

**Before an Expert Panel
Bendigo-Ophir Gold Project**

FTAA-2507-1089

Under the

Fast Track Approvals Act 2024

In the matter of

an application for approvals to establish,
operate, and remediate an open pit and
underground gold mine at Bendigo and
Ardgour Stations

By

Matakanui Gold Limited

Applicant

LEGAL SUBMISSIONS OF ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

10 April 2026

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INTRODUCTION

1. These are the Environmental Defence Society's (EDS) comments on Matakanui Gold Limited's (Applicant) substantive application (Application) under the Fast-track Approvals Act 2024 (FTAA) for the Bengio-Ophir Gold Project (Project).
2. EDS's interest in the Application relates to approvals required under the Resource Management Act 1991 (RMA), the Conservation Act 1987 (Conservation Act), Reserves Act 1977 (Reserves Act) and Wildlife Act 1953 (Wildlife Act).
3. EDS submits that the Panel:
 - a. Does not have jurisdiction to grant approvals for conservation concessions located on publicly owned land outside Bendigo and Ardgour Stations; and
 - b. That it should decline all approvals sought under section 85(3) of the FTAA.
4. The Project's adverse impacts are numerous and are sufficiently significant to be out of proportion to the overstated regional and national benefits.
5. A key concern are the extensive uncertainties associated with the mine's adverse impacts, operation and long-term management of the site. These uncertainties give rise to material risks to nationally and regionally significant environmental values that cannot be satisfactorily addressed by conditions of consent. Those risks are simply too high and therefore unacceptable.
6. These comments are filed along with independent expert evidence by:
 - a. Dr Leanne Morgan on groundwater hydrology.
 - b. Professor Jennifer Webster-Brown on geochemistry and water quality.
 - c. Elizabeth Steven on landscape.
 - d. Nicholas Head on terrestrial ecology.
 - e. Dr Bill Kaye-Blake on economics.

EXECUTIVE SUMMARY

7. The Applicant has provided a substantial body of information, but much of it is inadequate to assess the relevant impacts. Key statutory assessments have not been undertaken, and obvious environmental effects have not been assessed. Significant uncertainties abound.

8. The overwhelming amount of information provided by the Applicant does not clearly articulate aspects of the Project that are fundamental to the Panel's decision-making, including:
- a. Whether there are jurisdictional and scope limits to the Project, including under section 127B of the RMA and by reference to Schedule 2 of the FTAA?
 - b. What are the correct legal tests to be applied under sections 81, 85 and the Schedules to the FTAA?
 - c. What is the true extent of the Project's regional or national benefits? Is the Applicant's assessment of those benefits substantially overstated?
 - d. What are the adverse impacts relevant to the Panel's section 85(3) proportionality assessment?
 - e. To what extent has the Applicant addressed the relevant directive policy and legislative requirements?
 - f. How will the site be managed in the long-term, post cessation of mining operations, including who will pay for ongoing maintenance of water treatment systems and ecological mitigation?
 - g. Who will manage and pay for future unanticipated or low probability, high impact, events relating to mining infrastructure left on site, including the tailings dam and engineered landforms?
 - h. To what extent will the proposed conservation covenant revocations compromise the underlying conservation values (of regional and national significance) for the affected land?
 - i. Why should the Panel countenance revocation of conservation covenants outside the direct footprint of the proposed mine site?

Summary of adverse impacts

9. EDS submits that the following residual adverse impacts (after conditions are taken into account) are relevant for the Panel's section 85(3) proportionality assessment for the resource consent approvals sought.
10. These impacts are identified by EDS's independent experts and legal issues arising. To the extent that it is not covered in EDS's evidence, EDS relies on the independent expert evidence produced by the Department of Conservation, Fish & Game, Royal Forest & Bird Protection Society, and Sustainable Tarras on adverse impacts.

Groundwater and geochemistry

- a. Critical gaps in groundwater hydrology data, and inadequate conceptual modelling of groundwater flows leading to overall uncertainty in the assessment of groundwater effects.¹
- b. Multiple issues groundwater modelling that likely underestimate groundwater flow to the pits, drawdown and stream depletion.²
- c. Uncertain estimates of underground tunnel dewatering resulting in potentially considerably more water being pumped from the tunnels, impacting groundwater levels.³
- d. Unproven use of augmentation of the Rise and Shine Creek using groundwater from the Bendigo Aquifer to mitigate wetland loss.⁴
- e. Inadequate assessment of pit lake water quality and implications for future use of the site given likely chance of contamination, including toxic levels of arsenic and nitrogen.⁵
- f. Potential release of a significant quantity of hydrogen sulfide, a toxic unpleasant smelling gas, as a result of almost certain thermal stratification and expected pit lake ‘turnover’.⁶
- g. Potential underestimation of water percolation through engineered land forms and waste piles, and its implications for predictions of mine impacted water composition.⁷
- h. Seepage of mine impacted water with levels of contaminants exceeding proposed water quality compliance limits for receiving surface water and groundwater systems, enduring for over a century⁸ and resulting in a high potential for long-term contamination of shallow groundwater and surface water receiving environments.⁹
- i. Lack of impermeable liners under mining infrastructure to capture seepage into groundwater systems.¹⁰

¹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [19] – [37].

² Dr Morgan, Statement of Evidence dated 10 April 2026, at [38] – [75].

³ Dr Morgan, Statement of Evidence dated 10 April 2026, at [76] – [80].

⁴ Dr Morgan, Statement of Evidence dated 10 April 2026, at [81] – [93].

⁵ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [22] – [35].

⁶ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [31] – [33].

⁷ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [36] – [50] and Dr Morgan, Statement of Evidence dated 10 April 2026, at [94] – [115].

⁸ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [41] – [42].

⁹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [46].

¹⁰ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [36] – [50].

- j. Unsubstantiated methods of removing arsenic and trace metal from mine impacted waters¹¹ resulting in underpredictions of arsenic concentrations¹² and major risk of significant arsenic emission from the mining operation into the wider environment, via surface water, shallow groundwater and even wind.¹³
- k. Significant risk of contamination of the Ardgour Aquifer from mine impacted waters.¹⁴
- l. No modelling of solute transport into the Bendigo Aquifer so unknown contamination risk.¹⁵
- m. No cumulative assessment of groundwater drawdown resulting in potential underestimated drawdown and consequential impact on surface and ground water.¹⁶
- n. Significant environmental risk of relying on passive treatment of mine impacted water in the longer term.¹⁷
- o. Uncertainty about the ultimate fate of contaminated sludge and sediment from the active and passive water treatment systems.¹⁸
- p. Uncertainty about who will manage the site in the long term, including maintaining the passive water treatment system.¹⁹
- q. Omission from modelling predictions of trace metals being transported on suspended sediment offsite and proposed water quality monitoring of these contaminants based on untrue assumptions.²⁰
- r. Deficient water quality limits that would not prevent contaminants, particularly arsenic, moving offsite while bound to suspended solids or the contamination of downstream stream and possibly lake sediments.²¹

¹¹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [43].

¹² Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [51] – [62].

¹³ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [62].

¹⁴ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [47] and Dr Morgan, Statement of Evidence dated 10 April 2026, at [116] – [128].

¹⁵ Dr Morgan, Statement of Evidence dated 10 April 2026, at [116] – [128].

¹⁶ Dr Morgan, Statement of Evidence dated 10 April 2026, at [129] – [140].

¹⁷ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [65].

¹⁸ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [69].

¹⁹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [69].

²⁰ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [71] – [77] and [91].

²¹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [78] – [89].

Terrestrial ecology

- s. Permanent loss of approximately 600 hectares of ecologically significant habitats and multiple Threatened and At-Risk taxa across all major taxonomic guilds,²² including, cushionfield species such as *Ceratocephala pungens* (Nationally Critical), *Myosotis brevis* (Nationally Vulnerable), and associated herbfield assemblages (e.g. *Raoulia* spp., *Leptinella* spp., *Pygmaea* spp.), and native-dominant shrubland and tussock species such as *Aciphylla* spp. (taramea), *Celmisia* spp.²³
- t. Very high level of effect for most indigenous ecosystems affected by the Project.²⁴
- u. Breach of directive avoidance policies in the National Policy Statement for Indigenous Biodiversity 2023 (NPS-IB)²⁵ requiring no overall loss in indigenous biodiversity, including breach of offsetting and compensation principles.²⁶
- v. Speculative, research-dependent, or geographically disconnected restoration or rehabilitation mitigation unlikely to replicate the intrinsic composition, structure, ecological functions, or resilience of the ecosystems lost.²⁷
- w. Unknown and unassessed impacts on non-vascular plants.²⁸
- x. Most likely permanent loss of wetlands from water table drawdown.²⁹
- y. Breach of directive avoidance policies in the National Policy Statement for Freshwater Management 2020 (NPS-FM)³⁰ requiring no further loss of extent of natural inland wetlands, including breach of offsetting and compensation principles.
- z. Failure to adopt the precautionary principle for indigenous biodiversity, as a mandatory relevant consideration.

²² N Head, Statement of Evidence dated 10 April 2026 at [17].

²³ N Head, Statement of Evidence dated 10 April 2026 at [82].

²⁴ N Head, Statement of Evidence dated 10 April 2026 at Table 1.

²⁵ NPS-IB, objective 2.1, clause 3.10 and Appendices 3 and 4

²⁶ N Head, Statement of Evidence dated 10 April 2026 at [56] and [76].

²⁷ N Head, Statement of Evidence dated 10 April 2026 at [21].

²⁸ N Head, Statement of Evidence dated 10 April 2026 at [35a].

²⁹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [81] – [93].

³⁰ NPS-FM, policy 6, clauses 3.21 and 3.21, and Appendices 6 and 7.

Landscape

- aa. Information gaps and insufficient landscape assessment contributing to incomplete evaluation process and under assessment of adverse effects in scope and magnitude, including overly narrow identification of relevant landscape context, omission of relevant information and assessment relating to historic heritage, the Otago Conservation Management Strategy and the Tarras Community Plan and incomplete identification of viewing locations and viewing audiences.³¹
- bb. Similar information gaps in relation to understanding of the site and its values, including the omission of information on heritage and ecology, key viewing locations from public conservation areas and easements and public places within the Site.³²
- cc. Significant adverse effects on Matakanui Dunstan Mountains Outstanding Natural Landscape (ONL) such that part of the ONL will not maintain its outstanding landscape character during mining operations and will not regain outstanding nature unless and until revegetation successfully occurs, which could be decades.³³
- dd. Persistent adverse effects on the Matakanui Dunstan Mountains ONL post-closure from discordant man-made landforms and permanent loss of heritage and recreation values.³⁴
- ee. Significant adverse effects on overall landscape character, including as a result of overt development, adverse effects on visual coherence, intactness and legibility and loss of heritage features, mature kowhai trees and cushionfield.³⁵
- ff. Significant adverse effects on visual amenity during mining operations, remaining moderate-high due to persistent discordancy of large man-made landforms.³⁶
- gg. Significant adverse effects on amenity aspects of dark sky, natural quiet and tranquility from some locations.³⁷
- hh. Adverse effects on visual amenity dependent on unproven success of revegetation.³⁸

³¹ E Steven, Statement of Evidence dated 10 April 2026 at [19].

³² E Steven, Statement of Evidence dated 10 April 2026 at [21] – [23].

³³ E Steven, Statement of Evidence dated 10 April 2026 at [33].

³⁴ E Steven, Statement of Evidence dated 10 April 2026 at [34].

³⁵ E Steven, Statement of Evidence dated 10 April 2026 at [27].

³⁶ E Steven, Statement of Evidence dated 10 April 2026 at [28].

³⁷ E Steven, Statement of Evidence dated 10 April 2026 at [29].

³⁸ E Steven, Statement of Evidence dated 10 April 2026 at [30].

- ii. Permanent adverse effects ranging from moderate to very high (significant) on backcountry character, depending on location.³⁹
- jj. Moderate adverse effects on the values and character of the Significant Amenity Landscape (Bendigo Terrace) during mining activity.⁴⁰
- kk. Significant adverse effects on natural character of rivers and wetlands during mining and, in some cases, permanently.⁴¹
- ll. Contrary to section 6 of the RMA to recognise and provide for the protection of outstanding natural landscape and preservation the natural character of rivers and wetlands and their margins from inappropriate development.
- mm. Contrary to provisions of operative Otago Regional Policy Statement (ORPS) requiring the outstanding nature of the Matakanui Dunstan Mountains ONL to be maintained.

Other

- nn. Breach of scope of Schedule 2 listed project description; and breach of section 127B of the RMA as a result of seeking consent duration longer than 6 years for water takes.
- oo. Several information gaps across multiple topics such that the magnitude of adverse impact and benefits cannot be confidently assessed and may therefore be materially greater (for adverse impacts) and less (for benefits) than asserted, including economics, groundwater, geochemistry, terrestrial ecology and landscape.
- pp. Inadequate and insufficient bond and no public indemnity insurance necessary to management the site long-term and address any unanticipated events.

Regional and national benefits

- 11. EDS submits that the Application's asserted regional and national benefits are overstated and, in some cases, wrong. The following matters are relevant to the Panel's assessment of the Projects benefits:⁴²

³⁹ E Steven, Statement of Evidence dated 10 April 2026 at [31].

⁴⁰ E Steven, Statement of Evidence dated 10 April 2026 at [32].

⁴¹ E Steven, Statement of Evidence dated 10 April 2026 at [25].

⁴² Dr Kaye-Blake, Statement of Evidence dated 10 April 2026.

- a. Key economic considerations cannot be properly interrogated due to lack of raw calculations being provided.
- b. A cost benefit analysis has not been undertaken, so net benefits cannot be determined.
- c. The economic figures are not discounted by 8% as required by Treasury, which brings the gross domestic product impact down from \$5.8M to \$3.3M.
- d. The method of understanding economic impacts is inappropriate because there is no spare productive capacity within Central Otago.
- e. Information on the value of impacts on central Otago District, Queenstown-Lakes District and Otago Region is lacking.
- f. The geographic designations inflate the size of the supposed economic base and downplay the potential economic disruption from the BOGP.
- g. Negative regional impacts could be roughly the same magnitude as the benefits because most of the economic benefits go elsewhere, while most of the costs are localised.
- h. There is a 1 percent overstatement of the total contribution to the government as a result of 'double-counting' ACC and salary / PAYE.
- i. Figures are based on best case scenarios and do not include a sensitivity analysis. This could bring the national contribution down from \$2.8 billion to \$0.5 billion based on reasonable assumptions or counterfactual, for example if the price of gold drops.
- j. There is no attempt at assigning economic values to the many environmental, amenity, social, and heritage impacts.
- k. The national adverse impacts could be enough to outweigh national economic impacts if some assumptions about mine performance are too optimistic.
- l. Post-operational phases are not costed meaning the total cost of the project might be significantly underestimated.

Section 85(3) threshold met

- 12. The plethora of information deficits in the Application, and associated uncertainties, are adverse impacts relevant to the Panel's proportionality assessment under section 85(3). EDS submits that cumulatively they

represent a level of impact that is unacceptable given the nationally and regionally significant environmental values present.

13. Even if information gaps can be filled and uncertainties reduced, EDS submits that the relevant independent evidence demonstrates that residual adverse impacts are sufficiently significant to be out of proportion to the Project's regional or national benefits, which are optimistic and overstated. These include: the permanent loss of irreplaceable and vulnerable nationally and regionally significant ecosystems and species (including possible species extinctions); the permanent loss of nationally significant inland wetlands; the failure to maintain or protect, and the loss of outstanding natural landscape values; and long-term contamination of shallow groundwater and surface water receiving environments.
14. The adverse impacts are sufficiently significant that it would be disproportionate under section 85(3) to grant approval, despite proposed consent conditions, and the Panel should therefore decline the resource consent approvals sought. While it is ultimately a matter for the Panel, EDS submits that the preponderance of independent expert evidence supports the view that this is the only conclusion reasonably available on the evidence. In any event, and applying a merits assessment, EDS submits this is the appropriate outcome.

Covenant

15. The information before the Panel clearly demonstrates that the adverse impacts of the conservation covenant revocation are sufficiently significant to be out of proportion to the Project's overstated benefits and should be declined under section 85(3). Of note:
 - a. The legitimate expectation of the New Zealand public that Tenure Review outcomes would endure permanently as *quid pro quo* for freehold land ownership.
 - b. The adverse precedent effect that revoking a conservation covenant, established under Tenure Review, would have for the High Country.
 - c. The very high conservation values (heritage, ecological and landscape) of the land concerned.
 - d. The risk of extinction of Nationally Critical *Ceratocephala pungens* and the 7% loss of Kawarau Gecko's national habitat pushing it, and several other Threatened species, closer to extinction.
 - e. The Applicant's inadequate assessment of these values rendering the actual loss of flora, wetlands, lizards, invertebrates and other

nationally and regionally important indigenous biodiversity unknown and potentially significantly understated.

- f. No conditions are proposed for the conservation covenant and the proposed replacement covenant is fanciful and inadequate.
- g. EDS's economic evidence (and that of other parties) is that the Project's benefits are overstated.

Wildlife Act

- 16. The Applicant's wildlife approval to catch, salvage and relocate native lizard species is highly uncertain. These uncertainties should be of key concern to the Panel when considering the Applicant's wildlife approval.

SCOPE

- 17. Whether a listed project is within scope of Schedule 2 of the FTAA is quintessentially a question of jurisdiction.
- 18. The Panel must correctly direct itself on its jurisdiction and it is therefore *intra vires* for the Panel to assess any relevant scope issues.
- 19. Because a substantive application can only be made for a listed or referred project,⁴³ there is no jurisdiction for a panel to grant a substantive application for an activity that is not part of a listed project or a referred project.
- 20. A "listed project" means a project listed in Schedule 2 FTAA.⁴⁴ A "project":⁴⁵
 - (a) means,—
 - (i) in relation to a listed project, the project as described in Schedule 2:
 - (ii) in relation to an unlisted project,—
 - (A) the project as described in the referral application for the project or, if the referral application is yet to be lodged, as it will be described in the application; or
 - (B) if the project has been referred, the project as described in the notice under section 28; and
 - (b) includes any activity that is involved in, or that supports and is subsidiary to, a project referred to in paragraph (a)

⁴³ FTAA, s 4 definition of "substantive application".

⁴⁴ FTAA, s 4 definition of "listed project".

⁴⁵ FTAA, s 4 definition of "project".

21. The terms in (b) are not defined. Logically, there are limits on the extent to which an activity is involved in, supports, or is subsidiary to, a listed or referred project.
22. An activity will not be subsidiary if it involves additional approvals required under different legislation and a different Schedule to the FTAA, such as Schedule 6 FTAA in respect of concessions required under the Conservation Act 1987.
23. An activity will also be not subsidiary where it is outside the scope of the approximate geographical location of a listed project as described in Schedule 2; such as public conservation land that does not form part of the privately owned Ardgour and Bendigo Stations.
24. EDS submits that the Panel has no jurisdiction to grant approval for land that does not form part of Bendigo Station or Ardgour Station, including publicly owned land outside these Stations. These approvals are outside the scope of the Project’s Schedule 2 listing and are not subsidiary or otherwise activities involved in, or supportive of, the listed project.

The Project’s listing description

25. The Project is a listed project under the FTAA and is described in Schedule 2 as:

Authorised person	Project name	Project description	Approximate geographical location
Matakanui Gold Limited	Bendigo–Ophir Gold Project	Establish, operate, and remediate an open pit and underground gold mine	Bendigo and Ardgour Stations, approximately 20 kilometres north of Cromwell, Central Otago

26. The approximate geographical location of the Project is limited to Bendigo and Ardgour Stations, both privately owned land subject to Overseas Investment Act applications for transfer to the Applicant. There is no reference to public conservation land, specifically Ardgour and Bendigo Conservation Areas, Ardgour Road / Lindis River and Lower Lindis Conservation Areas or the Bendigo Historic Reserve, over which the Application now seeks the following concessions:
 - a. Ardgour Rise Concession Area: “concession (easement in favour of CODC as a public right of way) for activities occurring on public conservation land within the Ardgour Conservation Area”;⁴⁶

⁴⁶ A.11 Section 4 Approvals sought, at [243], available [here](#).

- b. SH8 Concession Area: “concession (easement in favour of NZTA and CODC) for activities occurring on public conservation land within the underlying Ardgour Road / Lindis River and Lower Lindis Conservation Areas”;⁴⁷
 - c. Come-In-Time Concession Area: “concession (permit) for activities occurring on public conservation land within the Bendigo Historic Reserve”;⁴⁸
 - d. Willow Concession Area: “concession (permit) for activities occurring on public conservation land within the Bendigo Historic Reserve”;⁴⁹ and
 - e. Water Monitoring Concession Area: “concession (permit) for activities occurring on public conservation land within the Bendigo Historic Reserve”.⁵⁰
27. The project description does not reference the location of the intended gold mine. This is left solely to the location column. There is no reference to the requirement for use of the conservation estate or concessions under the Conservation Act in any column.
28. By contrast, at least several listed projects in Schedule 2 expressly include reference to the conservation estate (where relevant) as follows:

Project Name	Project Description	Approximate geographical location
Remarkables Ski Area Upgrade and Doolans Expansion	Upgrade existing infrastructure at The Remarkables Ski Area, including a new passenger transport lift, carparking areas, and expanding the ski field into the adjacent Doolans Basin	Rastus Burn Recreation Reserve, Remarkables Mountain Range, Queenstown
Waihi North	In stages, expand the existing gold and silver mining operations, including establishing new open pit and underground mines, and extending the life of the mine from expiry in 2030 to 2040, including— - exploration drill sites within Department of Conservation	43 Moresby Avenue, Waihi, Waikato, and across 7 areas described as Wharekirauponga Underground Mine (Area 1), Willows Road Farm (Area 2), Wharekirauponga Access Tunnel Corridor (Area 3), Services Trench Corridor (Area 4), Gladstone Open Pit

⁴⁷ A.11 Section 4 Approvals sought, at [244], available [here](#).

