

Comments on draft conditions for a fast-track consenting application

Fast-track Approvals Act 2024 section 70

To: The Expert Panel

From: Director-General of Conservation

Regarding fast-track project: Waihi North

Fast track Reference: FTA –2504-1046

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Please find comments attached



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Acting pursuant to delegated authority on behalf of the Director-General of Conservation.

Date: 04 December 2025

Note: A copy of the Instrument of Delegation may be inspected at the Director-General's office at Conservation House Whare Kaupapa Atawhai, 18/32 Manners Street, Wellington 6011

Waihi North [FTAA-2504-1046] – s 70 FTAA comments – Covering Report – Department of Conservation

Introduction

1. The Department of Conservation (DOC) provides specific comments on conditions, marked as tracked changes and reviewer comments, attached to this document.
2. DOC also makes the following general comments on the draft conditions.

General structural issues

Management plans and certification requirements

3. A key issue for DOC is the approach the Panel has taken to management plans which span the DOC approvals and the resource consent approvals, and certification generally.
4. In OGNZL's most recent version of conditions (dated 5 September), it proposed parallel management plan conditions for the DOC approvals, which would have established separate management plans as relevant to the DOC approvals (i.e., separate to the management plans provided for under the resource consent conditions).¹ While OGNZL had prepared one set of draft management plans to cover both the DOC approvals and resource consents (which were to be approved by the Panel as part of their decisions), what this would have meant, in practical terms, is that both regulatory agencies (DOC and Councils) would have had a defined role in relation to any changes to those documents under their respective authorisations.
5. This is not the approach the Panel has taken. Rather, all management plans are to be certified by the relevant Councils. DOC would no longer have a certification role for any management plans under the DOC approvals, either for the initial certification or subsequent amendments. The rationale for this approach is set out at paragraph [9] of Part E of the draft decision.
6. This approach departs from what was the Applicant's suggested approach. The Panel's approach may be in response to the Hauraki District Council's s 53 comments

¹ See for example the proposed conditions in the Wharekirauponga Access Arrangement (Part 4-8), conditions 2.79 – 2.80 (establishing a Wharekirauponga Pest Animal Management Plan), conditions 2.84 – 2.85 (establishing a Coromandel Forest Park Kauri Dieback Management Plan) and conditions 2.90 – 2.91 (establishing a Native Frog Monitoring Plan).

about DOC certifying management plans, as a third party for the purposes of the resource consents.² We understand that the Council's concerns were in relation to DOC certifying plans for the purposes of the resource consents, and not a suggestion that DOC should have no certification role in relation to conservation approvals.

7. In its s 51 and s 53 report comments, DOC raised general concerns about the appropriateness of the conditions that set up the management plans and suggested that they needed to provide clear objectives and objective performance standards to certify against.³ The Panel does not share DOC's concerns,⁴ and has not made any further changes to the conditions establishing the management plans.
8. DOC maintains its view that a number of the management plan conditions in the resource consent conditions lack certainty and objectivity. For example, under the conditions establishing the ecology and landscape plan for the Wharekirauponga Underground Mine (the ELMP-WUG), the objective is to "identify how the potential adverse effects ... will be appropriately managed".⁵ This drafting leaves a very broad scope as to what the management plans may cover, including matters which are particular to council (e.g. landscape), matters which are particular to DOC (e.g. fauna handling), and matters which are common (e.g. vegetation clearance). For the terrestrial ecology management plan, which is one of the constituent plans of the ELMP-WUG, the conditions simply require inclusion of "detailed contents and performance indicators in relation to...the Terrestrial Ecological Management Plan – which seeks to provide an approach for managing and monitoring fauna values associated with site clearance as part of mining activities". As well as being very broad, these management plan conditions are also uncertain as to the outcome that will be achieved. Deciding whether effects are "appropriately managed" involves an element of judgement, and there is no objective test or standard set out in C47A(2) to determine what appropriate management is.
9. DOC considers a "certification" decision to change a plan against such broad objectives would be a substantive decision; and that it is for the Panel and not Council officials to determine how effects are to be appropriately managed.

² As referenced in Part E, [8] of the Panel's draft decision. We understand this to be a reference to be a reference to the HDC s 53 comments, Memo from Leigh Robcke, page 22.

