Environment Court has frequently said that the RMA is not a no-risk statute and has held that a certain degree of risk is acceptable. The measure of risk and its assessment, and the acceptable degree of risk avoidance, are matters of fact in each particular case[16]. It is necessary to take a pragmatic approach to both the degree of risk and its avoidance[17].

30 In *Clifford Bay Marine Farms Ltd v Marlborough District Council*[18], the Court held that the approach the Act requires is that under section 104(1)(a) of the Act, each potential effect raised in evidence should be assessed qualitatively, or preferably quantitatively, in the light of the principles of the RMA and the objectives and policies of the relevant instruments, as to:

(a) the probability of occurrence; and

(b) the force of the impact[19].

31 The issue of risk is particularly relevant to the discharge to air application. Mr Cudmore considers that with the implementation of the mitigation measures and routine compliance with PM_{10} trigger levels, the risk of dust discharges beyond the boundary of the site being offensive or objectionable is low[20]. In terms of the force of the impact should controls fail, Ms Underwood considers that the risk of cherries being rejected based on light dust contamination is relatively

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16 *Land Air Water Association v Waikato Regional Council* EnvC A10/01
17 *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130
18 EnvC C131/03
19 At [68]
20 Evidence of Roger Cudmore at [3.6]

low given export cherries are washed[21]. High amounts of dust on flowers could potentially reduce pollination effectiveness, although cherries naturally do not set fruit from every flower[22].

32 In contrast, Mr Stacey appears more focused on a zero risk approach. He refers for example to the controls in place for stripping the expansion land lowering risk, but the risk not being zero[23].

33 Caselaw makes it clear that risks, once identified, can often be appropriately addressed by the imposition of conditions (including monitoring conditions) and requirements for management plans. The conditions proposed by the applicant appropriately manage risk, including by providing for review of the proposed trigger levels.

National Environmental Standard for Sources of Human Drinking Water Regulations 2007 (NES-DW)

34 Regulation 12 of the NES-DW applies to an activity which has the potential to affect a registered drinking water supply that provides no fewer than 25 people with drinking water for not less than 60 days each calendar year. Counsel understands that AES currently supply 18 members but has capacity to supply 25.

35 When considering such an application, a consent authority must consider whether the activity to which the application relates may:

(a) itself lead to an event occurring (for example, the spillage of chemicals) that may have a significant adverse effect on the quality of the water at any abstraction point; or

(b) as a consequence of an event (for example, an unusually heavy rainfall) have a significant adverse effect on the quality of the water at any abstraction point.

36 If the consent authority considers that the circumstances in either (a) or (b) apply and it grants the application, it must impose a condition on the consent which requires the consent holder to notify

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21 At [3.2]
22 At [3.3]
23 At [131] of his evidence

(as soon as reasonably practicable) the registered drinking-water supply operators concerned and the consent authority if an event of the type described in (a) above occurs that may have a significant adverse effect on the quality of the water at the abstraction point.

37 There is no evidence or suggestion that the activity to which these applications relates would or may have a significant adverse effect on the AES bore. However AES have requested a condition requiring that in the event of a discharge of unauthorised contaminants to water (or to land in a manner that may enter water), including but not limited to fuel, hydraulic fluid, overspray of weed killer, contaminated soil or leachate, the consent holder shall notify the Consent Authority and AES of the spill or contamination, and of the actions taken to address any adverse environmental effects. This has been agreed to by the applicant.

38 Quarterly testing of water quality in a number of bores is also proposed. This will include the AES bore and a new bore, with results provided to AES.

Policy 6.4.10B of the Water Plan

39 Policy 6.4.10B of the Water Plan requires that in managing the taking of groundwater, you must *"have regard to avoiding adverse effects on existing groundwater takes, unless the approval of affected persons has been obtained".* The Explanation to the policy refers to Schedule 5 of the Plan, which identifies formulae that will be applied to determine the acceptable level of bore interference when identifying affected parties.