⁴⁸ A.11 Section 4 Approvals sought, at [245], available [here](#).

⁴⁹ A.11 Section 4 Approvals sought, at [246], available [here](#).

⁵⁰ A.11 Section 4 Approvals sought, at [247], available [here](#)

	<p>land, including 4 ventilation shafts and 4 new geotechnical drilling sites</p> <ul style="list-style-type: none"> - a new underground mine at Wharekirauponga with associated twin decline access to explore and mine including 4 ventilation or escapeway shafts capped at surface - a new open pit on Oceana Gold (New Zealand) Limited's private land at Gladstone Hill (with capacity to co-dispose waste and tailings) - a third tailings storage facility plus a new rock storage facility (with capacity to co-dispose waste and encapsulated filtered tailings) 	<p>and Waihi Surface Facilities Area (Area 5), Northern Rock Stack (Area 6), and Tailings Storage Facility 3 (Area 7)</p>
Arahura Papakāinga Housing	<p>Papakāinga development enabled by land exchange between Te Rūnanga o Ngāti Waewae and the Department of Conservation</p>	<p>Near 33 Old Christchurch Road, Arapura, Hokitika Ngāi Tahu Forestry: Part of Lot 8 DP301 (105 hectares) Public Conservation Land: Pt Sec 2 SO12035 (74.5 hectares)</p>
Tukituki Water Security	<p>Dam the Makaroro River and create a water storage reservoir to enable regional water security and sustainability, including—</p> <ul style="list-style-type: none"> - constructing an approximately 83-metre-high dam in the Makaroro River - creating a reservoir (of approximately 93 million cubic metres, approximately 7 kilometres long, and with a surface area of approximately 372 hectares) - releasing up to approximately 20 million cubic metres to ensure the provision of minimum flows in the Tukituki River - an irrigation footprint of approximately 20,000 to 30,000 hectares - land exchanges with the Department of Conservation 	<p>Makaroro River and Waipawa, Tukituki, and Papanui Stream catchments, Hawke's Bay</p>
Belmont Quarry Development	<p>Establish a new overburden disposal area adjacent to the existing quarry to enable the extraction of approximately 20 million cubic metres of aggregate, including land</p>	<p>541 Hebden Crescent, Belmont, Lower Hutt</p>

	exchange with the Department of Conservation, earthworks, and establishing new access roads	
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29. EDS submits that a project’s listing description in Schedule 2 constrains the scope of its substantive application. The Applicant’s substantive application does not align with its listing description in Schedule 2 with respect to conservation land that does not form part of Bendigo or Ardour Stations.
30. Accordingly, and having regard to text, purpose, and meaning, approvals sought for concessions on public conservation land owned by the Crown are outside the Panel’s jurisdiction. It will be *ultra vires* for the Panel to grant approval to these components of the Project.
31. The High Court in *Ngāti Kuku Hapū Trust v Environmental Protection Agency* is the leading authority on the scope of listed projects under Schedule 2. The case related to the Stella Passage Development project, a listed FTAA project relating to the expansion of the Port of Tauranga. The listing description for the project referred only to the Sulphur Point wharf, but the applicant sought approvals in a substantive application for the Sulphur Point wharf and the Mount Maunganui wharf. Ngāti Kuku Hapū Trust challenged the EPA’s decision to accept the project into the fast-track process on the basis that it did not relate solely to its listing description.
32. The Court said:⁵¹
- ... it is rare to read words into a statute when Parliament has not thought fit to include them. As the Court of Appeal observed in *R v Steigrad*, “adding words is very rarely legitimate”. The requirement, in s 46(2)(b), that applications relate *solely* to a listed project indicates Parliament intended the schedule would determine the scope of the projects the EPA could consider.
33. The Court held that the plain meaning of Schedule 2 should be applied, and that:⁵²
- It follows there is simply no basis, when reading the description of the Stella Passage Development, to look beyond the words in the schedule. They could not be clearer. The extension of the Sulphur Point wharf is included; the extension of the Mount Maunganui wharf is not.
34. Off the back of this case, the EPA declined to accept into the fast-track process a substantive application for the listed Downtown Carpark Redevelopment

⁵¹ *Ngāti Kuku Hapū Trust v Environmental Protection Agency* [2025] NZHC 2453 at [57].

⁵² *Ngāti Kuku Hapū Trust v Environmental Protection Agency* [2025] NZHC 2453 at [73].

project because the application went beyond the scope of the project's listed description. The substantive application included a hotel which was not referred to in Schedule 2.

35. Following this decision, Parliament amended the descriptions of several projects in Schedule 2 in the Amendment Act, including the Stella Passage Development project and the Downtown Carpark Redevelopment project.
36. The BOGP Project was not one of them.
37. Section 46(2)(b) requires that "the application relates solely to a listed project or a referred project". By reference to the 2025 amendments to the FTAA, Parliament has adopted a remedial wording in Schedule 2 for some projects but not others.
38. To grant an approval in a substantive application that goes beyond its listing description would:
 - a. Not accord with the interpretation of a substantive application being "for a listed project", as defined by Schedule 2;
 - b. Give applicants of listed projects an undue advantage, not intended by Parliament, over other proponents, who would otherwise have had to apply to the Minister for referral into the fast-track process;
 - c. Expand Parliament's clear intent, and require the reading into statute of additional words; and
 - d. Result in the Panel acting ultra vires its powers.
39. The Panel does not have jurisdiction to determine parts of the Application that are not included in the Project's listing description.

Summary

40. The Project has the advantage of being a listed project. The Applicant cannot materially expand the scope of its Project in its substantive application beyond what was enabled through Schedule 2. The Applicant must separately apply as a referred project for those aspects of its project not included in its Schedule 2 listing description, namely:
 - a. Approvals that relate to Crown owned public conservation land, including the Ardgour and Bendigo Conservation Areas, Ardgour Road / Lindis River and Lower Lindis Conservation Areas or the Bendigo Historic Reserve. Maps identifying these areas are set out below.

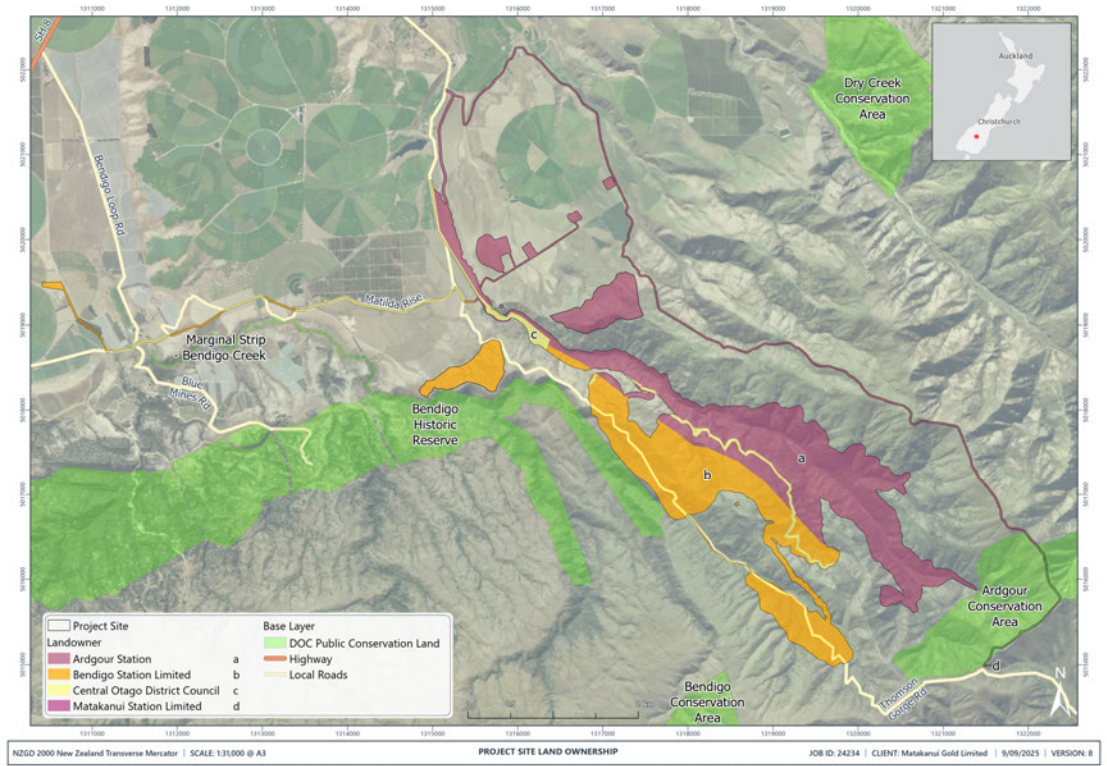


Figure 1: Project Site Land Ownership Overview.⁵³



Figure 2: SH8 Concession Area.⁵⁴

⁵³ C.06 Project Site Land Ownership Overview, available [here](#)

⁵⁴ A.11 Section 4 Approvals Sought, Figure 4-2, available [here](#).

DECISION-MAKING FRAMEWORK

Applicable law

41. The FTAA was amended by the Fast-Track Approvals Amendment Act 2025 (Amendment Act) and some of those changes apply to the Project, albeit not substantively.
42. Other FTAA Panel decisions are not binding on the Panel. While the Panel must make its own factual findings in the context of the FTAA and the substantive application before it, the Panel may take guidance from earlier factual or legal findings of RMA or conservation jurisprudence. Where there is overlapping factual or legal issues, those cases may be highly persuasive.

Section 81 FTAA

43. Under the FTAA the Panel must decide whether to grant (with or without conditions) or decline each approval sought in the substantive application.⁵⁵ Section 81(2) of the FTAA steps through that decision-making process for each approval.
44. These comments focus on the statutory requirements of section 81(2)(a), (b), (c), (d) and (f), namely, when making a decision the Panel:
 - a. Must consider the substantive application and any advice, report, comment or other information received by the Panel under relevant sections;⁵⁶
 - b. Must apply the relevant clauses set out in section 81(3) of the FTAA (i.e., clauses 17 and 22 of Schedule 5 for resource consent approvals and clauses 45 and 46 of Schedule 6 for conservation covenant approvals);⁵⁷
 - c. Must consider whether granting the approval would comply with section 7 of the FTAA, such that its decision is consistent with obligations arising under existing Treaty settlements;⁵⁸
 - d. Must, when imposing conditions of consent, ensure they are not more onerous than necessary to address the reason for which they are set in accordance with the provision of the FTAA that confers the discretion;⁵⁹ and

⁵⁵ FTAA, s 81(1).

⁵⁶ FTAA, s 81(2)(a).

⁵⁷ FTAA, sections 81(2)(b), 81(3)(a) and 81(3)(h).

⁵⁸ FTAA, sections 81(2)(c), 82 and 7.

⁵⁹ FTAA, sections 81(2)(d) and 83.

- e. May decline an approval under section 85 of the FTAA.⁶⁰
45. While section 81 sets the process that the Panel must step through for each approval, the decision-making criteria for each approval differs. These criteria are set out in the FTAA Schedules.
46. As EDS's comments relate to approvals for resource consents that would otherwise be applied for under the RMA, approvals to revoke a conservation covenant, and approvals that would otherwise be required under the Wildlife Act, Schedules 5 to 7 are respectively relevant.⁶¹
47. The Schedules import relevant considerations from each "specified Act".⁶² This ensures that each approval is considered in the context of its originating law.
48. This framing is important because it requires a separate and distinct assessment of *each* approval sought. An approach reinforced by the different information requirements for each approval.⁶³
49. To assist the Panel with decision-making on each approval, the Panel Convenor Guidance recommends that applicants "lodge separate technical and assessment reports in respect of each type of approval to make processing easier."⁶⁴
50. Doing otherwise, and taking a single or bundled approach to assessment of impacts across different approvals, risks:
- a. Omitting necessary statutory assessments required for each approval sought;
 - b. Unclear allocation of mitigation measures (i.e., offsetting and compensation) across approvals such that it is difficult or uncertain to decipher what mitigation is being proposed for each approval. This is important, given the different decision-making criteria and statutory contexts that apply to each different approval; and
 - c. Double counting mitigation across multiple approvals, such that one mitigation measure (such as restoration planting) is proffered to offset or compensate adverse impacts across more than one approval.
51. The Applicant has elected not to follow the Panel Convenor Guidance. Instead, it has bundled its assessments (or lack thereof) and is asking the Panel to

⁶⁰ FTAA, sections 81(2)(f) and 85.

⁶¹ EDS reserves its position on whether the Panel has jurisdiction to grant some of the Schedule 6 approvals. Whether the Panel has jurisdiction is addressed in EDS's comments under 'Scope'.

⁶² Defined in section 5 of the FTAA to be any of the Acts listed.

⁶³ FTAA, s 43.

⁶⁴ Fast-track Approvals Act 2024: Panel Conveners' Practice and Procedure Guidance, at 4.1(d).

consider the Application as a “cohesive whole”.⁶⁵ As a result, for approvals sought for the conservation covenant revocation:

- a. The Department of Conservation (DOC) has advised that “a common theme across all of the applicant’s assessments and documentation is the lack of detailed analysis of how the proposal will impact and compromise the values relating to the covenant.”⁶⁶
- b. It is unclear what aspects of the Applicant’s offsetting and compensation package is intended to address impacts on the conservation values of the land affected by the covenant revocation. No separate consent conditions are provided for the revocation.

Resource consent approvals: Clause 17 of Schedule 5 of the FTAA

52. Under clause 17 of Schedule 5, when considering a resource consent approval, the Panel must “take into account”, relevantly:

- a. The purpose of the FTAA to “facilitate the delivery of infrastructure and development projects with significant regional or national benefits” (section 3 of the FTAA);⁶⁷
- b. The following decision-making provisions of the RMA:⁶⁸
 - i. Sections 5, 6, and 7 (the purpose and principles of the RMA);⁶⁹
 - ii. Part 3 relating to duties and restrictions on land, including the section 17 RMA duty to avoid, remedy or mitigate adverse effects; and
 - iii. Part 6 (resource consents), including section 104 (but not section 104D) of the RMA which requires the panel to have regard to:
 - Any actual and potential effects on the environment
 - Conditions that offset or compensate for any adverse effects on the environment
 - Relevant provisions of national environmental standards, national policy statements, regional policy statements and plans.

⁶⁵ A.02B Legal Overview, at [28] – [30], available [here](#).

⁶⁶ DOC section 51 Conservation Covenant Report, at [6.3.5].

⁶⁷ FTAA, Sch 5, cl 17(1)(a). The s 3 FTAA purpose is to be given the greatest weight.

⁶⁸ FTAA, Sch 5, cl 17(1)(b).

⁶⁹ FTAA, Sch 5, cl 17(2)(a) excludes s 8 of the RMA from consideration.

Meaning of “take into account”

53. Several FTAA decisions have held that the phrase “take into account” requires a panel to directly consider the matters so identified and give them genuine consideration; rather than mere lip service, such as by listing them and setting them aside.⁷⁰
54. EDS agrees. Each matter listed must be independently and meaningfully assessed as part of the decision-making process, uninfluenced by the purpose of the FTAA. In other words, each matter listed stands on its own. This includes directive language used in policy instruments aimed at avoiding adverse effects on nationally significant environmental values. Weighting is generally a matter for the decision-maker to determine, save where the statute expressly provides otherwise. A Court may set aside a decision which has failed to give adequate weight to a relevant factor of great importance or which has given excessive weight to a relevant factor of no great importance.⁷¹

Purpose of the FTAA

55. When taking the above matters into account, the Panel must give the “greatest weight” to the purpose of the FTAA.⁷² The purpose in section 3 of the FTAA is to “facilitate” projects of “significant national or regional benefits”. ‘Facilitate’ is not defined. EDS submits that:
 - a. The FTAA’s purpose does not create a presumption that approval should be granted, subject to meeting the relevant statutory tests; and
 - b. ‘Facilitate’ conveys a solely procedural, or (alternatively) partly procedural and partly substantive function.
56. EDS submits that the section 3 FTAA purpose is procedural, not substantive. As described by the Sunfield FTAA Panel, delivery of projects is to be ‘facilitated’ i.e. placed before the decision-making panel on an expedited basis.⁷³ The purpose does not of itself provide a direction as to the substantive outcome. This is also reflected in the detailed machinery provisions of the FTAA, which ensure speedy consideration, but not necessarily approval, of substantive applications.

⁷⁰ Waihi North FTAA decision at Part G para [4], Kings Quarry Expansion – Stages 2 and 3 FTAA decision at [116], Sunfield FTAA decision at [544] all with reference to *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC and Taranaki VTM FTAA draft decision at [77].

⁷¹ A position noted by DOC in submissions on weighting (Appendix J, section 51 comments) citing *Thames Valley Electric Power Board v NZFP Pulp and Paper* [1994] LGHNZ 17 (CA).

⁷² FTAA, Sch 5, cl 17(1).

⁷³ At [554] “The purpose of the FTAA is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits; it seeks to expedite the provision of eligible development projects.”

57. The reference to “facilitate” in section 22(1)(b)(i) of the FTAA reflects this procedural focus: that referring a project to the fast-track process “would facilitate the project, including by enabling it to be processed in a more timely and cost-effective way than under normal processes.” Including through use of its one-stop-shop regime.
58. In that regard, EDS disagrees with the Taranaki VTM FTAA Panel that the purpose “makes the granting of approval more likely”.⁷⁴ It does not. With respect, that interpretation conflates the requirement in Schedules to give the greatest weight to the purpose, with the purpose itself. As a standalone provision, the purpose does nothing more than facilitate the delivery of infrastructure and development approvals, which means create an easier *process*.
59. Even if (in the alternative), ‘facilitate’ conveys a partly substantive meaning, this does not translate into a mandatory duty on the part of the Panel to grant approval, subject only to meeting the default requirements set by the FTAA. The Panel must independently assess whether each approval is merited. There is no presumption in favour of approval of projects under the FTAA, rather a merits assessment is required stepping through section 81(2), including section 85(3).

Greatest weight requirement

60. After the Panel has individually assessed (“take into account”) each criterion in clause 17 of Schedule 5, based on its merits, it should undertake its weighting exercise.
61. Other FTAA panels⁷⁵ have taken guidance on what giving the “greatest weight” means from the Court of Appeal decision of *Enterprise Miramar Peninsula Inc v Wellington City Council*,⁷⁶ which considered similar directive weighting in section 34 of the Housing Accords and Special Housing Areas Act 2013.⁷⁷
62. In that case, the Court held that the plain wording of section 34(1) indicated “that greatest weight is to be placed on the purpose of HASHAA...” and that the inclusion of additional considerations reflected a deliberate intention by Parliament for decision-makers “not to rely solely on the purpose of the HASHAA at the expense of due consideration of the matters listed in (b)-(e).”⁷⁸

⁷⁴ Taranaki VTM FTAA draft decision at [69].

⁷⁵ See Bledisloe North Wharf and Fergusson North Berth Extension FTAA decision [121], Dury Quarry Expansion – Sutton Block FTAA decision at [114], Mildale – Stages 4C and 10 to 13 FTAA decision at [60], Taranaki VTM FTAA draft decision at [78]] [79].

⁷⁶ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541.

⁷⁷ The difference between the Housing Accords and Special Housing Areas Act 2013 (HASHAA) formulation and that of the FTAA is that the HASHAA created a hierarchy of criteria, with the greatest weight to be given to criterion (a) and the least weight to be given to criterion (e), whereas in the FTAA the requirement is simply for the decision maker to give the greatest weight to criterion (a) (the purpose of the FTAA).

⁷⁸ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 at [41].

63. The Court of Appeal said:⁷⁹

The scheme and plain text of s 34(1) requires individual assessment of the listed matters prior to the exercise of weighing them in accordance with the prescribed hierarchy. The matters listed in subs 1(b)-(e) cannot properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)-(e).

64. It went on to find that:⁸⁰

The Council's adoption of this conclusion and its reference to "housing stock", and its cursory analysis of the matters arising under pt 2 of the RMA, are a further example of the Council having allowed the purpose of HASHAA to neutralise or minimise the other matters that arise for consideration under s 34(1)(b)-(e). As in relation to s 34(1)(d)(i) discussed above, the consequence is that the matters arising under s 34(1)(b) were not given due consideration and weight. Rather than just treating the purpose of HASHAA as the most important and influential matter to be weighed, the Council used the purpose of HASHAA to eliminate or greatly reduce its consideration and weighing of the other s 34(1) factors. For the reasons we have set out, this was a significant error of law resulting in a failure to take into account relevant considerations. We allow the appeal on that basis.

65. While not strictly binding, applying *Enterprise Miramar Peninsula* to the application of "greatest weight" in clause 17 of Schedule 5, requires the Panel to give the greatest weight to the purpose of the FTAA, while not rendering the other considerations irrelevant, insignificant, or less than minor simply because of the difference in weighting.