³ See [28] – [44] of DOC's s 51 Cover Report and [161] – [171] of DOC's s 53 comments.

⁴ Draft decision, Part E, [5], Part N, [13] – [14].

⁵ Appendix B1: Conditions common to the Hauraki District Council and Waikato Regional Council Resource Consents, condition C47A(1).

10. Given the identified shortcomings of the conditions, DOC considers it is even more important that the certifying agency has the appropriate expertise and statutory functions to perform this function effectively. DOC considers that a parallel DOC certification role within the relevant conservation approvals would enable DOC to manage elements of the management plans which fall within DOC's expertise and align with its statutory functions. DOC recommends re-instating a parallel certification role for DOC under the relevant DOC approvals (being the Northern Concession and the Wharekirauponga Access Arrangement) for the Native Frog Monitoring Plan, Native Frog Salvage Release Plan, Wharekirauponga Animal Pest Management Plan, the Coromandel Forest Park Kauri Dieback Plan and the Rehabilitation and Closure Plan; and for DOC to certify compliance with the site selection protocol.
11. For consistency and efficiency, DOC has modelled the proposed certification conditions on the conditions in the resource consents; and has cross-referenced to the resource consent conditions as appropriate to define the matters relevant to the certification decision.
12. The proposed conditions provide for separate certification requirements and management plans for the Wharekirauponga Access Arrangement and Northern Concession. This is because these approvals cover different geographic areas. In practice, however, certification (both for initial certification and certification of any changes) will be able to occur at the same time. Certification under both approvals will be undertaken by the same person (the named DOC Manager). The Wildlife Approval cross-references the management plans provided for under both the DOC approvals and resource consent approvals as both are relevant to the activities covered by the Wildlife Approval.⁶
13. DOC considers that its proposed approach maximises the efficiency opportunities that the Fast-track Approvals Act 2024 (FTAA) presents, in that the conditions are appropriately aligned to allow efficient development and changes to plans. However, DOC's proposed approach also ensures that the relevant regulators for the separate approvals will retain an appropriate role in their implementation, post approval.

Cross referencing approach

14. The Panel has taken a cross-referencing approach to address duplicated conditions, explained in Part N, at [21]-[25]. The draft condition sets for the Wharekirauponga

⁶ The Willows concession also cross-references the management plans provided for in the other DOC approvals.

Access Arrangement, Northern Concession and the Wildlife Approval now extensively cross-reference to the resource consent conditions.

15. If DOC has understood the Panel’s proposed approach correctly, DOC is concerned that the Panel proposes changes to cross-referenced resource consent conditions would automatically “flow through” to the DOC approvals, without a formal variation of the DOC approvals. The Panel has expressly acknowledged that the cross-referenced conditions ‘may be reviewed by the respective councils under section 128 of the RMA’.⁷ The Panel’s proposal is to amend the section 128 conditions in the resource consents to require the relevant Council to invite DOC to comment on the proposed wording of any amended condition and take into account any comments received when finalising the wording of any amended conditions.⁸
16. DOC considers it fundamental that any changes to cross-referenced resource consent conditions do not automatically “flow through” to the DOC approvals, without a formal variation of the DOC approvals.
17. The cross-referenced conditions set out, for example, requirements relating to vegetation clearance, the application of the site selection protocols and the requirements for ecological surveying - key steps for managing effects on wildlife and other conservation values. Changes to these conditions via a s 128 RMA review could in effect be substantive variations to the DOC approvals. Even if DOC is involved in the Council’s decision-making process in relation to the cross-referenced conditions, this proposed structure would, in effect, purport to delegate a variation decision for the DOC approvals to a third party (the Council). As relevant to the approvals sought in the application, the FTA expresses that variation of approvals relating to the Conservation Act 1987, Wildlife Act 1953, and Crown Minerals Act 1991 are to be made in accordance with those enactments.⁹
18. Condition 61 of the Wharekirauponga Access Arrangement specifically envisages that the Access Arrangement conditions may be reviewed and varied by the Minister if the Minister is of the opinion that any resource consents are inconsistent with the Access Arrangement, confirming the intention for a formal variation to address this situation.

⁷ Draft decision, Part N, [25].

⁸ Draft decision, Part N, [25]. See for example condition 210 of the Hauraki District Council land use consents (Appendix B5).