40 Mr Whyte states in the s42 report for the ORC[24]:

> *...This Policy identifies the appropriate formulae in determining the acceptable level of bore interference under Schedule 5. For an unconfined aquifer this is less than 0.2 metres...*

41 However the purpose of Schedule 5 is to set the threshold for identification of affected parties. This is reinforced by Section

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[24] At pages 26 - 27

16.3.1(5A) of the Plan (information requirements for resource consent applications) which provides:

> *In the case of the taking of groundwater, affected parties who are those taking from that aquifer, within a radius r of the proposed pumping bore as specified in Schedule 5B.*

42 As noted by Mr Freeman, the policy is unusual in that it appears to be directing decision-makers to "avoid" adverse effects on existing groundwater takes, but the policy is tempered by the direction to "have regard to".

43 To "have regard to" simply means to consider. It means that a decision maker must give genuine attention and thought to the matter, and give such weight to it as it considers appropriate. However it does not have to be implemented if the decision maker is of the view that it is not applicable in the circumstances[25].

Alternatives

44 The RMA only obliges the consideration of alternatives in limited circumstances, those being:

(a) through Schedule 4, for proposals with significant effects; and

(b) through s105, where there is a discharge proposed.

Schedule 4

45 With the mitigation measures proposed, the discharges to land and air will not have significant adverse effects. Therefore consideration of alternative sites is not required in terms of Schedule 4.

Section 105

46 Section 105 of the Act requires that when considering activities which would breach s15, you must "have regard to":

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25 *Lamb Packers Feilding Ltd v Manawatu-Wanganui Regional Council* [2004] NZRMA 178 (HC) at [171]

(a) *The nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*

(b) *The applicant's reasons for the proposed choice; and*

(c) *Any possible alternative methods of discharge, including discharge into any other receiving environment.*

47 In terms of the caselaw on s105:

(a) An applicant is not required to demonstrate that their proposal is the best available use of resources out of available alternatives[26];

(b) It is not the decision maker's role to substitute its own judgment for that of the applicant[27];

(c) You are not required to make any findings on the suitability or otherwise of alternative sites[28].

48 Alternatives have been considered and are addressed in the evidence of Mr Sutton[29], Mr Allison, Mr Cudmore, Mr Freeman and Mr Curran[30].

Higher Use of the Land

49 Some of the submissions on the proposal suggest that use of the expansion land for orchard or other horticultural purposes would be a higher use of the land, and Mr Weaver's evidence addresses this matter in some detail. Mr Whyte raised a similar issue in the s42A reports, and queried why Mr Colegrave did not provide a whole of life comparison of the proposed use of the site compared to other productive rural use of the site which will not have the same finite lifespan[31].

50 As set out above, your evaluation of these applications is governed by ss104 and 105 of the RMA which do not enable a consideration of

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26 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC)
27 *Tainui Hapu v Waikato Regional Council* A063/2004 at [148]
28 *Save Wanaka Lakefront Reserve Inc v Queenstown Lakes District Council* [2017] NZEnvC 88 at [55]
29 At [3.7]; [4.3] – [4.9]; [6.2]
30 At [72] of his evidence
31 Section 42A Report (CODC) at [12.23.2]

alternative uses for the expansion land. That said, Mr Colegrave observes in his evidence[32] that cherry seasons can be highly variable, whereas quarry operations are relatively constant and are also likely to have greater flow on economic effects (in terms of supporting other regional activities such as construction).

Section 107

51 Section 107 of the Act provides that:

> *Except as provided in subsection (2), a consent authority shall not grant a discharge permit [or a coastal permit to do something that would otherwise contravene section 15 or section 15A] allowing—*
>
> *(a) The discharge of a contaminant or water into water; or*
>
> *(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*
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> ...
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> *if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:*
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> *(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
>
> *(d) Any conspicuous change in the colour or visual clarity:*
>
> *(e) Any emission of objectionable odour:*
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> *(f) The rendering of fresh water unsuitable for consumption by farm animals:*
>
> *(g) Any significant adverse effects on aquatic life.*

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32 At [11.3]

52 Mr Freeman's evidence confirms[33] that the discharge of contaminants to land where it may enter water will not give rise to any of the effects listed above.