66. Thus the purpose of the FTAA is not logically relevant to the assessments otherwise required under the RMA, including an assessment of environmental effects and consistency with planning instruments. The weighting exercise follows this assessment, as part of the section 81(2) and Schedule 5 (and Schedule 6 – 7) review.

67. EDS supports the submission by DOC⁸¹ that, while the greatest weight is to be accorded to the purpose of the FTAA (for the purposes of the Schedules 5 - 7 assessments), it does not follow that when qualitatively assessed, the regional or national benefits of a project must necessarily outweigh other considerations, in combination or isolation, such as the adverse environmental

⁷⁹ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 at [53].

⁸⁰ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 at [59].

⁸¹ DOC in submissions on weighting (Appendix J, section 51 comments) at [12]-[13].

effects of a project. The extent of benefits will vary between projects, as will the nature and severity of adverse effects.

68. As the FTAA Panels in Maitahi Village, Tekapo Power Scheme and Kings Quarry all held, that means clause 17, Schedule 5 matters may be outweighed by the purpose of the FTAA, or they may not.⁸² That is an important conclusion. It confirms that giving the greatest weight to the purpose does not automatically afford it absolute dominance. Even while giving the greatest weight to the purpose of the FTAA, other matters can be of such gravity that they outweigh the purpose.
69. Where the Panel finds that benefits are overstated or reduced in scale or significance (for example, where there are national, but no material regional benefits), then the section 3 purpose is less likely to support approval, where adverse impacts are sufficiently significant. The degree of benefit or disbenefit is inherent to the proportionality assessment.
70. Finally, when giving the greatest weight to the purpose of the FTAA, the Panel must consider the “extent” of the project’s regional or national benefits.⁸³ That requires a “forensic exercise”, whereby a project’s benefits are identified and then assessed for significance.⁸⁴ National and regional benefits are addressed below in the ‘Regional and national benefits’ section of these comments.

Application of provisions that would otherwise require that consent be declined

71. Clauses 17(3) and (4) of Schedule 5 set out how the Panel should apply any provision of the RMA, or any other relevant Act, that would ordinarily require a decision-maker to decline an application for a resource consent under the RMA. These clauses give direction for treatment of a policy bottom-line in the context of the weighting exercise. They are not determinative of the proportionality assessment under section 85(3).
72. The clauses engaged in this case include (at minimum) Part 2 (ss5, 6, 7), sections 104, 104B, 104G,⁸⁵ 105, 106A, 107, 108, 108AA, 108A, 109, 123, and 127B of the RMA, the directive avoidance provisions set out in the NPS-IB and NPS-FM and the proposed Otago Regional Policy Statement (pORPS).
73. Read together, the clauses require the Panel, when undertaking its weighting exercise, to take into account any provision of the RMA, or any other Act referred to in clause 17(1)(c), that would require a decision maker to decline an application for a resource consent, but that the Panel must not treat the

⁸² Maitahi Village FTAA decision at [70], Tekapo Power Scheme – Application for Replacement Resource Consents FTAA decision at [48] and Kings Quarry Expansion – Stages 2 and 3 FTAA decision at [111].

⁸³ FTAA, s 81(4).

⁸⁴ Maitahi FTAA decision at [84].

⁸⁵ Whether s104G is relevant depends if there are registered drinking water supplies – a fact presently unknown to EDS.

provision as requiring it to decline the application the Panel is considering i.e., decline is not required at this juncture as that is the purview of section 85(3).

74. Other FTAA Panels have read section 85(4) together with clauses 17(3) and (4) of Schedule 5. Section 85(4) states that, to avoid doubt, the Panel may not form the view that an adverse impact meets the threshold to decline in section 85(3)(b) solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that the Panel must take into account or otherwise consider in complying with section 81(2).
75. EDS submits that section 85(4) has no bearing on the Panel's weighting exercise under clause 17 of Schedule 5. The decision-making process anticipated by Schedule 5 (and Schedule 6) takes place prior to the section 85(3) assessment. Section 85(4) is focused on the section 85(3) threshold. It provides direction as to how a policy bottom-line should be treated in the context of section 85(3).
76. Reading clauses 17(3) and (4) of Schedule 5, and section 85(4) together conflates the separate and distinct weighting and proportionality assessments anticipated by the purpose and machinery provisions of the FTAA.
77. The Waihi North Panel held that together these provisions mean that directive avoidance policies are to be taken into account by:⁸⁶
 - a. Recognising that they would usually require applications for consent to be declined based on the bottom-line approach in *King Salmon*;⁸⁷ but
 - b. They do not require the panel to decline an application.
 - c. While left unstated, it follows that such policies may (but not must) form a basis to decline.
78. EDS accepts that analysis insofar as it applies to clauses 17(3) and (4), but not to sections 85(3) and (4). The application of policy bottom-lines in the content of the Panel's proportionality assessment is discussed next.

Section 85 of the FTAA

79. As set out above, Panels have a discretionary ability to decline an approval under section 85(3) of the FTAA:

A panel may decline an approval if, in complying with section 81(2), the panel forms the view that—

⁸⁶ Waihi North FTAA decision at Part G, para [7].

⁸⁷ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

(a) *there are 1 or more adverse impacts in relation to the approval sought; and*

(b) *those adverse impacts are sufficiently significant to be out of proportion to the project’s regional or national benefits that the panel has considered under section 81(4), even after taking into account—*

(i) *any conditions that the panel may set in relation to those adverse impacts; and*

(ii) *any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.*

80. The Taranaki VTM FTAA Panel described section 85(3) as requiring “a factual proportionality assessment for the panel.”⁸⁸ It said:⁸⁹

It is not a like-for-like assessment that compares a particular impact with a particular benefit of the same type. Rather, it requires incommensurable impacts to be considered and compared. As a result, the analysis required under s 85(3) is inherently evaluative. In that context, the Panel found the framing by South Taranaki District Council – that ‘out of proportion’ means that the identified adverse impacts (after mitigation by any consent conditions or modifications) are larger, worse, or more important than the benefit – to be useful.

81. The Waihi North Panel similarly discussed section 85(3) in the context of “weighing of incommensurables”.⁹⁰

82. FTAA Panels are now consistently adopting the approach that applying section 85(3) requires assessments:⁹¹

- a. Of the extent of the project’s regional or national benefits;
- b. Of the significance of adverse impacts; and
- c. Whether the adverse impacts are sufficiently significant to be out of proportion to the project’s regional or national benefits.

83. While the decisions of earlier Panels are not strictly binding on this Panel, EDS accepts that framing.

⁸⁸ Taranaki VTM FTAA draft decision at [233].

⁸⁹ Taranaki VTM FTAA draft decision at [247].

⁹⁰ Waihi North FTAA decision at Part M, [17].

⁹¹ Taranaki VTM FTAA draft decision at [232], Waihi North FTAA decision at Part C, at [11].

No double-counting of FTAA purpose

84. While the purpose of the FTAA is always relevant to the interpretation of statutory provisions, the requirement to give “greatest weight” to the statutory purpose in section 3 of the FTAA is linked to specific provisions in the FTAA. Relevantly, these are section 81(2) and Schedule 5 (and Schedule 6). These provisions are explicit as to the weighting to be applied to the purpose of the FTAA.
85. By contrast, the requirement to apply greatest weight to the purpose of the FTAA does not apply to section 85(1), (2) or (3). Thus, if granting an approval would breach section 7 of the FTAA, then the approval must be declined under section 85(1)(b). This is mandatory, independent of the section 3 purpose.
86. The same approach applies to section 85(3) (approval may be declined if adverse impacts are sufficiently significant to be out of proportion to regional or national benefits).
87. It would be double-counting, at this point in the decision-making process, to apply greatest weight to the statutory purpose, regardless of the meaning of ‘facilitate’.
88. Instead, the Panel must apply a balancing approach under section 85(3), where adverse impacts are weighed against the project’s regional or national benefits (having regard to proposed consent conditions and modifications or conditions volunteered by the Applicant). The proportionality assessment under section 85(3) does not require or anticipate that greatest weight will be placed upon the purpose of the FTAA. This has already taken place. It does not need to be factored into the scales twice.
89. This reflects the text, meaning and context of the FTAA, including the architecture of the Act, which is explicit when the purpose is to be given greatest weight for the purposes of a decision-making evaluation, such as in Schedules 5 - 7.⁹²
90. Case law on section 104 of the RMA is analogous. While section 104 is stated as being “subject to Part 2 RMA”, the Court of Appeal has read this as requiring a contextual assessment.⁹³ In some circumstances, separate consideration of Part 2 RMA will not add materially to the assessment, or it may be unnecessary to resort to an overall broad assessment in light of the directive policy framework.
91. In summary, it is submitted that, while the purpose of the FTAA is always relevant to the interpretation of statutory provisions, the question of

⁹² Noting that Clause 17(1) is “for the purposes of s 81(2)”; and s 85(3) enables the Panel to decline an approval if, in complying with s 81(2), the Panel forms a view on the matters stated in s 85(3).

⁹³ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZCA 22 at [50] - [53].

weighting and relevance relates to the specific statutory provision in question. The FTAA is explicit where the purpose must receive the greatest weight. It would be double-counting to afford greatest weight when not required by the statutory provisions, on their proper interpretation.

92. Accordingly, once a proportionality assessment under section 85(3) is complete, that is the end of the decision-making line. The FTAA does not envisage or require a panel to then refer back to the purpose of the FTAA and undertake an overall broad judgment that gives greatest weight to the purpose of the FTAA. If the Panel decides that adverse impacts outweigh the benefits (having regard to, *inter alia*, proffered conditions and volunteered amendments) then the purpose cannot trump or override that finding.
93. EDS therefore disagrees with what appears to be a suggestion by the Waihi North FTAA Panel that section 85(3), and the decision-making criteria in the Schedules, should be read together and require something akin to the overall judgement approach.⁹⁴ This is an impermissible ‘blending’ approach.
94. As discussed next, EDS also does not agree with the Waihi North Panel that the FTAA does not include any “bottom-lines” of the kind applied in *King Salmon*.⁹⁵

Bottom-lines in proportionality assessment

95. As set out above, section 85(4) states that, to avoid doubt, the Panel may not form the view that an adverse impact meets the threshold to decline in section 85(3)(b) solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that the Panel must take into account or otherwise consider in complying with section 81(2).
96. It follows that the Panel retains a discretion to decline an approval if it breaches a directive avoidance policy or other provision of the RMA (or other relevant Act) i.e., a policy bottom-line, but only if the breach is accompanied by another adverse impact.
97. Adverse impact is defined by section 85(5) of the FTAA as “any matter considered by the panel in complying with section 81(2) that weighs against granting the approval.”
98. A policy bottom-line can therefore form the basis for declining an approval when accompanied by, for example, an adverse environmental effect. It could also be the basis for decline when accompanied by another adverse impact that arises due to a project being inconsistent with or contrary to a provision of the RMA (or other Act) (i.e., where more than one policy bottom-line is breached).

⁹⁴ Waihi North FTAA decision at Part M at [12a] and [17].

⁹⁵ Waihi North FTAA decision at Part M at [12b].

99. In that regard, EDS disagrees with the Waihi North FTAA Panel that “there are no “bottom lines” in the FTAA of the kind applied in *King Salmon*”.⁹⁶ Provisions and directive policies must still be given their normal interpretation (having regard to purpose, context and text), and a project may well breach a policy bottom-line (such as, for example, the offsetting or compensation principles of the NPS-IB. The bottom-line just needs an adverse impact ‘friend’ in order to reach the section 85(3) threshold.
100. Furthermore, by specifying that a sole or single policy breach is not a basis by itself to decline a project, by deduction the FTAA is anticipating a decline when a project is inconsistent with or contrary to more than one directive avoidance policy, subject to those breaches being sufficiently significant to be out of proportion to the project’s regional or national benefits.
101. This would occur, for example, when a project breaches more than one directive avoidance policy (i.e., in RMA national direction or in another relevant Act) which may result in the permanent loss of irreplaceable or vulnerable biodiversity, such as that with a ‘Threatened’ risk classification, or when that loss is irreversible i.e., the extinction of a species.

BREACH OF TREATY OBLIGATIONS

102. When making its decision, the Panel must comply with section 82 of the FTAA⁹⁷ which requires (among other things) that the Panel consider whether granting the approval would comply with section 7 of the FTAA. Section 7 requires that the Panel “must act in a manner that is consistent with the obligations arising under existing Treaty settlements.” The Panel must decline an approval if it considers that granting it would breach section 7.⁹⁸ In this sense, section 7 “operates as a substantive barrier to approval.”⁹⁹
103. The Taranaki VTM Panel has most recently considered the role of section 82 in decision making:¹⁰⁰

The Panel treats s 82 as important for two related reasons. First, it prevents settlement instruments (and the obligations therein) from being treated as background context only where, under the relevant specified Act, they are intended to have real and practical effect. Second, it informs what kinds of measures could realistically avoid or remedy any inconsistency. Where a settlement instrument is intended to operate in a durable and practical way, the Panel must be satisfied that approval, including any conditions, would preserve that practical

⁹⁶ Waihi North FTAA decision at Part M, at [12(c)].

⁹⁷ FTAA, s 81(2)(c).

⁹⁸ FTAA, s 85(1)(b).

⁹⁹ Taranaki VTM FTAA Proposal, Draft Decision, at [1899].

¹⁰⁰ Taranaki VTM FTAA Proposal, Draft Decision, at [1826].

operation. Where the Panel is not so satisfied, the FTAA requires that approval be declined.

104. When considering whether section 7 was breached, the Taranaki VTM Panel found:

In applying s 7, the Panel has considered whether approval would materially undermine the intended practical operation and integrity of Treaty settlement obligations.¹⁰¹

It is open to the Panel to set conditions to recognise or protect a relevant Treaty settlement. However, the proposed conditions framework and post-consent processes presented by the applicant would not preserve the practical operation and integrity of the affected settlement instruments and the Panel has not identified alternative conditions that would achieve Treaty settlement consistency.¹⁰²

The Panel therefore concludes that conditions would not, in any realistic or lawful sense, cure the inconsistency identified under s 7.¹⁰³

105. In relation to the Project, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Moeraki, Te Rūnaka o Ōtākou, and Hokonui Rūnanga (Kā Rūnaka) have advised: “The Applicant’s assertion that “granting the approvals would not breach Treaty settlements or recognised customary rights” is not accepted. The application may constitute an ineligible activity in terms of potential breaches of Treaty settlements. This is a complex issue, made more difficult by absence of any meaningful dialogue with the Applicant on this point.”¹⁰⁴
106. EDS defers to Kā Rūnaka for further discussion on this matter, but wishes to underscore the importance of section 7 as a legal threshold for decline.

REGIONAL AND NATIONAL BENEFITS

107. When taking into account the purpose of the FTAA, the Panel must assess the extent of the Project’s regional and national benefits.¹⁰⁵ Section 85(3) similarly requires an assessment of the Project’s regional or national benefits.
108. “Significant” is not defined in the FTAA but has been interpreted by the Maitahi Village and Waihi North FTAA Panels to mean something akin to

¹⁰¹ Taranaki VTM FTAA Proposal, Draft Decision, at [1827].

¹⁰² Taranaki VTM FTAA Proposal, Draft Decision, at [1899].

¹⁰³ Taranaki VTM FTAA draft decision, at [1901].

¹⁰⁴ Memorandum of Kā Rūnaka in response to Panel Convenor Directions, 16 January 2026, at [10], available [here](#).

¹⁰⁵ FTAA, s 81(4).

noteworthy.¹⁰⁶ It is “an indication of scale”¹⁰⁷ that requires “an intensely factual determination”.¹⁰⁸ As the Taranaki VTM Panel held:¹⁰⁹

The assessment of the extent of the TTRL project’s benefits, and whether they are significant, is a factual question based on evidence and informed by judgement. That factual assessment is undertaken against a regional or national reference point which asks whether the benefits are significant to the region or to New Zealand. Determining if this threshold is met is context-dependent: what constitutes a significant benefit may differ from one region to the next.

109. Some Panels have taken guidance on what having “significant regional or national benefits” means from section 22 of the FTAA, noting that it is not determinative of benefits. The idea that the mere inclusion of a project in Schedule 2 deems it to have significant benefits has been widely rejected by Panels.¹¹⁰
110. EDS accepts the above analysis and submits that the Panel’s assessment of the Project’s significance or extent of benefits is a merits one, to be determined based on the evidence.
111. “Benefits” is also undefined in the FTAA. EDS submits that a net benefits approach is required by section 85(3), which requires the Panel to assess adverse impacts proportionate to benefits. This requires:
 - a. That where economic benefits are relied upon, the economic disbenefits are accounted for (i.e., a net economic assessment).
 - b. Adverse environmental impacts should be costed where appropriate and discounted from the benefits assessment.
 - c. Where non-market values cannot (or should not) be monetised they should be assessed on the “adverse impacts” side of the section 85(3) ledger. Such impacts would include intrinsic environmental, social and cultural impacts, and any other matter raised that weighs against granting the approval.
112. This avoids double counting costs or impacts in the section 85(3) proportionality assessment.¹¹¹ It also allows for a qualitative analysis of environmental, social and cultural benefits and costs by the Panel, acknowledging that some values are best assessed in this manner. This

¹⁰⁶ Sunfield FTAA decision at [464], Maitahi Village FTAA decision at [515] – [516].

¹⁰⁷ Waihi North FTAA decision at [843].

¹⁰⁸ Maitahi Village FTAA decision at [515] and Waihi North FTAA decision at [844].

¹⁰⁹ Taranaki VTM FTAA draft decision at [83].

¹¹⁰ Sunfield FTAA decision at [462] and Taranaki VTM FTAA draft decision at [84].

¹¹¹ As discussed in Taranaki VTM FTAA draft decision at [88].

approach is consistent with the Supreme Court's decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*,¹¹² as followed by the Waihi North and Taranki VTM FTAA Panels.¹¹³

113. EDS's expert economic evidence demonstrates that:

- a. The economic information provided in the Application cannot be properly interrogated and tested. The Applicant's economic analysis relies on commercial information set out in the Applicant's Pre-Feasibility Study, released to the ASX on 1 July 2025, which is not before the Panel. This means that the following cannot be calculated:¹¹⁴
 - i. The expenses associated with the Project that would contribute to its economic impact.
 - ii. The profit calculations, which affect the calculations of contributions to the Government and GDP.
 - iii. The assumptions regarding direct economic impact, in particular the local economic impact in comparison to national-level multipliers.
 - iv. The assumptions regarding indirect and induced impacts, especially local multipliers compared to national ones.
- b. The flow-on economic impacts of the Project are unclear and one can only make assumptions, or rely on promises, about where the impact will be received – local, regional, national or international.¹¹⁵
- c. With respect to regional benefits:
 - i. Regional displacement impacts have not been fully assessed. The cost of displaced workers (moving from current employment to the mine) has largely been ignored in the Applicant's economic analysis.¹¹⁶
 - ii. The multiplier analysis technique used to assess impacts is a poor choice for analysing the economic impacts of Project because it does not include displacement effects or competition for economic resources.¹¹⁷
 - iii. The geographical designation used for the economic analysis masks impacts on labour and housing shortages. The

¹¹² *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [188] – [192].

¹¹³ Waihi North FTAA decision at [784]; Taranaki VTM FTAA draft decision at [86] – [92].

¹¹⁴ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [53] – [56].

¹¹⁵ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [68].

¹¹⁶ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [57] – [63].

¹¹⁷ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [64] – [67].

Applicant's economic analysis inflates the size of the supposed economic base and downplays the potential economic disruption from the Project.¹¹⁸

- iv. The regional economic impacts are overstated - the mine might generate billions of dollars in local production, but it would not generate that same level of local income. Royalties and taxes go to the Government and net profits mostly flow out of the district.¹¹⁹
- v. An assessment of the possible local economic benefits suggests they are less than \$570 million in total (undiscounted), and risk analysis using the Applicant's data suggests that the profit from the Project could amount to \$500 million in total (undiscounted).¹²⁰
- vi. "At the regional level, the net economic benefit may not be significant or could be negative, because most of the costs are localised while most of the benefits accrue outside the region, and the regional economic displacement has not been considered and is likely to be material."¹²¹

d. With respect to national benefits:

- i. The economic impacts of the Project have not been discounted as is preferred by Treasury, is standard economic practice and is required to account for the time value of money. The impact of this omission is substantial and brings down the Project's GDP impact from \$5.8 billion to \$3.3 billion (an almost 40% reduction).¹²²
- ii. A change in model inputs could dramatically change the economic impacts of the Project. For example, if there was a 25% decline in gold price, which is within the range of accuracy, Project profits could fall from \$2.8 billion to \$0.5 billion.¹²³
- iii. Double-counting ACC payments and PAYE contribute to 1 percent overstatement of the total contribution to the Government.¹²⁴

¹¹⁸ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [69] – [73].

¹¹⁹ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [74] – [76].

¹²⁰ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [140f].

¹²¹ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [25].

¹²² Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [50] – [52].

¹²³ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [77] – [82].

¹²⁴ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [90] – [91].

- iv. Non-market values are not accounted for and, based on the evidence available, are significant. The national adverse impacts could be enough to outweigh national economic impacts if some assumptions about mine performance are too optimistic.¹²⁵
 - v. “At the national level, the economic value of unconsidered costs, such as biodiversity loss and lost amenity value, may be large enough to outweigh gross economic benefits.”¹²⁶
 - e. The economic analysis uses upper limits on what can be expected, consistently take a best-case scenario.¹²⁷ No sensitivity analysis has been undertaken so Project economic risks cannot be assessed.¹²⁸
 - f. The Applicant’s economic analysis does not factor in wind-down costs or post-operational costs associated with long-term maintenance of the site.¹²⁹
114. Overall, EDS submits that the Project’s benefits are overstated, and the potential risks and costs are understated.