⁹ Fast-track Approvals Act 2024, Schedule 6, [cl 14\(2\)](#) Schedule 7, cl 7(2), Clause 11, cl 13.

19. In addition, if the conditions in DOC's approvals could be changed automatically, DOC does not consider the conditions in the DOC approvals would be sufficiently certain.¹⁰
20. Further, the Panel's decision (and conditions 210 for HDC and 45 for TCDC) only references section 128 reviews, but the RMA also provides for a consent holder to seek a variation to conditions under s 127. If the Council received a s 127 application, it would be obliged to consider the application in accordance with the process set out in the RMA. We think this further demonstrates the difficulty with the proposed approach.
21. To address this issue, DOC considers that the DOC approvals need to be clarified so that the cross-references are to the resource consent approvals *as granted by the Panel* – i.e. the cross-references are to fixed consent conditions. Should those conditions be subsequently amended via the processes provided for under the RMA, that would necessitate a variation application under the relevant conservation legislation pertaining to the approval. DOC has proposed Advice Notes to this effect in the draft conditions.
22. A similar position has been supported by the Expert Panel on the Drury Quarry expansion project in its draft decision [FTAA-2503-1037].¹¹ There, in the context of management plans, the Panel observed that the applicant would need to comply with the wildlife approval and the attached management plans referenced in it, unless amendments to those documents are made and agreed through the processes provided under the wildlife approval or the Wildlife Act. The Panel specifically recorded:

450.2 Notes that amendments that may subsequently be made to the EMP and LMP through the RMA resource consents process, for example following Auckland Council certification, will not (and could not, lawfully) 'flow through' to this wildlife approval. SAL will need to comply with the wildlife approval, the annexed LMP and the referenced parts of the dated EMP identified in the approval, unless amendments to those documents are made and agreed through the processes provided under the wildlife approval or the WA53. While the 'double-up' is unfortunate, in the sense that the EMP and / or LMP for RMA / resource consent purposes may not, over time, match the those [sic] for WA53 / wildlife approval purposes, it is unavoidable given the scope of the RMA and WA53.

¹⁰ (Notwithstanding the inclusion of conditions that would enable DOC to comment on proposed changes (e.g. condition 210 of the HDC conditions).

¹¹ [FTAA-2503-1037](#).

Recommended changes related to managing effects on herpetofauna, in particular native frogs

23. The Project poses potentially significant adverse effects to protected frogs and lizard species. DOC considers the draft conditions do not adequately address potential impacts to these species. While some of DOC's concerns raised in its s 51 reports and s 53 comments have been addressed, several remain. DOC has therefore made a number of suggested changes, marked as tracked changes in the various condition sets with reviewer comments. Key points addressed are:

- i. **Frog buffers for Drill/Portable Rig/Water pump sites** – DOC maintains its position that a 3 m buffer will not be appropriate in all circumstances and that 6 m is the appropriate default buffer. This is because a 3 m buffer will result in adverse impacts e.g. undermining habitat integrity, preventing frogs accessing critical habitat (as explained in the Ecology Conference) and should be applied with great caution to minimise adverse effects on frogs. DOC has proposed an exemption approach within the HDC conditions (which will apply by cross-reference to the Wharekirauponga Access Arrangement and Northern Concession) whereby the Consent holder can reduce the buffer to 3 m – 6 m if specified requirements are met.
- ii. **Native frog salvage release plan** – DOC is seeking the re-instatement of a separate Native Frog Salvage Release Plan within the Wharekirauponga Access Arrangement and Northern Concession. DOC had discussed the need for this plan with OGNZL, as DOC considers there are significant gaps in the ELMP-WUG. A Native Frog Salvage Release Plan is referred to in various condition sets as issued by the Panel,¹² but there are no corresponding conditions within the Hauraki District Council resource consents that establish the requirement for a Native Frog Salvage Release Plan.¹³ OGNZL's 5 September condition set included requirements for a Native Frog Salvage Release Plan in the Wildlife Approval conditions, but this has now been removed in the Panel's draft condition set. DOC has modelled the proposed conditions on the Applicant's 5 September Wildlife Approval condition,¹⁴ with further amendments to address

¹² See for example Appendix C, Wharekirauponga Access Arrangement, Condition 2.23; Appendix G, Wildlife Act Authority, Condition 2(a)(iv).

