Formal Rebuttal Submission Opposing RC246049

Submitters: Louise & Andrew Stalker – 116 McDonald Road, Greenpark

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Introduction

We are the directly affected adjoining landowners to **RC246049**. This application is not a fresh proposal but an attempt to retrospectively legitimise unlawful activities already carried out on contaminated (HAIL-listed) land. The Applicants and their counsel dismiss these issues as "procedural only" or matters for judicial review. That is legally wrong.

Under ss104 and 104D of the Resource Management Act 1991 (RMA), the Commissioner cannot be "satisfied" where the evidential base is false, incomplete, or built on unlawful activity.

False Foundation — Chronology of Non-Compliance

- **2018 Containers (COA180748):** Council issued a Certificate of Acceptance and Notice to Fix using our address **(116 McDonald Road)** on the Campbells' contaminated land and LIM a public record.. This error denied us affected-party status and notification rights.
- **2019 Accessory Building (RC195342):** Granted for boundary setback, still with no NES-CS investigation despite LLUR listing. **This piggy-backed on the 2018 error.**
- **2023 Earthworks & Geotech:** Driveway, shed platform, plumbing and power trenches disturbed contaminated soil. **NES-CS required a PSI/DSI by a SQEP**. None was undertaken, exposing neighbours and the public to risk. No Notification was made to affected parties.

- **2023 Bore Drilling of BX23/1492:** A 36 m bore was drilled with no resource consent and no NES-CS disclosure. ECan recorded it under the wrong address **(English's Road)**. On HAIL land, this bore created a contamination pathway into groundwater and waterways, threatening our potable supply. No public notification made.
- **2023 Pole Shed (BC231329):** Approved only under the Building Act. The LIM records its lawful use as **Industrial (Use 6.0.1)**. No RC was ever issued. No Change of Use on LIM. The shed has been unlawfully occupied since April 2024 without a Change of Use under s114 Building Act. No notification to affected parties.
- **IBC Tanks (Sewage):** Installed without any Council or ECan consent; discharging to ground. Ongoing environmental risk.
- **2024 RC246049:** First HAIL declaration (Form 9) filed, but it **falsely** ticked "NO" to HAIL despite LLUR listing and decades of fill history.

Conclusion: RC246049 rests on a false foundation of address misuse, NES-CS avoidance, and unlawful occupation.

NES-CS is Mandatory, Not Discretionary

National Environmental Standards (NES) are binding regulations under the RMA. Councils have no discretion to "opt out" of them. The Environment Guide confirms that a NES may prohibit activities, require consent, or specify notification requirements, and that local plan rules must be amended immediately if they conflict. The NES for Assessing and Managing Contaminants in Soil to Protect Human Health 2011 (NES-CS) applies nationally and is mandatory, not discretionary. It requires a PSI/DSI before any earthworks, subdivision, or change of use on HAIL land. Under section 43A(3) an NES cannot allow an activity with significant adverse effects unless it states that a resource consent is required for the activity, or states that the activity is a permitted activity.

The Commissioner must therefore treat NES-CS obligations as binding law. Non-compliance cannot be retrospectively cured through later consents.

NES-CS Regulations 5–8 require a PSI/DSI before earthworks, establishing a dwelling, or changing land use on HAIL land. **None of the Campbells' activities (containers, shed, geotech, bore, sewage) complied.**

Relevant Authorities:

- **Day v Manawatū-Whanganui RC [2012] NZEnvC 182** – NES-CS must be strictly applied; no scope for "practical compliance."
- **Carter Holt Harvey v North Shore CC [2015] NZCA 321** – Councils are liable for failing to act on contaminated land obligations.

These confirm NES-CS breaches are substantive and cannot be cured post-hoc.

Substantive Defects, Not "Procedural Only"

Applicants argue these issues are for judicial review only. **That is wrong.**

- Accuracy, notification and NES-CS compliance are substantive inputs to decision-making under s104.
- The Commissioner must be satisfied under s104D that effects are minor and that the activity is not contrary to policy. **That threshold cannot be met where:**
    - The HAIL status has been denied.
    - Our affected-party rights were bypassed multiple times (containers, bore, shed).
    - Occupation, bore, and sewage remain unlawful.
- Natural justice is integral to every RMA process. It cannot be side-stepped.

Rebuttal of Applicants' Claims

- **"Effects are minor"** → Wrong. Without PSI/DSI, effects cannot be measured. Bore and sewage create ongoing contamination pathways.
- **"Policy should be read down"** → Wrong. GRUZ-P2 uses the directive term **"avoid"**. In *Aitchison v CCC [2013] NZEnvC 240*, the Court held "avoid" must be applied strictly, not balanced away.
- **"Precedent risk overstated"** → Wrong. Selwyn has many undersized lots. Granting one invites others.
- **"Procedural defects are judicial only"** → Wrong. False addresses, unlawful shed occupation, and NES-CS breaches go to the heart of s104D.

Applicants' Case Law – Why It Does Not Apply

- **Hutchings v WBOP DC [2012] NZEnvC 100:** Allowed a non-complying dwelling as a "true exception." Distinguishable — that site was unique. This one is not; it is tainted by unlawful occupation and NES-CS breaches.
- **Clearkin v Auckland Council [2012] NZEnvC 238:** Concerned inconsistent council practice. Distinguishable — here the issue is not inconsistency but **continuous unlawful activity** (shed occupation, false HAIL declarations, address misuse). Clearkin does not allow unlawful actions to be legitimised by "consistency."
- **Price v Auckland CC (1996) 2 ELRNZ 443:** Very old, effects-based reasoning. Largely overtaken by King Salmon.
- **King Salmon [2014] NZSC 38 & RJ Davidson [2018] NZCA 316:** Applicants suggest these allow "balancing." In fact:
    - **King Salmon** held directive policies like "avoid" must be applied strictly.
    - **Davidson** only allows Part 2 to be considered if plan provisions are uncertain. **GRUZ-P2 is not uncertain — it is crystal clear.**
    - **Our Authorities (Day, Aitchison, Carter Holt Harvey)** are directly on point: NES-CS breaches, retrospective validation, and directive policies.

- For clarity, we annex a table (attached) setting out the cases relied upon by the Applicants, how they framed those cases, and our rebuttal. This provides the Commissioner with a quick-reference comparison alongside the fuller arguments above.

Relief Sought

We respectfully request that the Commissioner:

1. **Decline RC246049** as it fails both limbs of s104D.
2. Record that the site is already subject to:
    - Unlawful shed occupation (BC only, no RC).
    - Unconsented sewage discharge (IBC tanks).
    - Unconsented bore on HAIL land (with wrong address logged).
    - False Form 9 HAIL disclosure in 2024.
3. Recommend enforcement requiring:
    - Cessation of residential use of the shed.
    - Removal of Caravan, IBC tanks and sewage.
    - Mandatory PSI/DSI by a SQEP before any new application.

RC246049 rests on false addresses, false HAIL admissions, unlawful occupation, and missing NES-CS investigations. The law is clear: retrospective consents cannot cure these defects. Granting consent would undermine the District plan integrity, weaken the NES-CS regime, and deny affected parties their rights.