ADVERSE IMPACTS

Indigenous biodiversity

115. The Project involves mining 610 hectares of significant indigenous biodiversity and significant habitats of indigenous fauna, which will disappear permanently.
116. While the Application describes this habitat variously as being of variable quality, the Assessment of Ecological Effects (AEE) is clear that the entire 610 hectares “satisfies criteria for recognition as significant indigenous vegetation or significant habitats of indigenous fauna under Appendix 1 of the NPSIB, Schedule 4 of the ORPS and Appendix 2 of the pORPS”.¹³⁰ The Applicant’s Vegetation Values Assessment describes the area as containing “very high ecological value and ecologically significant vegetation communities” which it describes as being “an exceptionally large number”.¹³¹

¹²⁵ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [141].

¹²⁶ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [26].

¹²⁷ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [65].

¹²⁸ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [77] – [82].

¹²⁹ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026 at [83] – [89].

¹³⁰ Alliance Ecology Consulting – Assessment of Ecological Effects, October 2025 (Alliance AEE) at page 79.

¹³¹ RMA Ecology Ltd, Vegetation Values Assessment, August 2025, at page 4.

117. The AEE finds that the removal of this area of significant indigenous biodiversity and habitat will directly result in adverse effects on the following, which are found in the Direct Disturbance Footprint (DDF):
- a. Seven vegetation and habitat types, including over 100ha of mixed depleted herbfield (cushionfield) and grassland which supports several nationally Threatened and At Risk plants.¹³²
 - b. Three wetland types (all natural inland wetlands), which support three Regionally Threatened and Nationally At Risk wetland species and four Regionally or Nationally At Risk wetland species.¹³³
 - c. 48 Regionally or Nationally Threatened or At Risk flora species which represent locally, regionally or nationally significant populations, including two Nationally Threatened species (one Threatened-Nationally Critical species - *Ceratrocephala pungens* - and one Threatened-Nationally Vulnerable species - *Myosotis brevis*)¹³⁴ whose populations the AEE says “represent important strongholds for both species, are important for their long-term persistence, and are ecologically significant at local, regional and national scales”.¹³⁵
 - d. Eleven native species of avifauna, including up to eight Nationally or Regionally Threatened or At Risk species.¹³⁶
 - e. Three native lizard species, two of which are Nationally and Regionally At Risk.¹³⁷
 - f. Ten notable species of invertebrates, including Threatened, At Risk and new species - one of which is At Risk (declining) and was only found in the DDF. Another eight notable species were found in the surrounding area, three of which are Threatened - one Nationally Critical, which is the highest threat category and was previously thought extinct.¹³⁸
118. The Applicant also acknowledges that there is substantial uncertainty as to the extent of adverse effects of the Project on many of these species, and that those effects cannot be avoided, remedied or mitigated. In some cases, those effects cannot be offset or compensated with any level of certainty and, for others, it is clear (and certain) that the adverse effects on several Threatened or At Risk species simply cannot be offset or compensated for.¹³⁹

¹³² Alliance AEE at section 4.1, pages 58 – 60.

¹³³ Alliance AEE at section 4.2, page 60.

¹³⁴ Alliance AEE at section 4.3, page 62 - 63.

¹³⁵ Alliance AEE at section 4.3.2, page 63.

¹³⁶ Alliance AEE at section 5.3, page 71 - 72.

¹³⁷ Alliance AEE at section 5.4, page 73.

¹³⁸ Alliance AEE at section 5.5, pages 74 - 75.

¹³⁹ Alliance AEE, Table 26, pages 149 – 160.

119. The Applicant says it does not need to – and it will not - avoid, remedy, mitigate, offset or compensate for all of those effects under the FTAA, despite the significance of the indigenous biodiversity and habitat, the significance of adverse effects on them and the requirements of the NPS-IB, National Policy Statement for Freshwater Management 2020 (NPS-FM) and the National Environmental Standards for Freshwater (NES-F).
120. Instead, the Applicant relies on the extent of the Project’s regional and national benefits to overcome significant adverse effects of a kind that would, in an ordinary RMA context, simply not pass muster from an ecological perspective. The assessment of ecological effects goes so far as to say that the Application falls short of “good ecological practice” due to the “irreplaceability and vulnerability” of some affected species.¹⁴⁰ Despite that, the Application documents suggest that the offsetting and compensation package “balance most ecological impacts”. The Applicant appears to rely, at least in part, on this “balancing” approach to justify the ecological impacts of the Project.
121. This is an appropriate approach to consideration of the ecological effects as it obscures the assessment required to be undertaken by the Panel. EDS submits that the FTAA requires the Panel to consider, and make a specific finding on, the ecological effects of the Project and to apply the NPS-IB and NPS-FM, even if inconsistency with a policy document is not in and of itself a reason to decline the Application.
122. Those effects (as mitigated via conditions) are then put on the adverse impacts side of the section 85(3) ledger.¹⁴¹
123. The following discussion addresses how EDS considers the Panel should consider the ecological evidence in the context of the FTAA, and in light of the requirements of the NPS-IB and NPS-FM, and Mr Head’s evidence for EDS.

Approach required by NPS-IB

124. The NPS-IB is highly relevant to the Panel’s consideration of the Project. It is one of the matters the Panel must ‘take into account’ when considering whether to grant resource consent approvals sought by the Applicant.
125. The sole objective of the NPS-IB is to maintain indigenous biodiversity so that there is at least *no overall loss* in indigenous biodiversity.¹⁴² This requires:¹⁴³
 - a. the maintenance and at least no overall reduction of all the following:

¹⁴⁰ Alliance AEE, page 176.

¹⁴¹ To the extent that they are not otherwise costed in a full cost benefit analysis (to avoid double-counting), which is generally the case for biodiversity related impacts.

¹⁴² NPS-IB, objective 2.1.

¹⁴³ NPS-IB, clause 1.7.

- (i) the size of populations of indigenous species:
- (ii) indigenous species occupancy across their natural range:
- (iii) the properties and function of ecosystems and habitats used or occupied by indigenous biodiversity:
- (iv) the full range and extent of ecosystems and habitats used or occupied by indigenous biodiversity:
- (v) connectivity between, and buffering around, ecosystems used or occupied by indigenous biodiversity:
- (vi) the resilience and adaptability of ecosystems; and

b. where necessary, the restoration and enhancement of ecosystems and habitats.

126. To achieve this, specified adverse effects on an SNA¹⁴⁴ are to be avoided, including: loss of ecosystem representation and extent; disruption to sequences, mosaics or ecosystem function; fragmentation of SNAs or loss of buffers or connects within an SNA; reduction in the function of an SNA as a buffer or connection to other important habitats or ecosystems; and a reduction in the population size or occupancy of Threatened or At Risk (declining) species that use an SNA for any part of their life cycle.¹⁴⁵
127. The extraction of minerals and ancillary activities is exempt from the avoidance requirement if: it provides significant national or regional benefit; and has a functional or operational need to locate in that particular location; and where there are no practicable alternative locations for the activity.¹⁴⁶
128. EDS accepts that this exemption applies to the Project if the Panel finds that it will have significant national or regional benefits. EDS's evidence shows that is not necessarily the case¹⁴⁷ and that the Project will result in the specified adverse effects referred to above.¹⁴⁸ EDS submits that avoidance, not an effects management approach, is therefore required.
129. In the alternative, if straight avoidance is not required, the effects management hierarchy must be applied. That requires adoption of a cascade of management approaches to address the adverse effects of a proposal. Effects must be avoided, remedied or mitigated (in each instance, where

¹⁴⁴ The Applicant acknowledges that the site meets the criteria of an SNA, despite the planning instruments not having caught up with that status. It appears to accept that the NPS-IB applies on that basis. In any event, the effects management hierarchy applies when there are significant adverse effects on indigenous biodiversity outside an SNA (NPS-IB, clause 3.16).

¹⁴⁵ NPS-IB, clause 3.10(2).

¹⁴⁶ NPS-IB, clause 3.11(1).

¹⁴⁷ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026.

¹⁴⁸ N Head, Statement of Evidence, dated 10 April 2026.

practicable) in that order. Where residual effects that are more than minor still exist, biodiversity offsetting must be provided where possible. Where offsetting is not possible, biodiversity compensation must be provided. Importantly, if compensation is not appropriate, the activity itself must be avoided altogether. This represents an “environmental bottom line” in a *King Salmon* sense i.e., if, after applying the effects management hierarchy, residual effects remain, a resource consent would ordinarily be declined due to the strength of the national policy direction.

130. Principle 2 of each Appendix sets the limits of offsetting and compensation as:

- a. Biodiversity offsetting is not appropriate where the biodiversity values cannot be offset to achieve a net gain (like-for-like quantitative gain), including where:
 - i. residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:
 - ii. effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible:
 - iii. there are no technically feasible options by which to secure gains within an acceptable timeframe.
- b. Biodiversity compensation is not appropriate where biodiversity values are not able to be compensated, including where the matters in (i) – (iii) above apply.

131. The other three principles (principles 4 – 6, Appendices 3 and 4) that the Applicant must comply with are:

- a. Additionality - the gain must be over and above what would ordinarily occur and be in addition to gains resulting from any other measures to remedy or mitigate;¹⁴⁹
- b. Leakage - offsetting or compensation must avoid harming other biodiversity;¹⁵⁰
- c. Long-term outcomes – offsetting / compensation is managed to secure outcomes that last at least as the biodiversity is impacted and preferably in perpetuity and consideration must be given to funding, location, management and monitoring.¹⁵¹

¹⁴⁹ NPS-IB, principle 4 - Appendices 3 and 4.

¹⁵⁰ NPS-IB, principle 5 - Appendices 3 and 4.

¹⁵¹ NPS-IB, principle 6 - Appendices 3 and 4.

132. The Applicant must also demonstrate that it has regard to the remaining principles as appropriate:

- a. Landscape context - offsetting or compensation should be undertaken where it results in the best ecological outcome and preferably close to the impact site,¹⁵²
- b. Time lags - delay in achieving the gain resulting from offsetting or compensation should be minimised and should occur within the consent period, but no longer than 35 years (time lags);¹⁵³ and
- c. Science, mātauranga Māori, tangata whenua and stakeholder participation, and transparency - offsetting and compensation design should be informed by science and mātauranga Māori, provide opportunities for effective and early tangata whenua and stakeholder participation and be undertaken in a transparent and timely manner.¹⁵⁴

133. In relation to compensation:

- a. Any trading up must demonstrate that the biodiversity gains are demonstrably greater or higher than those lost – but the values lost are not to Threatened or At Risk (declining) species or those considered vulnerable or irreplaceable;¹⁵⁵ and
- b. A financial contribution is only to be considered if there is no effective option available for delivering biodiversity gains on the ground and it directly funds an intended biodiversity gain or benefit that complies with the remainder of the compensation principles in Appendix 4.¹⁵⁶

134. The Applicant is required to demonstrate:¹⁵⁷

- a. How each step of the effects management hierarchy will be applied; and
- b. If biodiversity offsetting or compensation is applied, how it has complied with principles 1 - 6 in the Appendices and had regard to the remaining principles in Appendix 3 and 4, as appropriate.

135. Meeting these requirements and applying the offsetting and compensation principles is not to be reduced “to a “tick box” or simple yes/no exercise”,

¹⁵² NPS-IB, principle 7 - Appendices 3 and 4.

¹⁵³ NPS-IB, principle 8 - Appendices 3 and 4.

¹⁵⁴ NPS-IB, principles 9, 10 and 11 - Appendices 3 and 4.

¹⁵⁵ NPS-IB, principle 12, Appendix 4.

¹⁵⁶ NPS-IB, principle 13, Appendix 4.

¹⁵⁷ NPS-IB, clause 3.10(4).

rather the “inter-relationship of complex ecological terms within the principles” requires “the careful application of judgement based on a thorough analysis of the expert evidence available to a decision maker.”¹⁵⁸ Meeting these principles goes to the heart of meeting the objective of the NPS-IB of no net loss.¹⁵⁹

136. Finally, the NPS-IB requires that a precautionary approach must be adopted when considering proposed activities where the effects on indigenous biodiversity are uncertain, unknown, or little understood but those effects could cause significant or irreversible damage to indigenous biodiversity.¹⁶⁰

Approach required by NPS-FM and NES-F

137. The Panel must also take into account the NPS-FM when considering whether to grant resource consent approvals sought by the Applicant. In terms of ecology, the provisions relating to natural inland wetlands are relevant to the Panel’s consideration.
138. The NPS-FM prioritises the health and well-being of water bodies and freshwater ecosystems above providing for the economic wellbeing.¹⁶¹ In doing so, there is to be no further loss of extent of natural inland wetlands, their values are to be protected and their restoration promoted.¹⁶²
139. The proposed Otago Regional Policy Statement (pORPS) gives effect to this directive in objectives LF-FW-O9-Wetlands “no decrease, and preferably an increase” in natural inland wetlands and objective 10.4.8 “the loss of natural inland wetlands is avoided, their values protected, and their restoration promoted.”¹⁶³
140. Activities necessary for extraction of minerals and ancillary activities are exempt from this requirement if they will provide significant national or regional benefits, there is a functional or operational need for the activity to be done in that location, and effects “will be” managed through applying the effects management hierarchy.¹⁶⁴
141. Consents are required under the NES-F on the same terms for these activities in proximity to wetlands.
142. As noted for analogous provisions the NPS-IB, EDS’s evidence shows that the Project will not provide national or regional benefits.¹⁶⁵ EDS submits that

¹⁵⁸ *Friends of Conical Hill Inc v Hurunui District Council* [2024] NZEnvC 324 at [216] – [217].

¹⁵⁹ *Friends of Conical Hill Inc v Hurunui District Council* [2024] NZEnvC 324 at [215].

¹⁶⁰ NPS-IB, policy 3 and clause 3.7.

¹⁶¹ NPS-FM, objective 2.1.

¹⁶² NPS-FM, policy 6.

¹⁶³ H.02 Full Statutory Provisions Table, available [here](#).

¹⁶⁴ NPS-FM, clause 3.22(e).

¹⁶⁵ Dr Kaye-Blake, Statement of Evidence, dated 10 April 2026.

avoidance of wetland loss, not an effects management approach, is therefore required.

143. In the alternative, the effects management hierarchy in the NPS-FM is substantially the same as the NPS-IB, and Appendices 6 (biodiversity offsetting) and 7 (biodiversity compensation) set out generally the same principles. Therefore, if offsetting and compensation are not appropriate for aquatic biodiversity the activity itself must be avoided.¹⁶⁶ This too represents an environmental bottom line in the *King Salmon* sense.

Assessment of ecological effects

144. The AEE (which relies upon a range of other assessments) identifies the entire area to be mined as ‘significant’ in terms of the NPS-IB and operative and proposed Otago Regional Policy Statement criteria. It then adopts ecological impact guidelines developed by the Environment Institute of Australia and New Zealand (EIANZ) (referred to in the application documents as EclAG) to assess ecological effects.
145. This approach involves assigning ecological value (‘negligible’ to ‘high’) to species and habitat values, before assessing the magnitude of ecological effects (after measures to avoid, minimise or remedy adverse effects, from ‘positive’ to ‘very high’), and then assessing the overall level of effect (again, after measures to avoid, minimise or remedy adverse effects, from ‘positive’ to ‘very high’). The assignment of ecological value and assessment of the magnitude of effects has informed the extent and nature of offsetting and compensation measures for effects which reach a ‘moderate’ level or higher.
146. Based this approach, it can be concluded from the AEE that:
- a. Rehabilitation outcomes for species, designed to remedy adverse effects, are subject to time lags and natural variability with an inherent degree of uncertainty.¹⁶⁷ While the Applicant expects half of the Threatened and At Risk flora species (26 flora species) can be rehabilitated within 35 years, rehabilitation of the other half (25 flora species) is either uncertain (5 species) or not possible (20 species).¹⁶⁸
 - b. For the majority of those notable flora species for which adverse effects cannot be remedied, the magnitude of residual effects (that would need to be offset or compensated for under the NPS-IB) remains moderate to very high.¹⁶⁹

¹⁶⁶ NPS-FM, clause 3.21(1)(f).

¹⁶⁷ Alliance AEE, section 7.3.2.2.4, page 102.

¹⁶⁸ Alliance AEE, Table 15, pages 105 – 109.

¹⁶⁹ Alliance AEE, Table 17, pages 113 – 118.

- c. The magnitude of residual effects on birds, lizards and invertebrates ranges from negligible to very high,¹⁷⁰ with half of all invertebrate species being affected to a 'moderate' to 'very high' level, although the analysis signals significant uncertainty around this assessment.¹⁷¹
- d. There are only four ecological values for which offsetting is appropriate and offsetting is not appropriate for the majority of ecological values affected, particularly because net gain outcomes could not be achieved with any certainty.¹⁷²
- e. Where compensation measures have been applied to the ecological values that could not be offset, they could not be modelled due to uncertainty of outcomes.¹⁷³
- f. Irrespective of all management measures, including offsetting and compensation, there will be net losses experienced by: four of eleven vegetation / habitat types; 24 of 40 plant species which were assessed as having moderate or higher residual effects (with one species too uncertain to say) and three lizard species. There is too much uncertainty to assess whether any invertebrate species will experience net gains or losses.¹⁷⁴
- g. Following this analysis, the AEE concludes that offsetting and compensation principles of the NPS-IB and NPS-FM are not all met by the approach taken by the Applicant.¹⁷⁵ In particular, even after offsetting and compensation, the AEE acknowledges that there will be adverse effects that remain unaddressed on five ecological values, including cushionfields, two Nationally Threatened plant species¹⁷⁶ for which this site has been recognised as an important national stronghold and two newly discovered species of invertebrates.¹⁷⁷ This represents a breach of the environmental bottom lines established by the NPS-IB and would, in an RMA context, require the application to be declined, by avoiding the activity.

147. It is noted here that Table 26 of the AEE sets out expected biodiversity outcomes for vegetation and habitats within 35 years of approval being granted after offsetting and compensation. That table identifies numerous species as experiencing a "net loss" and many others where the outcomes are uncertain. It is not clear how Table 26 (which appears to be a summary of expected outcomes showing that offsetting and compensation will not address

¹⁷⁰ Alliance AEE, Tables 18 – 20, pages 125 – 133.

¹⁷¹ Alliance AEE, Table 20, pages 128 – 133.

¹⁷² Alliance AEE, section 8.2.2, pages 140 – 141.

¹⁷³ Alliance AEE, section 8.2.2, page 141.

¹⁷⁴ Alliance AEE, Table 26, pages 149 – 160.

¹⁷⁵ Alliance AEE, Table 27, pages 161 – 165 and Table 28, pages 167 - 170.

¹⁷⁶ *Myosotis brevis*; *Ceratocephala pungens*.

¹⁷⁷ *Harpalus* (ground beetle); *Inophloeus* (weevil).

effects on a wide range of species) relates to Table 29 (which only identifies five ecological values that will not be addressed by the offsetting and compensation package).

148. The AEE “sets aside” those unaddressed residual effects when concluding that *“the compensation package is considered appropriate and well-designed to address ecological effects”*.¹⁷⁸ Taking into account all effects of the Project, the AEE concludes that the remaining adverse effects are significant. It is worth setting out that conclusion in full.¹⁷⁹

The residual adverse effects after the full effects management hierarchy has been applied remain significant despite this package. While successful outcomes from the 6+ years of applied cushionfield and rare spring annual research may lessen this scale of residual effect, even that will not balance it entirely.

Similarly, because of the nature of significant residual effects remaining after minimisation, remediation, offsetting and ecological compensation, there is no ecological action that can provide a balancing benefit with certainty. The financial compensation package for ecological works offsite can provide substantial positive benefits but must be regarded as dissimilar and in ecological terms cannot provide a compensatory or commensurate benefit that balances these significant residual losses.

149. The word “balance” appears here three times in two paragraphs. The term similarly appears throughout the AEE and legal overview in relation to ecological effects. There is nothing in either the NPS-IB or the NPS-FM that suggests it is appropriate to “balance” ecological effects – they are to be avoided, remedied, mitigated, offset or compensated. Where they are not, they must be avoided.
150. The Panel will need to consider, when undertaking its section 85(3) assessment, whether the adverse ecological impacts are sufficiently significant to be out of proportion with the national and regional benefits.
151. The upshot of the Applicant’s own evidence is that the Panel can confidently make a finding that the ecological effects of the Project are significant, and there are significant uncertainties associated with the proposed effects management regime. However, Mr Head’s evidence for EDS demonstrates that fundamental flaws in the approach to the ecological assessment mean that it does not provide a “reliable or transparent evaluation of the ecological consequences of the proposal”¹⁸⁰ and ecological effects may be even more significant than assessed by the Applicant.

¹⁷⁸ Alliance AEE, section 8.7.2, at page 175.

¹⁷⁹ Alliance AEE, section 8.7.2, page 176.

¹⁸⁰ N Head, Statement of Evidence, dated 10 April 2026 at [37].