¹³ A Native Frog Salvage Release Plan is not a listed 'subplan' of the ELPM-WUG – see Appendix B1, Conditions Common to the Hauraki District Council and Waikato regional Council Resource Consents, Condition C47A.

¹⁴ Applicant's 5 September response, Wildlife Act Authority conditions, Part 4.9, Condition 14.

information gaps. Conditions would also now reference international best-practice guidelines for herpetofauna translocation.

- iii. **Frog salvage Hochstetter's frog** – DOC is seeking amendments to the HDC conditions (which will apply by cross-reference to the Wharekirauponga Access Arrangement and Northern Concession) to address the salvage translocation of Hochstetter's frogs. While specific reference is made to salvaging Hochstetter's frogs in the application documentation, the HDC condition set does not include conditions to provide for Hochstetter's frog salvage. Hochstetter's frogs have different habitat needs to Archey's frogs because Hochstetter's frog is a stream-side dwelling species and is highly mobile.
- iv. **Frog salvage monitoring and reporting** – DOC is seeking specific inclusion of salvage translocation monitoring into the HDC conditions (and by cross-reference to the Wharekirauponga Access Arrangement and Northern Concession) which sets out requirements for the Native Frog Monitoring Plan. This appears to be an unintentional omission, as OGNZL's draft Native Frog Monitoring Plan included post release monitoring of salvaged frogs in pens and streams.¹⁵ Ongoing monitoring is critical for understanding if this mitigation tool is succeeding given the high uncertainty and lack of evidence supporting the use of salvage translocations as a mitigation tool for Leiopelmatid frogs.
- v. **Frog salvage at vent shafts** – DOC is seeking to re-instate the two-staged approach to frog (and lizard) salvage at vent shaft sites in the HDC conditions (which will apply by cross-reference to the Wharekirauponga AA and Northern Concession). The Applicant's 5 September Wharekirauponga Access Arrangement conditions,¹⁶ and updated Site Selection Protocols dated 17 October 2025 provided for frog (and lizard) search and salvage **both** prior to and during vegetation clearance at Vent Shaft Sites. The purpose of DOC's proposal is to minimise harm to frogs and lizards during vegetation clearance - pre-clearance salvage provides for the safe capture and transfer of frogs (and lizards). DOC is proposing this because avoidance exclusions and frog buffers do not apply at vent shaft sites. In addition, DOC is requesting a requirement to ensure that these surveys are done in the best conditions for frog (and lizard) emergence to maximise detection and capture for salvage.

¹⁵ Substantive Application, B.58, Frog Monitoring Plan.

¹⁶ Applicant's 5 September response, Part 4.8 Wharekirauponga Access Arrangement conditions, Condition 2.53.

- vi. **Frog population targets** – DOC is seeking amendments to the HDC conditions (which will apply by cross-reference to the Wharekirauponga Access Arrangement and Northern Concession) to ensure consistent application of the key frog success indicator proposed by OGL i.e. a three-fold increase in frog populations over 15 years. DOC has noted inconsistencies in how the growth target for frog populations is referred to in conditions e.g. no net loss, net gain, three-fold increase. These changes are discussed further below in the comments on the Hauraki District Council conditions.
- vii. **Timing for provision of Native Frog Monitoring Plan for certification** - OGLNZ's proposed timing for the provision of the Native Frog Monitoring Plan was at least four years prior to the commencement of WUG stoping activities.¹⁷ Vegetation clearance to establish drill sites may commence prior to WUG stoping. As frog salvage and translocation will have effects on frogs, this requires baseline monitoring at release sites to have been undertaken for an appropriate time prior to these activities commencing. DOC has therefore amended the timeframe for the provision of this plan to refer to both the WUG stoping (at least four years prior to commencement) and vegetation clearance (at least two years prior to commencement). This change has been made in the combined condition set, and in the Wharekirauponga access arrangement and northern concession.

Hauraki District Council Land Use consent conditions

Interaction with conservation approvals

- 24. DOC notes that there are areas where further consolidation and removal of duplication would be possible – for example, native fauna release, where high-level provisions and the establishment of the release areas are covered within the HDC consent conditions, while more detailed elements of operation and frog handling are within the Access Arrangement. DOC has recommended removal of some provisions where there is clear duplication or redundancy, but given the complex interactions and limited time available DOC considers that the remaining provisions should be left in their current locations.