Submissions

Jurisdiction

53 The discharge and water take applications were limited notified by the Regional Council to AES and users of the AES bore. Several of the submissions made by AES members[34] to the Regional Council raise noise and traffic effects which are not within the jurisdiction of the ORC. Therefore you need not address those submissions in your decision.

Dust Events and Complaints

54 The submissions and evidence for Mr and Mrs Clark, AOL and the Trust rely on photos and videos of past dust events and complaints which they have made to consent authorities about the existing quarry. All of those complaints were made after these resource consent applications were lodged and a number of those complaints specifically reference these applications. Only one complaint was made to the Quarry Manager[35].

55 Copies of email responses from Council compliance officers (who have visited the site several times in response to complaints) are attached to Mrs Clark's evidence. In an email 11 December 2020, an officer records that the site was not in breach of Rule 16.3.5.3 of the Air Plan. In an email dated 19 May 2021, the officer notes that when an inspection was undertaken, there were numerous other natural sources of dust in the area contributing to the downwind discharge.

56 No compliance action has been taken in response to any of the complaints by Mrs Clark, AOL or the Trust. Even in cases where such action has been taken against a consent applicant, the past conduct of an applicant is a matter of enforcement and does not provide a

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33 At [141]
34 Stephen and Olivia Morris; William and Phillipa Labes; Stephen and Louise Family Trust; Pisa View Cherries/Jane Miscisco; Towyn Trust and Lake Terrace Cherries Ltd
35 Evidence of Travis Allison at [6.7]

legitimate ground for refusing to grant a resource consent[36]. An applicant is entitled to be treated on the basis that it will comply with the consents it is granted, and with the Act[37].

57 Mr Stacey has relied on the submitters' photos and videos when preparing his evidence[38]. Mr Cudmore's evidence confirms[39] that the events recorded by the submitters are not representative of the controls proposed.

Effects on Property Values

58 The evidence of Mrs Clark and Mr Little refers to concerns about the effect of the proposal on property values. Such effects are not a relevant consideration in determining whether a resource consent should be granted. Any diminution in property values is instead another measure of adverse effects on amenity values[40].

Consent Conditions

59 An initial set of draft consent conditions and a draft DMP were proposed by the applicant. These were provided to Mr Whyte on 11 November 2021. The draft DMP was also included as part of Mr Cudmore's evidence[41].

60 Conditions have been discussed as part of expert conferencing by the noise, air quality and groundwater witnesses, and also with AES prior to the hearing. Comments have been sought from Mr and Mrs Clark, AOL and the Trust but none have been received as yet (other than those suggested by Mr Stacey and Mr Humpheson in their evidence).

61 Mr Curran, the applicant's planner, has prepared an updated set of conditions which includes amendments proposed by the applicant following expert conferencing and those agreed with AES. It is suggested that submitters and experts talk to that set of conditions

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36 *Walker v Manukau City Council* EnvC C213/99
37 Evidence of Roger Cudmore at [15.2]
37 *Guardians of Paku Bay Assn Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC)[37] At [72]
38 Evidence of Peter Stacey at [29]
39 At [15.2]
40 *Foot v Wellington City Council* EnvC W073/98
41 Evidence of Roger Cudmore, Attachment I

during the hearing. A final set of the applicant's proposed conditions will be provided as part of the applicant's reply (which is suggested be provided in writing following the hearing).

Evidence

62 The applicant calls the following witnesses in support of the proposal:

(a) Dominic Sutton (Director, Cromwell Certified Concrete Limited);

(b) Travis Allison (manager, Amisfield Quarry);

(c) Ravindu Fernando (transport expert);

(d) David Compton-Moen (landscape expert);

(e) Jamie Exeter (acoustic expert);

(f) Dr Mike Freeman (groundwater expert);

(g) Ruth Underwood (horticulture expert);

(h) Roger Cudmore (air quality expert);

(i) Cees Bevers (expert ecologist); and

(j) Fraser Copeland (expert economist);

(k) Matthew Curran (planning expert).

DATED this 15th day of December 2021

Monique Thomas
Counsel for Cromwell Certified Concrete Limited