152. His key concerns with the assessment of ecological effects are that:
- a. There is no comprehensive assessment of non-vascular plants (which can be important components of dryland ecosystems), no comprehensive survey of riparian margins and the spring annual surveys do not show geographic extent of survey coverage;
 - b. The ecological values of the site are likely to be understated using the EclAG approach, which breaks down significant sites into individual attributes, re-scores those against non-statutory (i.e., non NPS-IB) criteria and then combines those individual scores again into an “average” score; and
 - c. The magnitude of ecological effects are similarly downgraded using the EclAG approach, particularly as a result of considering factors that might remedy or mitigate those effects before quantifying the effect itself – which effectively represents “double counting” of mitigation measures and is also particularly an issue where mitigation is uncertain, delayed or not will not result in an equivalent ecosystem.
 - d. The combination of these factors leads to an assumption that offsetting or compensation is feasible in terms of the principles of the NPS-IB and NPS-FM, when those effects exceed the limits to offsetting and compensation and should therefore be seen as residual effects that must be avoided. He has undertaken a revised assessment which shows that offsetting is only appropriate for exotic pasture herbfield and not the other nine ecological management units.
153. In the context of the FTAA, this means that the Panel cannot be confident that the Applicant has accurately quantified the significant adverse effects that remain after all measures have been applied to avoid, remedy, mitigate, offset or compensate for those effects. The full extent of loss cannot be accurately totaled.
154. Notwithstanding, the evidence is clear that in this case, in the context of irreplaceable or vulnerable significant indigenous biodiversity and possible extinctions, the adverse ecological effects are sufficiently significant to be out of proportion to the Project’s benefits.

Approach to offsetting and compensation

155. The AEE concludes that the proposed offsetting and compensation is “generally consistent with the suite of offsetting and compensation principles set out in the NPSIB”.¹⁸¹ This conclusion is inconsistent with the Applicant’s

¹⁸¹ Alliance AEE, section 8.6.1, page 161.

own analysis set out in Table 27 of the AEE, which itself admits that the Project as currently designed cannot meet the offsetting or compensation principles in the NPS-IB.

156. Importantly, the proposal cannot comply with the limits to offsetting or compensation set out in principle 2 of either Appendix. The activity must therefore be avoided.
157. Mr Head raises a number of concerns with the biodiversity offsetting and compensation package, beyond those already addressed about the feasibility of offsetting and compensation at all. They include:
 - a. Offsetting and compensation has been conflated by the Applicant; it is not clear what effects are being offset and what are being compensated for, and the effects management hierarchy has not been clearly applied in a step-wise manner;
 - b. The offsetting / compensation package falls short of the requirement to meet the principles in Appendix 3 and Appendix 4; and
 - c. There is a great deal of uncertainty around the outcomes that can be achieved by the offsetting / compensation package, which relies on assumptions as to gains that can be achieved and future research - where the ability to restore ecosystems (such as the dryland ecosystems) is unproven and uncertain.
158. In addition, there is some question as to how the proposed financial contribution to the DOC is to be treated in the context of the NPS-IB and the Panel's overall decision-making function. On the one hand, the AEE notes that is not part of the biodiversity and compensation package and must be considered separately.¹⁸² On the other, it is referred to as justification for meeting Appendix 4 compensation principles.¹⁸³
159. The Panel should be clear that the financial contribution to DOC is not compensation that can be relied upon in the context of meeting the requirements of the NPS-IB, largely due to the inadequate levels of uncertainty, acknowledged by the Applicant,¹⁸⁴ as to the type, quantum and location of benefits that might arise.
160. EDS submits that, at best, the financial contribution can be considered a positive effect of the Project in terms of section 104(1)(a) of the RMA (which is to be taken into account under Schedule 5, clause 17(1)(b)), noting that the extent of positive effects that might arise from the contribution is uncertain

¹⁸² Alliance AEE, section 8.5, page 160, footnote 76.

¹⁸³ Alliance AEE, Table 27, page 164.

¹⁸⁴ N Head, Statement of Evidence, dated 10 April 2026 at [90] – [94].

and should be considered in that context. We understand that is the approach now being taken by the Applicant.¹⁸⁵

Appropriateness of mining Come in Time (CIT) pit

161. The location of the Come in Time (CIT) pit is acknowledged as being the site of two nationally threatened species, the adverse effects on which will be permanent and not able to be addressed through application of the effects management hierarchy.
162. Mr Head notes that the population of *Ceratocephala pungens* on the mine site is of exceptional conservation importance, representing one of the largest remaining populations in New Zealand, and this habitat is “*effectively irreplaceable, and its loss cannot realistically be offset or compensated*”.¹⁸⁶ This is not disputed by the Applicant.
163. DOC says that for this species there is a high risk of extinction as the covenant area contains its national stronghold.¹⁸⁷
164. The Applicant proposes that the CIT pit be delayed until research is carried out on other populations of the two threatened species and the potential for successful re-propagation, with the pit to only proceed if the population in the CIT pit area is shown to be less than 1% of the total population across the wider ecological district.
165. The fact that the Applicant is prepared not to mine the CIT pit demonstrates that effects on the ecologically significant cushionfields in that location can practically be avoided in terms of the effects management hierarchy.
166. A key question for the Panel therefore will be whether the CIT pit should be mined at all in light of the national significance of the cushionfield habitat, the significance of the material effects on it, and the inability to address those effects. EDS submits that it should not.

Conditions

167. The Application proposes a complex suite of management plans for the purposes of managing ecological effects. The conditions requiring those management plans contain little in the way of detailed and appropriate requirements to meet specified ecological outcomes. For example, while Condition 102 of the land use consent conditions requires the Biodiversity Outcome Monitoring Plan to include the “limits and standards” set out in that condition, the condition contains “targets” rather than limits or standards. It

¹⁸⁵ As confirmed by Counsel for the Applicant during the Project Overview Conference, see Mr Leckie at 35:29: “I would describe it as a positive effect. It’s not compensation or offsetting in the traditional RMA sense.”

¹⁸⁶ N Head, Statement of Evidence, dated 10 April 2026 at [31].

¹⁸⁷ DOC section 51 Conservation Revocation Report, at [4.8].

is not clear that there is a requirement to meet those targets, or any consequence of not meeting them. The condition sets out biodiversity outcomes that are “sought” rather than required and only requires the consent holder to “use best endeavours” to enhance native biodiversity.

168. Mr Head’s evidence is that the lack of binding conditions that secure the ecological outcomes anticipated by the effects assessment increases the risk of ecological loss without effective regulatory control.¹⁸⁸
169. This approach results in yet another layer of uncertainty as to the robustness of the assessment of ecological effects. EDS submits that this is a factor the Panel should take into account when quantifying the adverse impacts of the proposal, which requires the Panel to take into account conditions that mitigate those effects. In other words, the Panel should be careful taking into account conditions that do not ensure that the ecological outcomes anticipated will in fact eventuate.
170. Mr Head suggests that, if the proposal goes ahead in whole or part, the management plans need clear and measurable ecological outcomes, including enforceable performance standards and limits. He also recommends that an ecological expert panel be established to advise the councils on ecological management plans, outcomes and ongoing review of management plans and conditions.
171. In particular, the CIT pit should not be mined (at all, but alternatively) without independent review of research and findings. EDS is particularly concerned, for example, that the CIT pit could be mined if the spring annual population in the pit can be demonstrated as less than 1% of the population in the wider Dunstan Ecological District by identifying further spring annual populations in part of the district and then extrapolating those results across the district (see Condition 111 of the land use consent conditions). Given the ecological significance of the spring annual population, EDS submits that this type of approach requires additional scrutiny and that, even if it is demonstrated that the population is less than 1% of the wider ecological area, the significance of the existing population is not diminished.

Summary

172. The Project is required to avoid net loss of indigenous biodiversity because it does not have national or regional benefits or, in the alternative, it does not comply with the offsetting or compensation principles of the NPS-IB and must be avoided for failure to comply with the effect management hierarchy. It does not take a precautionary approach. The Project is therefore inconsistent with or contrary to the NPS-IB.

¹⁸⁸ N Head, Statement of Evidence, dated 10 April 2026 at [104].

173. While the Application suggests in various places that ecological effects are “balanced” and the principles of the NPS-IB are “generally met”, this is not what the FTAA requires. Non-compliance with the NPS-IB is not a trivial matter than can be brushed aside under the FTAA simply because greater weight is to be given to the purpose of the FTAA and approval can only be declined if effects are sufficiently significant to be out of proportion to the benefits. Rather, the Panel must consider the requirements of the NPSIB as they apply under the RMA before engaging in any weighting exercise with the purpose of the FTAA. The fact that the NPS-IB would require this application to be declined is a relevant matter for the Panel to take into account.
174. Similarly, the Project is inconsistent with or contrary to the NPS-FM because it will result in the loss of extent of inland natural wetlands and cannot comply with the offsetting or compensation principles of the NPS-FM.
175. These are of the type described above at [95] to [101]. The Panel has a discretion to decline the Application based on them (collectively, not individually). EDS submits that the breaches are material in that they result in the permanent loss of irreplaceable and vulnerable nationally and regionally significant indigenous biodiversity, including wetlands, and may result in possible species extinctions.
176. These are all adverse impacts sufficiently significant to be out of proportion to the Project’s overstated benefits and should, EDS submits, trigger a decline under section 85(3).
177. EDS submits that inadequacies and uncertainties associated with the Applicant’s ecological assessment further adds to these adverse impacts. The Panel cannot be confident that the true impact of the ecological effects of the Project are properly understood. This has knock-on effects for the application of the effects management hierarchy and therefore to application of offsetting and compensation.
178. The conditions currently proposed by the Applicant do not provide sufficient certainty that the ecological outcomes upon which the ecological assessment relies will eventuate. The adaptive management approach proposed by the Applicant should be rejected in light of the nationally and regionally significant indigenous biodiversity values present and the material risks posed to those ecosystems, habitats and species.
179. In light of the above, EDS submits that anticipated expert conferencing will need to address:
 - a. The methodology adopted to undertake the ecological effects assessment;
 - b. Identification of ecological effects and their significance;
 - c. Application of the effects management hierarchy;

- d. Consistency with offsetting and compensation principles;
- e. Quantification of residual effects after offsetting and compensation;
- f. Appropriateness of mining the CIT pit from an ecological perspective; and
- g. Appropriate conditions that provide certainty of ecological outcomes if the Project were to go ahead.

180. EDS estimates this caucusing could take up to 3 days.

Hydrology and geochemistry

181. The Project requires extensive water management, including the taking of groundwater, dewatering of mine pits, diversion of clean water (both temporary and permanent), recycling of contaminated mine water (referred to in the application as “mine impacted waters”), treatment of contaminated mine water (including via a passive treatment system) and related compliance monitoring. Heavy reliance is placed on a water management plan and an adaptive management approach.

182. The potential adverse impacts, without appropriate conditions to ensure that effects on water quality and water quantity are properly managed, are significant. They include impacts on existing consent holders to continue to access water from bores and contamination of groundwater and surface water (including the Lindis River and potentially even the Mata au Clutha River) with contaminants such as arsenic, sulfate and trace metals.

183. Impacts would continue beyond the operational phase of the mine, including ongoing generation of contaminated mine water from the site and the perpetual existence of two pit lakes in the upper catchment.

184. The Applicant asserts that:

- a. Existing permit holders will be able to access their consented allocation in full throughout the life of the mine, and the consents sought by the Applicant will be able to be exercised alongside existing consents (assisted by augmentation of surface flow in Shepherds Creek and Rise and Shine Creek);¹⁸⁹ and
- b. The environmental risks associated with contaminated mine water are understood and can be successfully managed via the processes, engineering controls and adaptive management processes set out in the Water Management Plan.¹⁹⁰

185. EDS’s evidence clearly demonstrates that the technical information provided in the Application is characterised by insufficient information and data. This

¹⁸⁹ A.02B Legal Overview, at [128], available [here](#).

¹⁹⁰ A.02B Legal Overview, at [135], available [here](#).

includes low confidence modelling, and considerable uncertainty that the extensive water issues can be appropriately managed to avoid potentially significant, long-term and irreversible effects on groundwater and surface water hydrology, and water quality in both aquifers and surface water – including the Lindis River and potentially even the Mata au Clutha River.

Statutory framework

National direction

186. The NPS-FM and the National Environmental Standards for Freshwater Management (NES-F) are highly relevant to the Panel’s consideration of the water-related aspects of the Project. The NPS-FM is addressed at [137] – [143] above of these submissions in relation to inland natural wetlands.
187. As discussed, the NPS-FM is a relevant consideration for the Panel under clause 17 of Schedule 5. It’s overarching objective is to prioritise the health and well-being of water bodies and freshwater ecosystems. Relevant policies include:
- a. Policy 3 – integrated management of freshwater that considers effects on a whole-of-catchment basis, including effects on the receiving environment; and
 - b. Policy 6 – there is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted (addressed above).
188. In addition, clause 1.6 requires the use of “best information” in giving effect to the NPS-FM. This means that decision makers must, if practicable, use complete and scientifically robust data.¹⁹¹ In the absence of complete and scientifically robust data, the best information may include modelling, partial data, local knowledge and other information – but the decision maker must prefer sources of information that provide the greatest level of certainty and take all practicable steps to reduce uncertainty.¹⁹²

Section 107 RMA

189. Relevant to the discharge of contaminants to water, or land where it may enter water, section 107 of the RMA precludes the grant of consent if, after reasonable mixing, the contaminant or water discharged is likely to give rise to a range of effects, including rendering freshwater unsuitable for the consumption by farm animals or significant adverse effects on aquatic life.

¹⁹¹ NPS-FM, clause 1.6(1).

¹⁹² NPS-FM, clause 1.6(2).

Section 127B

190. Relevant to the approval sought to take groundwater, section 127B of the RMA specifically precludes the granting of consent to take or use water under the Otago Regional Plan for a duration exceeding 6 years. The only exception applies to hydro-electricity generation infrastructure specifically listed in the regional plan. Section 127B explicitly overrides any provision in the regional plan that applies to the duration of a water take or use. Consideration of section 127B under the FTAA is discussed below in the 'Consent Conditions' section of these comments.

Assessment of effects on water quality and water quantity

191. EDS's groundwater hydrology, geochemistry and water quality evidence paints a consistent picture – the Applicant has not undertaken sufficient work to demonstrate to the Panel that water management measures proposed are adequate to responsibly manage the potential effects of a mine of this size and scale at this location.
192. The result is that there is an excessive amount of uncertainty as to the effects of the proposal on water quality over the long term, and on the hydrological system, including effects on stream depletion and wetlands.

Lack of data, appropriate modelling and assessment

193. There is a fundamental lack of data, appropriate modelling, and assessment to support the assertions made by the Applicant that the water management proposed, including mitigations, will result in acceptable outcomes.
194. EDS's evidence shows that:
- a. There has been limited hydrological data collection,¹⁹³ there is no robust conceptual model of groundwater flows near the pits and mine waste storage facilities¹⁹⁴ and cumulative effects of drawdown from dewatering are not assessed,¹⁹⁵ and information relating to surface water/ groundwater connection and transport of seepage is lacking.¹⁹⁶
 - b. This leads to high levels of uncertainty in conceptualisation of groundwater flows, surface water/ groundwater interaction and solute transport at the site, such that planning for monitoring and mitigation of effects is also uncertain.¹⁹⁷

¹⁹³ Dr Morgan, Statement of Evidence dated 10 April 2026, at [19] – [37].

¹⁹⁴ Dr Morgan, Statement of Evidence dated 10 April 2026, at [50].

¹⁹⁵ Dr Morgan, Statement of Evidence dated 10 April 2026, at [55].

¹⁹⁶ Dr Morgan, Statement of Evidence dated 10 April 2026, at [48].

¹⁹⁷ Dr Morgan, Statement of Evidence dated 10 April 2026, at [19].

- c. The limited availability of data limits the reliability of the numerical groundwater model that assesses flow to mining pits, drawdown from pit dewatering and stream depletion¹⁹⁸ and the steady-state modelling approach has prevented the assessment of changes in groundwater levels and stream depletion over time.¹⁹⁹
- d. Limited data means the numerical groundwater model is a Class 1 low confidence model (normally used for low-risk developments) according to indicators from the Australian Groundwater Modelling Guidelines.²⁰⁰
- e. There has been no assessment of hydrogeology in the vicinity of the wetlands, including those assessed as being of high value, and mitigations proposed are uncertain.²⁰¹
- f. Significant limitations in modelling (acknowledged by the Applicant) mean that a credible prediction of pit lake water quality has not been undertaken – water quality is likely incorrectly predicted and underestimated.²⁰²
- g. There is minimal information relating to shallow hydrogeology at the site and limited assessment of seepage risk – those assessments are proposed (inappropriately) to be deferred to after mining commences.²⁰³
- h. Testing of effects of the bore water take does not meet the minimum requirements required by Otago Regional Council or test for cumulative drawdown effects.²⁰⁴

195. Professor Webster-Brown draws comparisons with the quality of information used to assess both the Martha Pit mine at Waihi (which is comparable in size to the RAS pit lake),²⁰⁵ and the standard of mitigation (i.e., liners for the TSF, waste rock and rock stockpiles) for the extension of the Waihi North mine.²⁰⁶ The information and mitigation provided in support of this application falls well below the level of information and mitigation available for the Waihi Martha and Waihi North mines and, in her view, a similar level of detailed assessment is required.²⁰⁷

¹⁹⁸ Dr Morgan, Statement of Evidence dated 10 April 2026, at [38].

¹⁹⁹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [41] and [63] – [65].

²⁰⁰ Dr Morgan, Statement of Evidence dated 10 April 2026, at [42] and [70] – [72].

²⁰¹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [81] and [82] – [93].

²⁰² Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [22] – [35].

²⁰³ Dr Morgan, Statement of Evidence dated 10 April 2026, at [97].

²⁰⁴ Dr Morgan, Statement of Evidence dated 10 April 2026, at [129] – [140].

²⁰⁵ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [34].

²⁰⁶ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [50].

²⁰⁷ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [35].

196. The limitations in the data, modelling and appropriate assessment means that:
- a. It is likely the groundwater model underestimates flow to the pits, drawdown and stream depletion.²⁰⁸
 - b. It is likely that the impact on wetlands will be irreversible and result in their permanent loss.²⁰⁹
 - c. There is a risk that dewatering will change groundwater levels and flow patterns such that contaminated groundwater will flow away from planned interception.²¹⁰
 - d. Potential for groundwater contamination in all receiving environments has not been assessed appropriately.²¹¹
 - e. Predictions of arsenic adsorption in the seepage systems of the TSF and ELFs are unrealistic and incorrect, such that there is a major risk of significant arsenic emission into the wider environment, via surface water, shallow groundwater and wind.²¹²
 - f. Contaminants leaving the mine site bound to suspended sediments would be uncontrolled and undetected by compliance monitoring.²¹³

High risk of contaminants impacting water quality

197. Dr Morgan considers that if unrecovered seepage of contaminants flow into Shepherds Creek and the Ardgour Aquifer, it is very likely to adversely impact groundwater users and the Lindis River.²¹⁴
198. Professor Webster-Brown considers that seepage through the base of the tailings storage facility, ELFs and waste rock stacks is likely, given that there are no liners proposed, and the potential for contamination of shallow groundwater and spring-fed streams is high.²¹⁵ She notes that both seepage from the ELFs and water in the pit lakes are predicted to have higher contaminant concentrations than the water quality compliance limits proposed by the Applicant for surface water and groundwater for a range of

²⁰⁸ Dr Morgan, Statement of Evidence dated 10 April 2026, at [43] and [57] – [58].

²⁰⁹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [81] – [93] and [98] – [100].

²¹⁰ Dr Morgan, Statement of Evidence dated 10 April 2026, at [95].

²¹¹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [116].

²¹² Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [51] – [62] and [71] – [77].

²¹³ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [77].

²¹⁴ Dr Morgan, Statement of Evidence dated 10 April 2026, at [116] – [128].

²¹⁵ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [20(b)].

contaminants, including arsenic, iron and nitrate and, for some contaminants, will remain above those limits for over 100 years.

199. While it is proposed to treat contaminated seepage first via an active treatment plant, followed by passive treatment, Dr Webster-Brown holds serious concerns about this approach. She considers reliance on passive treatment in the longer term poses a “significant environmental risk”, citing examples where passive treatment approaches have not been successfully implemented.²¹⁶ She emphasises the need for clarity around ongoing responsibility for maintenance of water treatment systems and addressing any environmental issues that may arise if the passive system does not perform effectively.

Adaptive management approach inappropriate

200. Dr Morgan and Professor Webster-Brown both raise concerns about the adaptive management approach being proposed. Neither consider that an adaptive management approach is appropriate for water management at this site.
201. Professor Webster-Brown considers that uncertainties around percolation rates through the waste piles and the poor water quality predicted for the seepage (and uncertainties in those predictions), adaptive management is inappropriate. She notes that liners cannot be retrospectively fitted to the TSF and ELFs if significant seepage loss is identified.²¹⁷ She says:²¹⁸

Cumulatively, the uncertainties and assumptions being made in the application greatly erode my confidence that the proposed mine could operate in this catchment without leaving a legacy of contaminated surface and groundwater for the community to live with.

202. Dr Morgan’s view is expressed as follows:²¹⁹

...proposed monitoring is inadequate, mitigation measures are defined in only broad terms and there is ambiguity in descriptions of the remedial actions and timing of those actions should trigger levels be exceeded. There is no reassurance of accountability and public access to performance monitoring data. Overall, the water management plan employs an adaptive management framework, but suitability of adaptive management of groundwater effects where lag times are long (in the order of years to decades) and effects are likely permanent is questionable. A precautionary approach is recommended.