¹⁷ Combined HDC and WRC Conditions, condition C5(n).

Frog population targets

25. The draft conditions have two different targets for frog populations – a specific requirement for a “three times population increase” for both species within fifteen years (condition 171C.k), and more general requirements that the populations be no lower than would be expected in the area had the mining activity not occurred or have a net increase (e.g. 173.b, 175.c). As those general requirements would not enable the specific requirement to be met, DOC considers all references should reflect the “three times within 15 years” target, which itself reflects the undertaking provided by the applicant. OGNZL committed to achieving the “three times within 15 years” target in its 5 September response and associated conditions.¹⁸

Management regime to achieve frog population targets

26. The draft conditions would not trigger the “three times population increase” target until the end of the 15-year period. Changes are therefore recommended to ensure that the applicant works towards that outcome through the 15-year period, and there are monitoring and response points built in to support achievement of the objective
27. The suggested revisions would operate as a standard monitoring and response process, so that:
 - i. Condition 168 sets the objective;
 - ii. 171C.k requires the consent holder to set out how the objective is to be achieved, including progress trajectories;
 - iii. 174-176 require monitoring against the requirements of 168 and 171C.k;
 - iv. 171C.l requires progress reviews of the monitoring results, and sets intervention points for increasing pest management if targets are not being met;
 - v. 210.e provides a back-up provision, so that if increased pest management under 171C.l is not effective then a wider review of possible measures can be triggered;
 - vi. 173 requires pest management to continue until the objective is met.

¹⁸ Within the 5 September response, see in particular: Part 4.3 HDC condition set (Condition 168(k); Part 3.13 Appendix M, SOE Graham-Ussher RMA Ecology at [14]; Part 2.5 Applicant Response to s 54 comments from Department of Conservation e.g. comment number 751.

Thames Coromandel District Council, combined conditions (Schedule 1) and Waikato Regional Council conditions

28. DOC suggests a smaller number of changes to these draft condition sets, mainly to ensure consistency across related conditions. However, comments above relating to cross-referencing and interactions with conservation approvals should also be read as relevant to these conditions.

Freshwater Fisheries Dispensation conditions

29. It is DOC's preference that the conditions include a requirement that ensures OGNZL will follow the best practice design standards set out in the NZ Fish Passage Guidelines.

Wildlife Act approval conditions

Authorised activity - scope of what is to be authorised

30. DOC considers the scope of what is to be authorised, for the purposes of the Wildlife Act 1953, needs to be clarified, so it is clear the approval includes the incidental killing of wildlife that will occur during vegetation clearance and related activities (e.g. salvage and relocation), and monitoring. DOC has made a suggestion as to how this can be clarified and simplified. This issue is discussed in detail below.
31. A “wildlife approval” is an approval as defined in clause 1 of Schedule 7 (s 42(4)(h) of the FTAA): it is a lawful authority for an act or omission that would otherwise be an offence under listed sections of the Wildlife Act.
32. As set out in the draft decision report (Part J, [7]), and as stated in the application (A.07), OGNZL has sought wildlife approvals to:
 - i. Undertake monitoring of leiopelmatid frogs within the vibration impact area, Wharekirauponga Animal Pest Management Area and a control area, all of which are located within the Coromandel Forest Park;
 - ii. Undertake monitoring of leiopelmatid frogs in waterways within and outside the area potentially affected by the dewatering of the WUG, all of which are located within the Coromandel Forest Park (excluding any areas listed in Schedule 4 of the Act);

- iii. Handle, salvage and relocate leiopelmatid frogs and lizards in order to enable vegetation clearance at TSF3, NRS, GOP and Willows SFA, all of which are located on OGNZL owned land; and
- iv. Handle, salvage and relocate leiopelmatid frogs and lizards in order to enable vegetation clearance for drill sites and pumping test / ventilation shaft sites located within the Coromandel Forest Park.