²¹⁶ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [63] – [70].

²¹⁷ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [49].

²¹⁸ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [93].

²¹⁹ Dr Morgan, Statement of Evidence dated 10 April 2026, at [142].

Panel's consideration of hydrological evidence

203. The Panel simply cannot, with any confidence, find that the adverse impacts of the proposed mine on groundwater and surface water are acceptable in light of the serious deficiencies in the Applicant's evidence.
204. EDS submits that, on the hydrological and geochemical evidence alone, the potential adverse impacts of the mine are sufficiently significant to be out of proportion to the project's benefits because on the available information:
- a. The potential for contamination of groundwater and surface water, with contaminants such as arsenic, in a manner that is long-term and irreversible, is high;
 - b. The potential for effects on the ability of existing consent holders to continue to take groundwater is high;
 - c. The potential for complete drainage and loss of high value wetlands is high;
 - d. Inadequacy of information is a reason for declining a consent application under section 104(6) of the RMA, which is an adverse impact the Panel must take into account;
 - e. Section 107 precludes consents from being granted where a discharge would render freshwater unsuitable for the consumption by farm animals or significant adverse effects on aquatic life, which is an adverse impact the Panel must take into account; and
 - f. The proposal is inconsistent with policies in the NPS-FM, including the directive policy to avoid any further loss of extent of wetlands and to use best available information, which is an adverse impact the Panel must take into account.
205. The proposed conditions, including an adaptive management approach to water management, are entirely insufficient to mitigate any of these adverse impacts. This proposal is not saved by either those conditions, or the national or regional benefits asserted by the Applicant.
206. If the Panel is minded to provide the Applicant with the opportunity to fill gaps in the information provided, EDS submits that it should seek the further information identified in the statements of Dr Morgan and Professor Webster-Brown prior to any caucusing, which would be ineffective and inefficient until that information is made available. EDS estimates this caucusing could take up to 3 days.

207. Even in the event that the extensive information gaps in the application are filled to the Panel's satisfaction, EDS submits that:
- a. An adaptive management approach is inappropriate given the severe and irreversible consequences for people and the environment if the measures proposed by the Applicant are ineffective. Liners should be required as recommended by Professor Webster-Brown.
 - b. Measures must be put in place to provide for long term water management, taking into account Professor Webster-Brown's evidence that passive treatment of seepage is not reliable.
 - c. The maximum duration of the water take permit is 6 years, in accordance with section 127B of the RMA, for reasons set out below at [267] – [273].

Landscape

208. The Project is located within an area that has been identified in the Central Otago District Plan as an Outstanding Natural Landscape (ONL), known as the Matakanui Dunstan Mountains ONL, adjacent to other areas that have been identified as Significant Amenity Landscapes (SAL) and in an area containing several creeks, tributaries and springs.
209. The Dunstan Mountains are described by the Applicant's landscape assessment as a *"highly intact mountain sequence"* where the broader landform is *"highly expressive of its tectonic, and glacial formative processes"* and the mountains form a *"distinctive mountain backdrop"* with a *"high level of perceived naturalness, with a general lack of structures and modifications"*.²²⁰
210. The key elements of the Project that would have adverse landscape, visual amenity and natural character effects include four open cast mine pits – two of which will remain open on closure of the mine – two quarries, haul roads, mine plant infrastructure and various supporting buildings, and permanent features including three ELFs, diversion channels and a tailings storage facility. These features will all be located either within, or in close proximity to, the ONL.
211. There is no doubt that the Project will have adverse landscape and visual amenity effects and effects on the natural character of rivers and wetlands. The Applicant's landscape assessment concludes that *"the proposed mining activity will inevitably result in some significant adverse landscape effects during operation"*.²²¹ The landscape assessment also concedes that there will

²²⁰ Landscape Assessment, section 6.5.1, page 26.

²²¹ Landscape Assessment, Executive Summary, page i.

be long-term significant adverse landscape and visual effects, although considers they will remain “relatively” localised²²² (which not a view shared by Ms Steven).

212. In other words, the Project will have significant adverse effects, both during operation and, following closure, in perpetuity.
213. Ms Steven’s evidence for EDS is that the Applicant’s landscape assessment has significant information gaps, including inadequate identification and recognition of landscape values and their significance, and insufficient consideration of visibility of the mine, that has led to an under assessment of effects. Ms Steven has undertaken a significant landscape assessment exercise to identify the full range of relevant landscape and amenity values, and concludes that some effects on those values (including effects on the ONL and on visual amenity) are understated.

Relevant statutory framework

214. ONLs are recognised as matters of national importance in, and therefore have the highest level of protection under, the RMA. Decision makers must recognise and provide for their protection from inappropriate subdivision, use and development. “Protect” in this context means to “defend or guard from danger or injury; to keep safe; take care of”.²²³
215. Similarly, the preservation of the natural character of wetlands, rivers and their margins are matters of national importance and decision makers must recognise and provide for the natural character of these water bodies by “preserving” that natural character. “Preserve” means to “maintain something in its original or existing state”.²²⁴
216. What constitutes “inappropriate” development is to be interpreted against the backdrop of what is sought to be protected or preserved.²²⁵
217. In addition, the maintenance and enhancement of amenity values and of the quality of the environment are specifically listed as a matter in section 7 of the RMA, which decision makers must have particular regard to.
218. Under the FTAA, clause 17 of Schedule 5 requires the Panel to take into account the fact that the RMA requires:
 - a. The protection of the Matakanui Dunstan Mountains ONL to be recognised and provided for;

²²² Landscape Assessment, section 8, page 61.

²²³ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [272].

²²⁴ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [272].

²²⁵ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [105].

- b. The preservation of the natural character of wetlands and the Rise and Shine and Shepherds Creeks (and their tributaries) to be recognised and provided for;
 - c. The maintenance and enhancement of amenity values to be had particular regard to; and
 - d. The maintenance and enhancement of the quality of the environment to be had particular regard to.
219. The relevant planning documents detail how the Matakanui Dunstan Mountains ONL is to be protected, and how other landscape and amenity values are to be maintained and enhanced. Ms Steven has taken those into account when assessing landscape, visual amenity and natural character effects.

Landscape effects

220. The Applicant's landscape assessment considers effects at a site scale and at a landscape unit scale to enable the scale of the Project to be considered in the context of the underlying ONL values.
221. Based on the values and context identified in the landscape assessment, key conclusions that it draws include:²²⁶
- a. Adverse effects on the Dunstan Mountains ONL will be moderate (more than minor) during startup and operation, reducing to low-moderate in reliance on rehabilitation of the site, including native vegetation restoration;
 - b. Adverse effects associated with the Rise and Shine Pit will be high (significant) throughout operation and post-closure;
 - c. Adverse effects of the Shepherds ELF will be high (significant) during operation; and
 - d. Adverse effects of all other aspects of the proposal will be no more than moderate to high (more than minor) during operation, all reducing post closure.
222. Ms Steven considers that the landscape assessment fails to identify relevant context and values associated with both the site and wider landscape. In particular, she considers it is deficient in the following ways:

²²⁶ Landscape assessment, Table 2, page 43.

- a. It is too narrowly focused and lacks consideration of the Dunstan Mountains as part of the broader landscape context, including the wider mountain ranges of Central Otago, the wider Bendigo-Tarras basin landscape and the SAL (highly valued landscape) of the Bendigo Terrace;²²⁷
 - b. It contains an insufficient level of information about the biophysical, perceptual and associative values associated with the site and broader landscape, particularly for the scale, complexity and magnitude of effect of the Project;²²⁸
 - c. It lacks consideration of existing heritage elements on the site and their significance as part of a heritage landscape of national significance, including the impact of removal of historic heritage features;²²⁹
 - d. It does not adequately assess effects on valued attributes of dark sky, natural and rural levels of quiet and tranquillity, and on the sense of remoteness and backcountry experience;²³⁰
 - e. It does not adequately assess the effects of closing the two public roads and uplifting the Bendigo covenant, both in terms of removing existing protection of values and affecting existing opportunities to appreciate those values via public access;²³¹
 - f. It relies heavily upon reestablishing native plant communities and ecological enhancements to mitigate landscape effects, when the feasibility and efficiency of these measures (including ongoing management) is uncertain;²³² and
 - g. It lacks consideration of documents relevant to landscape values, including the Otago Conservation Management Strategy and the Tarras Community Plan 2023.²³³
223. When the wider landscape context and landscape values that Ms Steven has identified are properly considered, she concludes that the values of the Matakanui Dunstan Mountains ONL would not be maintained during mining operations. As a result, that part of the ONL (i.e., the central part of the range on the west side) would no longer be outstanding during that period, would be significantly compromised post-mining (where any increase in ONL values

²²⁷ A Steven, Statement of Evidence dated 10 April 2026, at [25], [40] – [43] and [51].

²²⁸ A Steven, Statement of Evidence dated 10 April 2026, at [44] – [48].

²²⁹ A Steven, Statement of Evidence dated 10 April 2026, at [49] and [108].

²³⁰ A Steven, Statement of Evidence dated 10 April 2026, at [43] and [62].

²³¹ A Steven, Statement of Evidence dated 10 April 2026, at [52].

²³² A Steven, Statement of Evidence dated 10 April 2026, at [79].

²³³ A Steven, Statement of Evidence dated 10 April 2026, at [43].

is highly dependent on the success of revegetation) and would not be protected from the adverse effects of inappropriate development.²³⁴

224. This is particularly notable because Policy 5.4.8 of operative ORPS requires the following:

Manage adverse effects from the exploration, extraction and processing of minerals and petroleum, by:

a) Giving preference to avoiding their location in all of the following:

iv. Areas of significant indigenous vegetation and significant habitats of indigenous fauna beyond the coastal environment;

vi. Outstanding natural features and landscapes beyond the coastal environment;

viii. Places or areas containing historic heritage of regional or national significance;

b) Where it is not practicable to avoid locating in the areas listed in a) above because of the functional needs of that activity:

...

ii. Avoid, remedy or mitigate, as necessary, adverse effects on values in order to maintain the outstanding or significant nature of a)iv-viii;

...

225. In other words, while the operative ORPS contemplates the location of mining activities in an ONL, that is only the case where adverse effects on ONL values are managed (i.e., avoided, remedied or mitigated) in order to maintain the outstanding nature of the ONL. EDS submits that this policy language is sufficiently directive as to represent an environmental bottom-line.
226. This is a significant adverse impact that the Panel must take into account when considering the Project. EDS submits that it is also an adverse impact for the purposes of section 85(3) that the landscape values of an ONL be so sufficiently degraded that the landscape would no longer be considered outstanding. While Ms Steven anticipates (subject to the success of revegetation) the ONL regaining its values over time, this may take decades.
227. In addition to effects on the Matakanui Dunstan Mountains ONL, Ms Steven draws the following conclusions in relation to effects on landscape more generally:

²³⁴ E Steven, Statement of Evidence dated 10 April 2026, at [33] – [34] and [162] – [168].

- a. The Project would have significant adverse effects on landscape character, which would be overwhelming with respect to experiences in close proximity (such as the RAS valley and Ardour Conservation Area) because of the nature and degree of change to the landscape;²³⁵
- b. The amenity of the rural landscape would not be maintained, including the visual amenity conferred by the existing Bendigo-Tarras Basin context landscape, and attributes of natural dark, rural peace and quiet, and backcountry qualities;²³⁶
- c. There would be high adverse effects (significant) on natural dark, quiet and tranquillity during mine operations from some locations;²³⁷
- d. The existing backcountry character would be permanently adversely affected to from a moderate to high degree (significant), depending on location, and existing access would be irreversibly altered;²³⁸ and
- e. The loss of historical heritage and and uplift of the Bendigo covenant area, with the removal of protection for significant landscape, heritage and recreational values, represent very high (significant) adverse effects).²³⁹

Visual / amenity effects

228. Despite acknowledging the strong visual effects of several aspects of the Project, the Applicant's landscape assessment concludes that the visual amenity effects are generally no more than moderate. Ms Steven finds this rating difficult to reconcile with the strength of language used to describe visual effects in the assessment and considers that the assessment underestimates the visual effects even on the Applicant's own assessment.²⁴⁰
229. Ms Steven considers that the visual assessment is deficient because it lacks adequate consideration of relevant viewing points and viewing audiences, including public conservation areas, public access tracks with direct views of the site and from the air (for example, during tourist flights). It also fails to consider views from within the site, including Thomson Gorge Road, which would remain partly open to provide access to the conservation areas. She

²³⁵ E Steven, Statement of Evidence dated 10 April 2026, at [107] – [140].

²³⁶ E Steven, Statement of Evidence dated 10 April 2026, at [141] – [159].

²³⁷ E Steven, Statement of Evidence dated 10 April 2026, at [29].

²³⁸ E Steven, Statement of Evidence dated 10 April 2026, at [31].

²³⁹ E Steven, Statement of Evidence dated 10 April 2026, at [178].

²⁴⁰ E Steven, Statement of Evidence dated 10 April 2026, at [28].

considers these inadequacies result in underestimating visibility of the project and its visual effects.²⁴¹

230. Once the wider landscape values and additional viewpoints are taken into account, Ms Steven considers that, from most viewpoints, visual effects would be at least moderate to high (significant) and closer views would be very high (significant), if not overwhelming. While some rehabilitation measures (such as removal of buildings) will reduce or remove adverse effects, the man-made landforms would likely remain permanently incongruous or discordant due to the scale of change to the natural landform, and reduction in effects anticipated from ecological rehabilitation are uncertain, given the unknown of feasibility of those measures.²⁴²
231. In addition, Ms Steven cautions that:
- a. The visual representations of the Project do not appear to adequately reflect what the mine will look like in real life. In that regard, she considers the visuals to be “flat”, not realistic, and overstate the extent to which permanent features such as the ELFs will integrate into the landscape;²⁴³ and
 - b. The operational and early closure phases of the project span 15 – 18 years and it might be decades before the proposed rehabilitation is sufficiently effective in absorbing certain elements into the landscape. The open pit elements will never be absorbed.²⁴⁴

Natural character

232. The landscape assessment records that the proposal will have a range of adverse natural character effects on Shepherds Creek, Rise and Shine Creek and their tributaries, which will change throughout the Project.
233. Key conclusions in relation to the Shepherds Creek catchment are that:²⁴⁵
- a. Shepherds Creek and its tributaries will become highly modified (including modification of the natural hydrological processes of the catchment) in the upper reaches of the catchment, particularly due to the Shepherds ELF, tailings storage facility and freshwater diversion channels.
 - b. The natural character of the lower Shepherds Creek catchment will also be affected by the presence of a sediment pond and seepage

²⁴¹ E Steven, Statement of Evidence dated 10 April 2026, at [23], [43] and [54] – [56].

²⁴² E Steven, Statement of Evidence dated 10 April 2026, at [76] – [80].

²⁴³ E Steven, Statement of Evidence dated 10 April 2026, at [81] – [84].

²⁴⁴ E Steven, Statement of Evidence dated 10 April 2026, at [67].

²⁴⁵ Landscape Assessment, section 7.3.1.1, page 57 and Table 1, pages 57 – 58.

- collection sump, permanent freshwater diversion and mine processing plant.
- c. Adverse natural character effects will be moderate to high (more than minor) for the decade of operation, reducing slightly to moderate (more than minor) following rehabilitation of the tailings storage facility, removal of plant and construction of wetlands.
 - d. The overall perceived natural character of the catchment would drop from moderate to low.
234. Ms Stevens disagrees to some extent with this assessment. She considers that:²⁴⁶
- a. Adverse effects on the natural character of Shepherds Creek during operation will be very high (significant) due to the complete erasure and relocation of natural streams and wetlands in man made channels; and
 - b. Effects on the natural character of creeks under the tailings storage facility and the Western ELF will be overwhelmingly adverse (significant), as they would no longer exist.
235. She agrees that some of these effects (e.g., part of Shepherds Creek) will reduce to moderate to low following closure, provided that riparian planting can be restored.²⁴⁷ It will therefore be important to ensure appropriate conditions that guarantee the restoration and survival of riparian planting.
236. The key conclusion of the landscape assessment in relation to the Rise and Shine Creek is that adverse effects will arise during operation due to the excavation of the Rise and Shine Pit within the creek bed, construction of diversion channels and permanent modification of the natural path of the upper reaches of the catchment. Adverse effects will be moderate (more than minor) during operation. Ms Stevens generally agrees with this assessment, but considers there will be some localised sections such as the permanent diversion around the Rise and Shine open pit that have a high degree of adverse effect (significant).²⁴⁸

Panel's consideration of landscape evidence

237. EDS submits that the information provided by the Applicant in relation to landscape effects is inadequate and represents, at best, only a partial assessment of effects on the landscape. Information gaps, an overly narrow focus and a lack of comprehensive analysis and understanding of the broader

²⁴⁶ E Steven, Statement of Evidence dated 10 April 2026, at [169] – [174].

²⁴⁷ E Steven, Statement of Evidence dated 10 April 2026, at [170].

²⁴⁸ E Steven, Statement of Evidence dated 10 April 2026, at [172].

landscape has resulted in a significant understatement of effects. This is illustrated by the additional work undertaken by Ms Steven, which addresses the full range of biophysical, perceptual and associative elements present in the broader landscape.

238. In particular, the Applicant's landscape assessment significantly underestimates the effects of the Project on the Matakanui Dunstan Mountains ONL. This is not a matter the Panel should take lightly. ONLs are afforded the highest protection under the RMA and are recognised as landscapes to be protected as a matter of national importance. Allowing the mine, as currently proposed, in this location would represent a significant departure from the scheme of the RMA and would represent a significant adverse impact that must be considered, along with the other adverse effects on landscape and backcountry character, visual amenity and significant historic heritage (in a landscape context) identified by Ms Steven, against any regional and national benefits that the Panel may find the Project has.
239. In light of the above, EDS submits that anticipated expert conferencing will need to address:
- a. Identification of the range of landscape values and their significance;
 - b. Identification of relevant landscape, visual and natural character effects, their nature and degree;
 - c. Whether residual landscape effects can be compensated for and, if so, how; and
 - d. Appropriate conditions.
240. EDS estimates this caucusing could take up to 1.5 days.

INADEQUATE INFORMATION AND UNCERTAINTY

241. Under section 104(6) RMA a consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application, including the ability to assess environmental effects and compliance with relevant planning instruments. Section 17U(2) of the Conservation Act similarly enables the Minister for Conservation to decline any application if the information available is insufficient or inadequate to enable an assessment of effects.
242. The Panel must take these sections into account when assessing the Project's approvals sought,²⁴⁹ and they can form an "adverse impact" for the purpose of section 85(3),²⁵⁰ acknowledging that they cannot on their own be solely a reason for the Panel to decline an approval.²⁵¹

²⁴⁹ FTAA, clause 17(1)(b), Schedule 5.

²⁵⁰ As accepted by the Taranaki VTM Panel with respect to an analogous provision in the EEZ Act, Executive Summary, Draft Decision Taranaki VTM, at [xv]; and Taranaki VTM FTAA draft decision, at [1802].

²⁵¹ FTAA, s 85(4).

243. The FTAA Schedules list information required to assess environmental effects in the context of the FTAA. They reflect the broad definition of “environment”²⁵² in the RMA and include effects on people, landscape, indigenous biodiversity and discharges.²⁵³
244. Failure to provide this information hinders the Panel’s ability to assess the actual and potential effects on the environment of allowing the activity under each Specified Act,²⁵⁴ and the Project’s adverse impacts or benefits under section 85(3) FTAA.
245. When uncertainty of impacts exists, and when those adverse impacts are potentially material or significant, the NPS-IB and regional planning provisions require that a precautionary approach be taken.²⁵⁵
246. There is an extensive amount of inadequacy of information and, consequently, uncertainty of adverse impacts, across the Application. The same applies to the Project’s benefits. EDS’s experts identify these uncertainties throughout their evidence.
247. Further inadequacies and uncertainties are extensively canvassed in comments by Fish & Game, Sustainable Tarras and DOC (in its section 51 reports). Of particular concern to EDS are the numerous uncertainties raised in DOC’s section 51 reports about impacts on the conservation covenant,²⁵⁶ flora, wetlands, lizards and invertebrates.²⁵⁷ Consequently, DOC does not consider that the scale of loss across these values can be quantified, or that effects can be accurately assessed.²⁵⁸
248. These inadequacies in information are critical to the Panel’s assessment of the Project’s biophysical impacts and, consequentially, its net benefits. The missing information is not just a ‘nice to have’, but a central requirement for the Panel’s determination of the Application under sections 81 and 85(3) of the FTAA.

²⁵² environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

²⁵³ FTAA, Schedules 5 and 6.

²⁵⁴ A matter the Panel must take into account under clause 17(1)(b) of Schedule 5 FTAA.

²⁵⁵ NPS-IB, clause 3.7 “When information is uncertain, unknown, or little understood but those effects could cause significant or irreversible damage to indigenous biodiversity a precautionary approach be taken.”

²⁵⁶ DOC, section 51 Conservation Covenant Report, page 7, at [6.3.5].

²⁵⁷ DOC, section 51 Conservation Covenant Report, pages 4 - 5, at [4.8].

²⁵⁸ DOC, section 51 Conservation Covenant Report, page 4, at [4.8].

249. EDS submits that the inadequate information, and consequential uncertainties, give rise, or are likely to give rise, to unacceptable and material adverse impacts on ecosystems, Threatened and At Risk species, outstanding landscape values and surface and groundwater bodies, including wetlands.
250. The adaptive management approach proposed by the Applicant does not cure these deficiencies, particularly in the context of policy direction to adopt the precautionary approach. As the Supreme Court in *King Salmon* stated:²⁵⁹

The issue for the Court is when an adaptive management approach can legitimately be considered a part of a precautionary approach. This involves the consideration of the following: what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a “suck it and see” approach. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

251. The Court went on to describe a range of further relevant factors that need to be addressed:²⁶⁰

The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:

- (a) The extent of the environmental risk (including the gravity of the consequences if the risk is realised);
- (b) The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
- (c) The degree of uncertainty; and

²⁵⁹ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 at [124] – [125].

²⁶⁰ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 at [129].

- (d) The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

252. EDS submits that the precautionary principle required to be applied by national policy direction and regional planning instruments is engaged by the Project; the evidence on whether the Project will result in adverse impacts on biophysical values is uncertain, unknown, or little understood and those impacts are potentially material or significant.
253. For hydrology (including geochemistry) and terrestrial ecology matters, the inadequacies of information result in a cascade of uncertainties, where each uncertainty compounds in a snowball effect, resulting in the Panel being unable to properly quantify the Project's adverse impacts. As EDS's evidence states:
- a. "... there are too many sources of uncertainty in the predictions of site water quality and its effects on downstream environments."²⁶¹
"Cumulatively, the uncertainties and assumptions being made in the application greatly erode [J Webster-Brown's] confidence that the proposed mine could operate in this catchment without leaving a legacy of contaminated surface and groundwater for the community to live with."²⁶²
 - b. "Overall, there remain many uncertainties associated with effects of the BOGP on groundwater and connected surface water. These gaps and uncertainties need to be addressed before conclusions can be drawn regarding the level of these effects. Evidence in the technical documents indicate considerable potential for groundwater contamination and loss of wetlands. It needs to be shown that these can be effectively avoided or mitigated and to date that has not been achieved."²⁶³
 - c. "The EIANZ constructs of averaged "ecological value" and "magnitude of effect" ... When these constructs are applied together, they compound to produce an overall "level of effect" that materially understates the true severity, permanence, and irreversibility of impacts, and in doing so artificially increases the apparent feasibility of offsetting for losses that cannot be offset in principle."²⁶⁴

²⁶¹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [90].

²⁶² Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [93].

²⁶³ Dr Morgan, Statement of Evidence dated 10 April 2026, at [155].

²⁶⁴ N Head, Statement of Evidence dated 10 April 2026, at [19].

254. This is also evidenced in the economic assessment, which consistently adopts a ‘best case’ scenario and other configurations to oversell the economic benefits of the Project.²⁶⁵
255. There is not even certainty in the Application as to mine life,²⁶⁶ let alone how the site will be maintained and managed in the long-term. For example, the Mine Closure Plan condition provides for the Applicant to relinquish tenure and associated obligations.²⁶⁷ This raises serious unresolved questions about who is left with the responsibility for the tailings storage facility and ELFs in the long-term. This is particularly concerning given that mine water seepage through these structures will remain above the proposed water quality limits for over 100 years for some contaminants²⁶⁸ and that reliance on passive treatment in the longer term “Post Closure” phase poses a significant environmental risk.²⁶⁹
256. Similar issues arise with respect to who will retain responsibility for the replacement conservation covenant²⁷⁰ and roads.²⁷¹
257. In this context, the risks are too great. There is not an adequate evidential foundation to have reasonable assurance that an adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.
258. As set out by EDS experts:
- a. “... adaptive management cannot address all problems.”²⁷²
 - b. A ‘try and see’ approach is not an appropriate option for dealing with uncertainties about percolation rates through mine infrastructure or seepage of mine contaminated waters. Liners to capture this water cannot be retrospectively fitted.²⁷³ Contamination of groundwater cannot be reversed.²⁷⁴
 - c. Suitability of adaptive management of groundwater effects where lag times are long (in the order of years to decades) and effects are likely permanent is questionable. Given the persistence and high cost of groundwater contamination a precautionary approach is

²⁶⁵ Dr Kay-Blake, Statement of Evidence dated 10 April 2026.

²⁶⁶ Dr Kay-Blake, Statement of Evidence dated 10 April 2026, at [83] – [89].

²⁶⁷ D.03 Combined Conditions C48.j.

²⁶⁸ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [42].

²⁶⁹ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [65].

²⁷⁰ DOC section 51 Conservation Covenant Report, page 14, at [9.1].

²⁷¹ DOC, section 51 Concessions Report, page 12, at [7.5.2].

²⁷² Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [92].

²⁷³ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [49].

²⁷⁴ Prof Webster-Brown, Statement of Evidence dated 10 April 2026, at [92].

recommended.²⁷⁵ The precautionary principle in the context of groundwater management requires that proactive protective measures be taken against potential pollution or depletion (and associated loss of wetlands), even if scientific evidence is not yet conclusive.²⁷⁶

- d. Adaptive management responses cannot prevent or reverse the loss of irreplaceable habitats. The conditions do not provide a robust or precautionary basis for managing ecological effects.²⁷⁷

259. EDS submits that inadequate and uncertainty of information is an adverse impact for the purpose of the Panel's section 85(3) assessment, and that adaptive management does not militate those impacts to any material degree.

CONDITIONS OF CONSENT

260. The FTAA provides opportunity for the Applicant to voluntarily offer a reduction in its Project's footprint (or other conditions to militate against a consent decline, whether in whole or part):

- a. Section 69 of the FTAA, which states that if a panel proposes to decline an approval, the Environmental Protection Agency must invite the applicant to "propose conditions on, or modifications to, any of the approvals sought";
- b. Section 68A of the Amendment Act, which provides an applicant with an opportunity to reduce the scope of its application by modifying an approval sought at any time before a decision is made;²⁷⁸ and
- c. Section 85(3)(b)(ii) of the FTAA, which requires the proportionality assessment to be undertaken after taking into account "any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts".

261. A reduction or other mitigation can also be imposed via conditions of consent, provided the conditions:

- a. Are no more onerous than necessary to address the reason for which they are set (which is largely equivalent to the RMA requirement for

²⁷⁵ Dr Morgan, Statement of Evidence dated 10 April 2026, at [142].

²⁷⁶ Dr Morgan, Statement of Evidence dated 10 April 2026, at [154].

²⁷⁷ N Head, Statement of Evidence dated 10 April 2026, at [108].

²⁷⁸ Fast-track Approvals Amendment Act 2025, s 68A.

conditions to be ‘appropriate’ under the thresholds in ss 108 and 108AA);²⁷⁹ and

- b. Apply s 108 (conditions of resource consents), s 108AA (requirements for conditions of resource consents) and s 108A (bonds) of the RMA.

262. It is important to emphasise that the ability to impose conditions of consent is not subject to the proportionality test in section 85(3). Rather, the imposition of conditions must be assessed against the matters listed above – being no more onerous than necessary, and in accordance with the well settled legal principles for conditions of consent i.e., that they are appropriate, certain, enforceable, directly connected to specific issues (including adverse effects on the environment) and reasonable.²⁸⁰
263. EDS’s experts have engaged with the Applicant’s proposed conditions to the extent possible, given large information deficits and uncertainties. It is expected that further review of conditions will occur during expert caucusing.

Management plans

264. The Applicant relies heavily on management plans. Management plans are an effective tool for detailing how a consent condition is to be achieved over the life of the Project. They do not, and should not, replace the setting of performance standards in consent conditions.²⁸¹ Rather, their purpose is to set out how those standards are to be achieved.²⁸²
265. This dynamic between conditions and management plans needs to be carefully managed to maintain this separation of function and so that limits do not ‘slip through the cracks’. As noted above, Condition 102 of the land use consent conditions requires the Biodiversity Outcome Monitoring Plan to include the “limits and standards” set out in that condition, but the condition contains “targets” rather than limits or standards.
266. The Applicant has requested that the Panel approve its management plans as part of the FTAA process. EDS opposes that request, the Applicant’s management plans should be independently reviewed²⁸³ and certified by the Councils or DOC, as relevant. Other FTAA Panels²⁸⁴ have rejected applicant requests to approve management plans, as has the Environment Court.²⁸⁵

²⁷⁹ FTAA, sections 81(2)(d) and 83.

²⁸⁰ FTAA, cl 18, Schedule 5.

²⁸¹ As accepted in the Maitahi Village FTAA decision at [698] – [699], with reference to the *Re Canterbury Cricket Assn Inc* [2013] NZEnvC 184.

²⁸² *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [125].

²⁸³ N Head, Statement of Evidence dated 10 April 2026, at [113].

²⁸⁴ Waitaha Hydro FTAA decision at [1126] and Southland Wind Farm FTAA decision at [83] - [85].

²⁸⁵ *Waka Kotahi NZ Transport Agency v Manawatū-Whanganui Regional Council* [2020] NZEnvC 192 at [278].

Resource consent approval duration

267. The Applicant is seeking approval for water takes for a duration of 35 years, contrary to section 127B of Resource Management (Consenting and Other System Changes) Amendment Act 2025,²⁸⁶ which states:

127B Duration of new water permits under Regional Plan: Water for Otago must not exceed 6 years

(1) The duration of a water permit authorising the taking or use of water granted on and after the commencement date under the Regional Plan: Water for Otago must not exceed 6 years.

...

(4) This section overrides any provision in the plan that applies to the duration of a water permit authorising the taking or use of water.”

268. Section 127B sits alongside policy 10A.2.2 of the Otago Regional Water Plan which limits the duration of resource consents for new takes and / or uses of freshwater to no more than six years. The policy was introduced to the Regional Water Plan via Plan Change 7 (PC7).²⁸⁷

269. PC7 was promulgated at the recommendation of the relevant Minister (Hon David Parker) in response to the Skelton Report²⁸⁸ which found that Otago does not have a fit for purpose planning framework in place to appropriately manage applications for new water permits. It was designed as an interim measure until a new planning regime was operative.²⁸⁹ The possibility of an alternative pathway for longer term consents was expressly rejected in the PC7 decision.²⁹⁰

270. Section 127B is a relevant consideration for the Panel under clause 17(1)(b) of Schedule 5 and constitutes an environmental bottom-line that the Project, insofar as it seeks a consent duration of longer than 6 years, will breach. It is therefore an adverse impact for the purposes of section 85(3) assessment.

271. When being considered under section 85(3) it operates as a jurisdictional bar to consent durations longer than 6 years. Section 127B was introduced by Parliament after commencement of the FTAA. It is bespoke to the Otago region

²⁸⁶ A.11 Section 4 Approvals Sought, section 4.2.2, page 235, available [here](#).

²⁸⁷ *Re Otago Regional Council* [2021] NZEnvC 164 available [here](#) and [2021] *Re Otago Regional Council* NZEnvC 179 available [here](#) (then Environment Judge Borthwick presiding).

²⁸⁸ P Skelton, 2019, Investigation of Freshwater Management and Allocation Functions at Otago Regional Council, Report to the Minister for the Environment.

²⁸⁹ Otago Regional Council was due to notify such a plan but the Government prevented its progress via a law change in October 2024.

²⁹⁰ *Re Otago Regional Council* [2021] NZEnvC 164 at [92], available [here](#).

for important public interest reasons. The two statutes are to be read as consistent unless this contradicts the plain meaning of both, having regard to text, purpose and meaning.²⁹¹ It does not strain the meaning of the FTAA regime or section 127B RMA to read the Panel's jurisdiction as confined to the grant of a 6-year consent.

272. The Homestay Bay FTAA Panel has addressed Policy 10A.2.2 and section 127B in the context of the FTAA²⁹² concluding that a 35 year consent is appropriate due to the scale of the project, the investment required and the certainty of providing for critical infrastructure necessary for the housing development.
273. This decision is not binding on the Panel. Some of its findings are contrary to the considered position adopted in the PC7 decision and it does not directly address the jurisdictional issue raised above. EDS submits that it should not be followed.

Bond

274. As is evident from EDS's expert evidence, uncertainties associated with long-term management of the site and compliance with consent conditions is a serious concern. There are significant risks associated with ongoing contamination and ineffective ecological mitigation.
275. The Applicant's proposed bond does not remedy these issues. It is likely to be insufficient due to inadequately characterised risks (including not factoring in low risk-high probability events), unallocated 'risk owners' and reliance on unproven rehabilitation techniques.²⁹³ It does not cover the full 'life' of the mine, which is permanent for the tailings dam, ELFs and ecological rehabilitation, and effectively permanent for potential surface and groundwater contamination from mine water seepage.
276. EDS agrees with Sustainable Tarras and others that should approvals be granted a condition requiring public indemnity insurance should be imposed in addition to the bond requirement.²⁹⁴

ROADING

277. The Project requires access to, and use of (including stopping), public roads owned by CODC. EDS set out this issue in a memorandum to the Panel Convenor dated 16 January 2026, and also attached it to its request to the Panel to be heard under section 53(3) of the FTAA. EDS's summary of the issue is included in **Appendix A** of these comments.

²⁹¹ See for example *Attorney-General v Motiti Rohe Moana Trust* [2019] NZCA 532 at [56]-[58] (statutes looked at, and complemented, each other).

²⁹² Homestead Bay FTAA decision, at [475] – [479].

²⁹³ Dr Kay-Blake, Statement of Evidence dated 10 April 2026, at [119] – [128].

²⁹⁴ Sustainable Tarras s 53 comments.

278. The Applicant asserts it has now secured necessary roading arrangements outside of the FTAA process. EDS reserves its position on other legal remedies to address this. The Panel must assure itself that the Applicant does have legal access to the site, and that the project cannot be impeded due to public road access over the intended mine sites. The Project cannot proceed until these arrangements are in place, including stopping the paper road which runs through the open pits. This will operate as a condition precedent to the exercise of any FTAA approvals granted.²⁹⁵
279. Without seeking road access arrangements under the FTAA (i.e., approvals described in section 42(4)(l) of the FTAA), the Application's proposed activities on public roads cannot be approved via the FTAA process. Further, the Project requires the closure or stoppage of a paper road. As noted, this must be undertaken outside of the FTAA process, in accordance with the Local Government Act 1974.²⁹⁶
280. EDS understands that the Applicant has applied for resource consent to establish alternative road access for Ardgour Rise. An urgent request has been made to CODC for disclosure of this application, which has not been provided as at the date of these comments. Until further information is available on the scope of this separate application, EDS reserves its position on whether section 40 of the FTAA prevails over the parallel RMA application made to CODC (the RMA being a 'specified Act' under section 40). Counsel will update the Panel on this as soon as further information is to hand.

CONSERVATION COVENANT

281. Revocation of the conservation covenant should be a major focus for the Panel. Under clause 45 of Schedule 6 the Panel must take into the account:
- a. The purpose of the FTAA (giving it the greatest weight);
 - b. The purpose of the covenant and the conservation values of the land affected; and
 - c. Whether the revocation will compromise values of regional, national or international significance.
282. The purpose of the covenant is contained at Ci – iv of the covenant.²⁹⁷ Its objectives will be familiar to the Panel and EDS does not repeat them here. EDS

²⁹⁵ The Panel is of course still able to grant its approvals but these will not be able to be exercised pending road stopping: discussed in a different context in *Lysaght v Whakatāne District Council* [2022] NZCA 423 at [53]-[66].

²⁹⁶ EDS submits that the Local Government Act 1974 must be relied upon, but is aware of a competing view on the relevance of road stopping processes under the Public Works Act 1981. EDS disagrees. This legal issue does not require resolution by the Panel.

²⁹⁷ Conservation covenant, available [here](#).

relies on DOC's section 51 report and evidence for the conservation values of the land affected and how the revocation will compromise them. The DOC report and evidence catalogue severe and extreme impacts on nationally and regionally significant values (and internationally significant values in the case of potential species extinctions).

283. The Applicant has not done an assessment of the conservation values of the land affected or how the Project compromises them. It has no rebuttal to DOC's reports and evidence. The Panel can, therefore, treat DOC's reports and evidence as uncontested.
284. EDS also relies on the DOC report and evidence for commentary of the history of the covenant via Tenure Review, and the importance of permanent protection established through that process. Sustainable Tarra's comments also detail this context and EDS relies on them too.
285. EDS submits that the information before the Panel clearly demonstrates that the adverse impacts of the revocation are sufficiently significant to be out of proportion to the Project's overstated benefits and should be declined under section 85(3). Of note:
 - a. The legitimate expectation of the New Zealand public that Tenure Review outcomes would endure permanently as *quid pro quo* for freehold land ownership.
 - b. The public interest factors underlying Tenure Review, for the nationally and regionally significant indigenous biodiversity and landscape values of the high country.
 - c. The very high conservation values (heritage, ecological and landscape) of the land concerned, as extensively detailed in DOC's report and evidence and by Heritage New Zealand Pouhere Taonga.
 - d. The risk of extinction of Nationally Critical *Ceratocephala pungens*, which has its national stronghold within the covenant area, and the 7% loss of Kowarau Gecko's national habitat pushing it, and several other Threatened species closer to extinction.
 - e. The Applicant's inadequate assessment of these values rendering the actual loss of flora, wetlands, lizards, invertebrates and other nationally and regionally important indigenous biodiversity unknown and potentially significantly understated.
 - f. No conditions are proposed for the conservation covenant:

- i. The broader ‘offsetting and compensation’ package is not targeted to mitigating adverse impacts on the conservation covenant’s values;
 - ii. The proposed replacement covenant is fanciful (given CODC’s apparent refusal to accept that ongoing liability), and inadequate (given the irreplaceable and vulnerable nature of the indigenous biodiversity affected by the revocation and its permanent loss); and
 - iii. No equivalent land outside the area of the covenant is proposed to be protected, although recognising this would result in the permanent loss of irreplaceable values.
- g. EDS’s economic evidence (and that of other parties) that the Project’s net economic benefits are not accurately assessed and may, in fact, be negative, and that the national benefits have been inaccurately calculated (which brings economic impact down by almost 40%) and that national costs may be large enough to outweigh gross economic benefits.

WILDLIFE ACT

286. The Wildlife Act seeks to absolutely protect all wildlife subject to the Act’s jurisdiction. Of importance here is the Applicant’s wildlife approval to catch, salvage and relocate native lizard species. This includes effects on approximately 500,000 – 750,000 individuals, with 80% of effects being residual and the possible uplifting of some species’ regional and threat status.²⁹⁸
287. There is also the potential for the rare Lake’s skink and other species of high conservation value to be present on the site. DOC has “low confidence” of the species information provided by the Applicant.²⁹⁹
288. There are significant uncertainties associated with the feasibility of the Applicant’s proposed catch, salvage and relocation approach the magnitude of effect on lizard populations of regional and national significance. These uncertainties should be of key concern to the Panel when considering the Applicant’s wildlife approval.

REBUTTAL POINTS

289. **Appendix B** to these comments is EDS’s rebuttal points to the Applicant’s Legal Overview.³⁰⁰

²⁹⁸ DOC section 51 Wildlife Act Report, at [6.4.9].

²⁹⁹ DOC section 51 Wildlife Act Report, at [8.2.7].

³⁰⁰ A.02B Legal Overview, available [here](#).

PROCEDURAL MATTERS

290. EDS requests that the Panel direct expert conferencing on the following topics (we provide an initial indication of how much time is likely required for each):
- a. Economics (2 days)
 - b. Groundwater hydrology and Geochemistry (3 days)
 - c. Landscape (1.5 days)
 - d. Terrestrial ecology (3 days)
291. EDS also requests that the Panel:
- a. Convene a legal issues hearing, to enable counsel to address disputed legal issues.
 - b. Provide a focused opportunity for cross-examination of experts in relation to key issues, following completion of expert caucusing.
 - c. Commission an independent expert or experts to review the Application's approach to long-term management of the site, including how environmental risks will be managed and who will pay for ongoing mitigation and remediation of any unanticipated adverse impacts such as groundwater contamination, tailings dam failure or ineffective ecological restoration. This should include review of the Applicant's proposed bond condition and recommendations for international best practice bond and insurance requirements.
 - d. Seek clarification from the Applicant as to its road access and road stopping arrangements with CODC.

CONCLUSION

292. EDS asks that the Panel decline the approvals sought under section 85(3) of the FTAA because the adverse impacts are sufficiently significant to be out of proportion to the Project's regional and national benefits. In addition, EDS submits that the Panel does not have jurisdiction to grant approvals relating to publicly owned land as this is outside the scope of the listed project under Schedule 2 FTAA,

Appendix A

1. Access to, and use of, public land is necessary for the Project to proceed and is therefore a critical, not ancillary, component of the Project.
2. The Project requires use of public land administered by three government agencies: DOC, Land Information New Zealand (LINZ) and CODC.
3. Section 2.4 of the Substantive Application Report outlines this public land tenure and its proposed utilisation.³⁰¹ Consent or agreement for the Applicant to use public land is not a straightforward exercise, nor is it guaranteed.
4. Of most import is the Project's requirement to stop and access public roads owned by CODC. This element raises complex legal and factual issues that require close scrutiny. The issues include:
 - a. The Applicant has not applied for road access arrangements or approvals in its Application under the FTAA. However, the Application clearly intends that road access arrangements be authorised as part of the Application. This may create a jurisdictional or condition precedent / condition subsequent issue.
 - b. The Applicant relies on a landowner consent form signed by CODC as evidence that it has landowner approval to use the public roads. That does not constitute legal consent to close or use the public roads, and any use by the Applicant must be compatible with use of the roads by the public generally.
 - c. The Project requires closure and stopping of public and paper roads, which cannot be authorised under the FTAA, and requires a separate process under the Local Government Act 1974, which requires public notification. Any approvals granted under the FTAA cannot predetermine the outcome of a road stopping application.
5. The following details EDS's understanding of these road access issues. They raise three interrelated problems: legal authority, statutory pathway and factual uncertainty.