33. The Panel has noted in its draft decision that OGNZL has also sought approval “to ... harm wildlife that could arise from any of its other activities”, but “as a result of comments from DOC (and perhaps from Forest and Bird), OGNZL has elected to proceed only in relation to the first four approvals sought”. The Applicant’s response to comments confirmed that the applicant “is content to revert to the original proposed condition describing the activities and species to which the approval relates, consistent with the application documents” at [64].¹⁹ The original proposed condition as submitted as part of the application was:²⁰

Activity:

- a) To catch, salvage and relocate native frog and lizard species listed in Schedule 4 prior to vegetation clearance at mineral exploration and mining operation sites (see list of sites, in next section)
- b) To catch and hold native frogs for the purpose of long-term monitoring
- c) To take or destroy the eggs of wildlife when unavoidable (any taxa)
- d) To kill wildlife when unavoidable (any taxa)

34. The context suggested that clauses (c) and (d) refer to the activities in (a)-(b), but this was unclear. If the Panel did revert to the original proposed condition, it would not be clear what activities to be undertaken by OGNZL could result in this “activity” (killing of any wildlife when unavoidable). It is unclear whether this is intended to apply to killing arising in the context of the activities of lizard salvage, frog salvage, and frog

¹⁹ ([Part 1 legal submission Stephen Christensen, 5 September](#)). However, the proposed wildlife approval conditions submitted at the same time as those legal submissions do not revert to the original proposed conditions.

²⁰ D.10 of the application.

monitoring (consistent with the Panel’s draft decision), or to *any* unavoidable killing that could arise from any of its activities. DOC raised this issue in its s 51 report.²¹

35. On 28 July 2025, OGNZL provided an updated set of conditions. The activity description had been updated so that the authorised activities included:
 - c. To take wild or destroy the eggs of the following wildlife species when unavoidable:
[i – xvi: listed taxa]
 - d. to kill the wildlife species listed in A(c)(i – xv) above, and / or long-tailed bats (*Chalinolobus tuberculatus*) when unavoidable
 - e. Any accidental / unintentional harm to wildlife that could arise from any of the activities undertaken in relation to the Waihi North Project.
36. The Panel has now adopted this drafting in the draft conditions provided in Appendix G. The Panel’s draft decision does not appear to align with Appendix G, because the draft decision appears to only consider wildlife approval in relation to lizard salvage, frog salvage, and frog monitoring, yet Appendix G would still authorise any killing of listed wildlife; and any accidental / unintentional harm to wildlife arising from any activity at all that is undertaken in relation to the Project.
37. It is not clear why the Panel has adopted this drafting when it appears inconsistent with OGNZL’s indication that it was content to revert to the original conditions as submitted with the application. OGNZL has specifically confirmed that it does not seek a wildlife approval for disturbance that may arise from vibrations,²² noting (in OGNZL’s opinion) that DOC does not require a wildlife authority for activities that may disturb frogs.²³ OGNZL has also stated that it has no intention to harm wildlife and refers to the management measures that it has proposed to ‘minimise the risk of incidental harm occurring as it goes about the various activities’ (legal submissions at [55]). OGNZL states that it will look to make a subsequent application: ‘If in the future DOC is able to substantiate that activities proposed as part of the WNP in addition to those listed

²¹ See DOC s 51 Wildlife Approval Report, [177] – [179].

²² (Part 1 legal submission Stephen Christensen, 5 September at [69]).

²³ While it is correct that DOC cannot *require* applicants to seek or obtain a wildlife approval, DOC notes that it is nonetheless an offence to disturb wildlife (s 63 of the Wildlife Act, see also *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111), and that is something that is able to be authorised by a wildlife approval under the FTTA.

in the application are properly subject to the wildlife approval regime in the Wildlife Act’.

38. Overall, it appears to DOC that OGNZL is only seeking wildlife approvals in relation to monitoring of frogs, and handling, salvage and relocation of frogs and lizards that occurs in the context of vegetation clearance, as set out in the draft decision (I-IV above). It appears subclauses (d) to (e) are intended to apply to the activities listed in subclauses (a) and (b), but this is unclear. DOC considers it will be necessary for the approval to clarify what is authorised, rather than referring to the killing of wildlife that could arise from *any* of the activities undertaken in relation to the Waihi North Project.