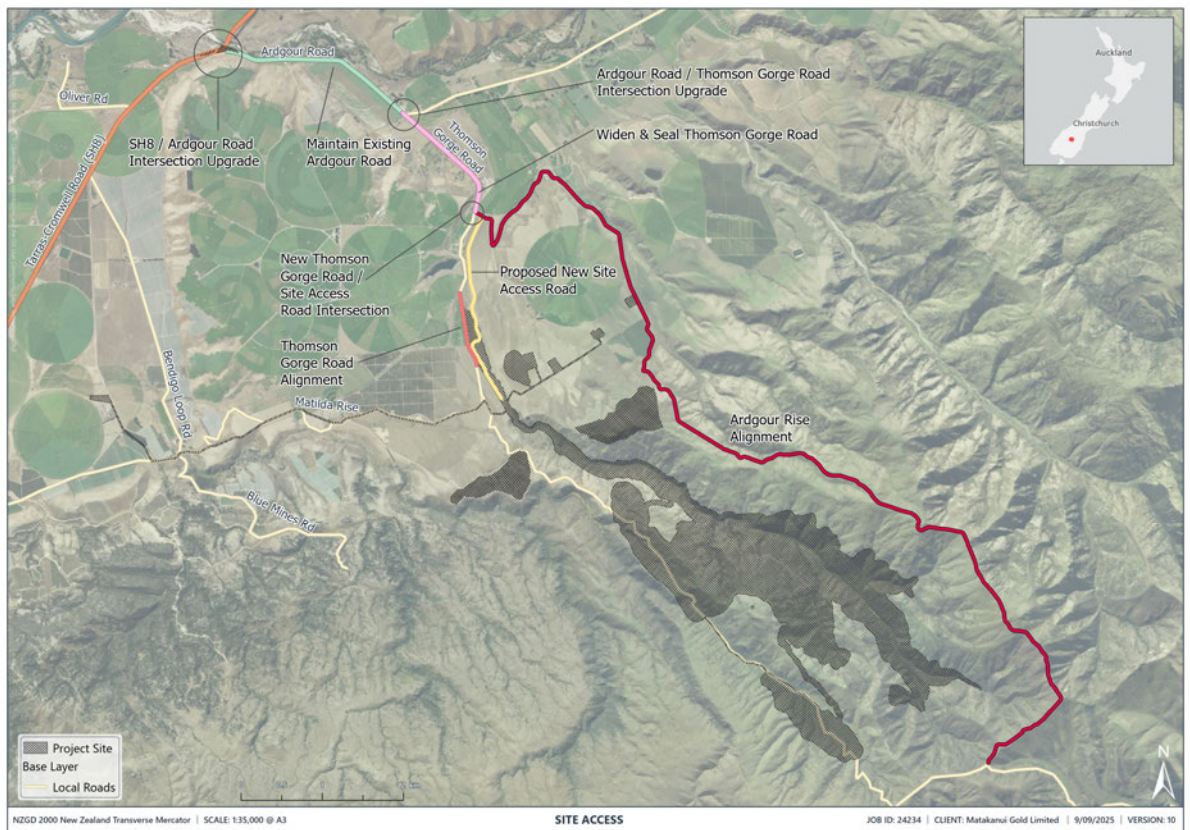
Access requirements to public land – roads

6. Access to the Project site is proposed via State Highway 8 (SH8), Ardgour Road and Thomson Gorge Road. Access via Bendigo Loop Road and Matilda Rise may also be necessary during the initial Project phases.³⁰²

³⁰¹ A.09A Section 2 Existing Environment, section 2.4, page 39, available [here](#)

³⁰² B.30 Stantec Integrated Transport Assessment, page 1, available [here](#)

7. The location of these roads is shown on the map below:³⁰³



8. In summary, the Project proposes to:³⁰⁴

- a. Upgrade the SH8 / Ardour Road intersection;
- b. Upgrade Ardour Road from the SH8 intersection to Thomson Gorge Road (green in the map above);
- c. Widen 1.6 km of Thomson Gorge Road to a width of 6.5m (pink in the map above);
- d. Create a new Thomson Gorge Road site access intersection (where pink meets red in the map above);
- e. Upgrade Thomson Gorge Road and realignment of approximately 800m to bring it back within the legal road reserve (orange in the map above);
- f. Legally stop part of Thomson Gorge Road (the exact extent of which is unclear);

³⁰³ C.21 Project Site Access, available [here](#)

³⁰⁴ B.30 Stantec Integrated Transport Assessment, available [here](#)

- g. Legally stop the paper road that runs through the Project site (the exact extent of which is unclear);
 - h. Construct a new private road from Thomson Gorge Road through to the 'neck' of the lower Shepherds Gorge into the processing plant area (dark yellow in the map above); and
 - i. Create a 13.3km alternative route east over the Dunstan Mountains to the Manuherikia Valley, which the Application calls Ardgour Rise (red line in the map above).
9. Although access via Bendigo Loop Road and Matilda Rise may also be necessary, the Application does not propose any upgrades to these roads which are currently unsuitable for heavy vehicle use.³⁰⁵
10. The exact parts of the above roading network that CODC owns are unclear. EDS has been unable to find a consolidated map in the Application showing the location of all publicly owned roads that the Applicant requires access to or requires to be stopped for the Project. The Records of Title and Landowner Table that sets out the legal descriptions / records of title within and adjacent to the Project consent area redacts the owner section column.³⁰⁶ Several of the parcels listed in the Table include road reserve.
11. What can be deduced from the Application is that CODC owns the following roads:
- a. Thomson Gorge Road and the paper road that runs through the lower Shepherds Valley,³⁰⁷
 - b. Large tracts of Matilda Rise where the Application proposes to locate the borefield pipeline (shown in maps C.07 – C.09),³⁰⁸ and
 - c. Parts of Bendigo Loop Road.³⁰⁹
12. EDS understands that CODC also owns Ardgour Road, but this is not confirmed in the Application, although it is intimated in the Access Road Construction Traffic Management Plan.³¹⁰
13. While the Application emphasises the value of the 'one-stop-shop' nature of the FTAA as a timely and integrated means of processing multiple approvals,³¹¹ it

³⁰⁵ B.30 Stantec Integrated Transport Assessment, page 24, available [here](#)

³⁰⁶ I.02 Records of Title and Landowner Table, available [here](#)

³⁰⁷ A.09A Section 2 Existing Environment, section 2.4.1, page 39, available [here](#)

³⁰⁸ Available [here](#), [here](#) and [here](#)

³⁰⁹ A.09A Section 2 Existing Environment, section 2.4.1, page 39, available [here](#)

³¹⁰ G.10 Access Road Construction Traffic Management Plan, available [here](#)

³¹¹ A.08 Section 1 Introduction, section 1.4, page 16, available [here](#); A.10 Section 3 Project Description, section 3.1, page 130, available [here](#)

has elected not to seek road access arrangements via its substantive application, even though that option was available to it.³¹²

14. Notwithstanding this deliberate approach, the Application clearly intends that road access be approved as part of its substantive application:
 - a. In the proposed CODC Land Use Consent and Conditions:³¹³
 - i. “Activities authorised by this consent” include:
 - The “upgrade of Ardgour Road and Thomson Gorge Road to provide improved access to the BOGP”,³¹⁴
 - The “proposed temporary closure of part of Thomson Gorge Road, enhancement of Thomson Gorge Road east of the project and the closure of an undeveloped road (“paper road”) in the lower Shepherds Valley whilst mining operations and rehabilitation activities are undertaken”,³¹⁵
 - The “realignment of Thomson Gorge Road, via Ardgour Station (“Ardgour Rise”) to provide public access between the Bendigo / Ardgour terraces and the Thomsons Saddle” (inclusion of Ardgour Rise in the Application is perplexing as CODC has advised that “Ardgour Rise is subject to an existing resource consent application”³¹⁶),³¹⁷ and
 - An “upgrade to the intersection of State Highway 8 (“SH8”) and Ardgour Road to provide safe and suitable access to the Project Site whilst appropriately managing effects on the wider transport network.”³¹⁸
 - ii. “Construction work” is defined to include “[c]onstruction of new access roads and road upgrades”,³¹⁹ and
 - iii. The Consent Holder must “widen Thomson Gorge Road between Ardgour Road and the proposed new intersection of Thomson Gorge Road and the proposed new site access road (approximately

³¹² FTAA, s 42(4)(l); A.11 Section 4 Approvals Sought, available [here](#)

³¹³ D.01 CODC Land Use Consent and Conditions, available [here](#)

³¹⁴ Condition 2(k)

³¹⁵ Condition 2(l)

³¹⁶ Fast Track Approval – Substantive Application Completeness Checklist – CODC Resource Consent, Table A, page 8, available [here](#)

³¹⁷ Condition 2(p)(i)

³¹⁸ Condition 2(p)(iii)

³¹⁹ Condition 7

1.6 km) as shown in Attachment B to this Land Use Consent to provide a minimum two-way sealed carriageway width of 6.5m.”³²⁰

- b. In the proposed Common Conditions for CODC and ORC:³²¹
- i. Activities addressed in management plans are “certified as part of the approval of the BOGP pursuant to section 81 of the Fast-track Approvals Act 2024 and form part of this consent”.³²² The Application includes an Access Road Construction Traffic Management Plan.³²³ Its purpose is to “implement a phase of the Project Traffic Management Plan” (which is not included in the Application).³²⁴ Activities set out in the Access Road Construction Traffic Management Plan include works that “traverse both public road corridors and private land”, including the following which, by virtue of the proposed conditions, would be certified by any approval of the Application:³²⁵
 - Upgrading the SH8 / Ardgour Road intersection;
 - Upgrading the Ardgour Road and Thomson Gorge Road intersection; and
 - Upgrading Thomson Gorge Road.
15. Without seeking road access arrangements under the FTAA (i.e., approvals described in s42(4)(l) of the FTAA), the Application’s proposed activities on public roads cannot be approved via the FTAA process. Further, the Project requires the closure or stoppage of a paper road. As noted, this must be undertaken outside of the FTAA process, in accordance with the Local Government Act 1974.
16. The Application includes a “landowner consent form”, dated 16 October 2025, which purports to be CODC’s landowner approval to the Project activities taking place on council-owned roads.³²⁶
17. The Application relies on this form as evidence that:
- a. CODC has approved the proposed road stopping of the paper road that traverses through the lower Shepherds Valley: “CODC has provided its

³²⁰ Condition 47

³²¹ D.03 Schedule One – Central Otago District Council and Otago Regional Council Common Conditions, available [here](#)

³²² Condition C13

³²³ G.19 Access Road Construction Traffic Management Plan, available [here](#)

³²⁴ G.19 Access Road Construction Traffic Management Plan, available [here](#)

³²⁵ G.19 Access Road Construction Traffic Management Plan, page 3, available [here](#)

³²⁶ F.07 CODC Approval as Landowner Letter_Redacted, available [here](#)

written approval in its capacity as a land owner to this occurring (presented in **Part F**”;³²⁷ and

- b. The “written approval of CODC as landowner has been obtained to undertake mining operations on various parcels of land (paper roads) owned by CODC (Provided in **Part F**).”³²⁸
18. The assertion that CODC has approved the closure of the paper road is legally and factually incorrect. As noted above, road stopping requires a separate process which has not been initiated by CODC. EDS reserves its position on other legal remedies to address this.
19. The Application states that “MGL does, or will, hold legal rights (access arrangements, easements, licences to occupy, consents or concessions) from the Department of Conservation and CODC in relation to any works proposed on land administered by these parties. Copies of affected party approvals are provided as **Part F** to these application documents”³²⁹
20. MGL has since entered into an access arrangement and a road stopping deed with CODC. EDS reserves its position on other legal remedies to address this.
21. Road access matters have garnered significant interest from the public. Future access to CODC-owned roads cannot be asserted with this degree of confidence.
22. That is particularly so with respect to the paper road which is, as acknowledged in the Application:³³⁰
 - a. A well-established recreational driving and 4WD route;
 - b. A recognised cycling tour route; and
 - c. A popular local equestrian route.
23. To date, all negotiations between the Applicant and CODC on road access have been undertaken privately and all Council reports and Council meetings on the topic have excluded the public. CODC has, subsequent to it entering an access arrangement with MGL, released information pertaining to CODC’s decisions.
24. The Panel should seek clarification from the Applicant about its road access and stoppage arrangements with CODC. Disclosure of this information will greatly assist the Panel in understanding the Project’s putative road access arrangements. The Project cannot legally proceed until these matters are resolved.

³²⁷ A.10 Section 3 Project Description, section 3.18.4, page 207, available [here](#)

³²⁸ A.09A Section 2 Existing Environment, section 2.4.1.1, page 40, available [here](#)

³²⁹ A.15 Section 8 Fast Track Approvals Act 2024 Requirements, section 8.4, page 388, available [here](#)

³³⁰ A.09A Section 2 Existing Environment, section 2.23 page 128, available [here](#)

Appendix B

Paragraph No. of Applicant's Legal Overview (dated 31 October 2025)	Extract	EDS's Response
51	The affected party approvals by the owners of Bendigo and Ardgour Station “should also be afforded significant weight by the Panel in its decision making on all FTA approvals as they demonstrate support from the underlying landowners”.	Disagree: the default rule in the RMA is that affected person approval means the effects on those persons are disregarded. This includes both adverse and positive impacts, which have been addressed by way of side agreement and purchase of the underlying land.
55	"The BOGP application satisfies the scope and completeness requirements in Section 46(2) as the application as it: Complies with the scope of approvals provided for in Section 42."	Disagree: the project appears to seek RMA approval for the alternative public road/access at Ardgour Rise. This is also the subject of a resource consent application to CODC, which has not been disclosed by Council despite EDS requests for urgency. To the extent that there is duplication, the resource consent application may be impermissible under s42 FTAA.
62(c)	“The purpose of the FTAA is not logically relevant to an assessment of environmental effects. Environmental effects do not become less than minor because of the purpose of the FTA. What changes is the weight to be placed on those more than minor effects, they may be outweighed by the purpose of facilitating the delivery of infrastructure and development projects with significant regional or national benefits, or they may not.”	Agree: effects are to be assessed independently of the s3 purpose of the FTAA. Application of greatest weight to the s3 purpose (as part of the Schedule 5 - 7 assessment) does not necessarily result in approval of the project. This is ultimately a matter for the Panel to determine.
63(c)	“Under the FTA, decision making on resource consents must prioritise the purpose in Section 3 of facilitating significant regional or national benefits over other considerations. This results in a legislative regime that may support the grant of a resource consent,	Disagree with first sentence: the requirement to give greatest weight to the s3 purpose does not necessarily result in prioritising benefits over other considerations. It remains a discretionary and merits assessment.

	even where the traditional RMA process would not.”	
63(d)	“A statutory requirement to give greatest weight to the purpose of an Act does not mean it will always outweigh other considerations. A broad evaluative exercise is required weighing a range of matters within the FTA benefit led framework and the purpose of the FTA guides interpretation and takes primacy in decision-making.”	Disagree with second sentence: the s3 purpose does not take ‘primacy’. The architecture and carefully worded text of the Act, including its schedules, identifies the sequence for consideration of relevant matters, including (ultimately) the proportionality assessment. Once the Panel has made a proportionality assessment under s85(3), it does not then have recourse to the s3 purpose or apply an overall broad judgment.
64(b) and (c)	“(b) acknowledgement that the legislative primacy of the FTA purpose does not alter the relevance of assessments but instead affects the weighting to be given to these assessments in the final weighting exercise; and (c) After completing individual assessments undertaking an overall evaluative judgement in which the purpose of the FTA is given the greatest weight”.	Disagree: it is inapt to describe the s3 purpose as being given primacy over all other considerations. Even when the s3 purpose is given the greatest weight under Schedules 5 - 7, this does not necessarily lead to a conclusion that approval should be granted. Instead, it will depend on the Panel’s merits based assessment. If the regional and national benefits are overstated or non-existent (as Dr Kaye-Blake’s evidence suggests) then the s3 purpose will support declining the proposal.
68	At [67]-[68] [68], Counsel asserts that the key sections within those parts of the RMA are: (a) Section 104 (b) Section 104B; (c) Section 105; (d) Section 107.	Agree in part: EDS agrees that the identified provisions are relevant but submits that additional provisions in Pt 6 RMA direct decision-making and must be taken into account for the RMA approvals. ³³¹ These are: sections 104, 104B, potentially 104G, ³³² 105, 106A, 107, 108, 108AA, 108A, 109, 123, and 127B of the RMA. Section 106A states that a consent authority may refuse land use consent or grant subject to conditions if there is a significant risk from natural hazards. Sections 108 and 108AA relate to the consent authority power to impose conditions. EDS submits that the power to impose conditions is wider (less

³³¹ Per Clause 17 of Schedule 5 FTAA, noting that ss5, 6, 7 RMA are relevant but located in Pt 2 RMA.

³³² Whether s104G RMA is relevant depends if there are registered drinking water supplies. EDS has not been able to confirm this as at the date of these submissions.

		<p>constrained) than the RMA but these provisions remain relevant.</p> <p>Sections 108A and 109 relating to power to impose bonds, including where these run with the land.</p> <p>Sections 123 and 127B RMA which constrain the Panel’s jurisdiction to a maximum 6-year duration for new water permits authorising the taking or use of water.</p>
70	<p>“..Instead, the FTA provides the Panel with discretion to weigh the broader purpose of the FTA, prioritizing significant regional or national benefits over an inability to meet other RMA requirements.”</p>	<p>Disagree: there is no necessary or automatic priority conferred on net benefits over disbenefits (adverse impacts). The proportionality test in s85(3) FTAA does not have a starting point in favour of approval – this will depend on the extent of adverse impacts weighted against regional and national benefits, including certainty of realisation of benefits.</p>
71-72	<p>At [71]-[72], Counsel for the Applicant asserts that s127B RMA does not constrain the Panel’s ability under the FTAA to grant a 35 year term, in reliance on (<i>inter alia</i>) Clause 17(4) of Schedule 5; and submits that s127B RMA is not a provision that directs decision-making and has less relevance to the Panel’s consideration.</p>	<p>Disagree: section 127B RMA is not a provision that would “..require a decision maker to decline an application for resource consent..” (the language used in Clause 17(4) of Schedule 5 and s81(5) FTAA).</p> <p>Instead, s127B, which operates in tandem with s123 RMA, specifies the maximum duration of a resource consent. This is a jurisdictional limit to the Panel’s ability to impose a consent condition for duration. As stated in s127B RMA, there is a 6 year limit on the duration of new water permits authorising the taking or use of water granted on and after the commencement date for the Regional Plan: Water for Otago.</p> <p>Section 127B RMA was introduced by Parliament after commencement of the FTAA. It is bespoke to the Otago region. The two statutes are to be read as consistent unless this contradicts the plain meaning of both, having regard to text, purpose and meaning. It does not strain the meaning of the FTAA regime or s127B</p>

		RMA to read the Panel’s jurisdiction as confined to the grant of a 6-year consent. ³³³
97	As regards s85(4) FTAA “..This means that, unlike traditional RMA processes, an inability to meet bottom line objectives or policies, while a matter to be taken into account, must not be the basis on which a proposal is declined. Rather, in that scenario our submission the Panel is required to conclude that the purpose of facilitating delivery of the BOGP outweighs any non-compliance with the planning instruments.”	<p>Disagree: where the Panel finds that the proposal is inconsistent with, or contrary to, directive policy instruments, then this will be a relevant consideration that can be relied on under the definition of adverse impacts in s85(3) FTAA.</p> <p>As noted elsewhere, where the proposal is inconsistent or contrary to two or more such policy bottom lines, then this is a sufficient basis for decline, albeit acknowledging that there will usually be evidence of adverse environmental effects.</p> <p>In most cases, a finding that a proposal is inconsistent with a directive policy will rely on evidential findings on environmental effects. This is because most directive policies are effects-based.</p>
98	“Use of the term ‘out of proportion’ requires an evidential finding that adverse impacts must substantially outweigh and exceed the national and regional benefits unlocked by a project before decline is warranted under Section 85.”	Disagree: there is no additional threshold in s85(3), such as ‘substantial disproportionality’ or similar. It is effectively a merits decision for the Panel without any predetermined or pre-weighted approach given to benefits or adverse impacts.
100 - Conditions	“A Panel’s discretion to set conditions under the FTA is limited by the directive in Section 83 that conditions must not be more onerous than necessary. We consider that, in imposing conditions, a Panel must ensure that: [..](d) the obligations imposed by the condition would be consistent with the purpose of the FTA by facilitating the delivery of the BOGP; and”	<p>Disagree: the ability to impose conditions is not fettered by the s3 purpose of the FTAA. Nor does the purpose of the Act provide guidance or predisposition when it comes to the specific power to impose consent conditions.</p> <p>Necessary conditions may for example be imposed to ensure that the relevant (and promised) regional and national benefits are secured. EDS submits that there are fewer statutory constraints on imposing consent conditions under the statutory</p>

³³³ In a different context, *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] NZCA 532 at [56]-[58] (statutes looked at, and complemented, each other).

		powers in s83 FTAA, than under ss108 and 108AA RMA.
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