39. If the conditions currently included in Appendix G are to be retained, DOC makes the following observations:

- i. Clause A(e) is so broad that it is not possible to understand what activities or impacts will harm wildlife, how wildlife would be harmed, and where, what methods would be used to minimise any effects. Without a clear understanding of what the actual activities are that could harm wildlife (in addition to vegetation clearance on OGNZL land and corresponding salvage, and monitoring of frogs in the Forest Park), and the potential effects of those activities on that wildlife, DOC considers it may not be possible to appropriately regulate the effects of any such activities on protected wildlife through conditions, in accordance with clause 6 of Schedule 7 of the Act, considering the matters listed in clause 2(1)(a) to (o).
- ii. Clause A(e) would also not necessarily authorise the incidental killing of wildlife (as defined in s 53A(2) of the Wildlife Act), as distinct from “accidental/unintended” killing. While accidental killing *could* be authorised under the FTTA, s 68AB(3) provides a specific defence, meaning it may not be necessary to authorise it. Yet it is inevitable the applicant will incidentally kill some wildlife:²⁴ while a person may not desire to kill wildlife, it may be an inevitable and foreseeable consequence of carrying out an activity (such as clearing vegetation inhabited by wildlife) that wildlife will be incidentally killed (a level of associated “by-kill”). Such killing may not always be able to be considered “accidental” where it is a foreseeable consequence of carrying out an intentional activity. The applicant has noted it has no intention to kill

²⁴ See [122]-[127] of DOC’s s 51 report (appendix D).

wildlife.²⁵ While that may be so, killing wildlife is a strict liability offence, and intention is not an element of the offence.

- iii. It is also not clear why clause A(c) (eggs of listed taxa) is included as an authorised activity, if it is the case that OGNZL is only seeking approval in relation to harm arising from the salvage and the monitoring of frogs/lizards. This may have been intended to relate to impacts arising from vegetation clearance, but the list of taxa in the draft conditions also omits to include key lizard and frog species. DOC considers this list could be deleted, and the condition could simply refer to the killing of wildlife (i.e., any taxa) that may be unavoidably killed when undertaking vegetation clearance, salvage, and monitoring.

40. In light of the comments above, DOC suggests that the condition could instead simply authorise OGNZL to incidentally kill and disturb wildlife that occurs during vegetation clearance (and associated salvage activities), and monitoring, and to catch and possess wildlife to undertake those activities, along the following lines:

- A. Activity:
 - a. To catch and temporarily possess the species listed in Schedule 4 for the purposes of salvage and relocation, prior to and during vegetation clearance at mineral exploration and mining operation sites (see list of sites, in next section)
 - b. To catch and then release native frogs for the purpose of long-term monitoring
 - c. To kill wildlife, including the eggs of wildlife, that could occur as a result of vegetation clearance, when unavoidable
 - d. To kill wildlife that may occur during salvage, relocation, or monitoring of wildlife, when unavoidable.

41. DOC considers this would enable the harm to wildlife arising from the activities set out in the draft decision report at Part J, [7] (I-IV) above, to be authorised.

Special conditions

42. The special conditions provide that all activities must be undertaken in accordance with various management plans (clause 2 of Schedule 3). However, as described above, DOC considers the management plan conditions are uncertain as to the outcomes that will be achieved. They are to be certified at a future date, and there is

²⁵ At [66] of Mr Christensen's legal submissions.

no role for DOC in this certification. Because of this, the extent to which wildlife will be protected if activities are undertaken in accordance with the listed management plans is uncertain.

43. However, the consents, access arrangements and concessions contain detailed conditions relating to wildlife.²⁶ A possible solution is for the wildlife approval to incorporate these conditions, or to cross-refer to them. This could potentially be done by amending clause 1 or 2 of Schedule 3 of the wildlife approval, so that all activities authorised by the wildlife approval must be undertaken in accordance with the access arrangements, concessions and consents, to the extent that they condition those activities in relation to wildlife. DOC has suggested track changes to that effect.
44. Given DOC has proposed a parallel DOC certification role within the relevant conservation approvals, and the wildlife approval cross-refers to those approvals, DOC has suggested some consequential changes to the wildlife approval conditions, marked as tracked changes and comments.
45. Finally, DOC recommends clause 12 (dispute resolution) of the special conditions be deleted. There does not appear to be a power to restrict resolution of disputes to arbitration in this way, given (i) a panel may set any conditions on a wildlife approval that the panel considers necessary to manage the effects of the activity on protected wildlife, and such a condition is not about managing effects, and (ii) the FTAA specifically contemplates the ability to appeal or apply for judicial review.

²⁶ DOC has also sought additional changes to these conditions in its comments.