

**BEFORE THE EXPERT PANEL**

**IN THE MATTER** of the Fast-track Approvals Act 2024 (**FTAA**)

**AND**

**IN THE MATTER** of an application by Matakanui Gold Limited under section 42 of the FTAA for the Bendigo-Ophir Gold Project

**APPLICATION NO.** FTAA-2507-1089

---

**Legal Submissions for Director-General of Conservation re Minutes 46-48**  
**– in response to RFI 11 and updated conditions dated 28 August 2026**

Dated 7 September 2026

---

Barrister instructed: Dean van Mierlo; dean@environmentalbarrister.co.nz

|                                                                                                                                                                                      |                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Pene Williams<br/>Senior Solicitor Rōia Matua<br/>Department of Conservation Te Papa<br/>Atawhai<br/>PO Box 5244<br/>Dunedin 9054<br/>Phone: [REDACTED]<br/>Email: [REDACTED]</p> | <p>Marie Payne<br/>Fast-Track Programme Lead<br/>Department of Conservation Te Papa<br/>Atawhai<br/>PO Box 10420<br/>Wellington 6140<br/>Phone: [REDACTED]<br/>Email: [REDACTED]</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**May it please the Expert Panel (Panel),**

The following matters are submitted on behalf of the Director-General of Conservation (DG):

**Introduction**

1. In Minute 46<sup>1</sup> the Panel granted leave for any party to file comments in response to Matakanui Gold Limited's (the Applicant) RFI 11 response by 7 September 2026, including on the bonding/ economics material. Subsequently, in Minutes 47<sup>2</sup> and 48<sup>3</sup> the Panel clarified that while processing of the application is suspended, parties may also voluntarily provide comments on the updated conditions and approvals circulated by the Applicant on 28 August 2026.
2. The DG is providing comments in response to both RFI 11 and the updated conditions and approvals.
3. These legal submissions provide context and support the comments in relation to the following matters:
  - a. the relevant statutory considerations under the Fast-track Approvals Act 2024 (FTAA) as they relate to the Applicant's revised lizard management approach and the Applicant's proposed wildlife approval conditions as they relate to lizards
  - b. the relevant considerations under the FTAA for conditions that may be imposed by the Panel should it decide to revoke (in part) the Bendigo covenant

**Wildlife approval considerations arising from the Applicant's RFI 11 response**

4. This part of these submissions addresses legal issues relating to lizards arising out of the applicant's response to RFI 11. The Applicant has acknowledged that its response to RFI 11 introduces an 'entirely new'<sup>4</sup> approach to addressing the impacts of the Bendigo-Ophir Gold Project (BOGP) on lizards. Accordingly, these submissions discuss:
  - a. The relevant statutory considerations under the FTAA, as they relate to the Applicant's revised approach to management of impacts on lizards

---

<sup>1</sup> [Minute 46](#) of the Expert Panel – Memoranda from Sustainable Tarras and Environmental Defence Society seeking leave, dated 19 August 2026 at [9]

<sup>2</sup> [Minute 47](#) of the Expert Panel – Response to MGL's Memorandum and Suspension, dated 25 August 2026

<sup>3</sup> [Minute 48](#) of the Expert Panel – Acknowledging Memorandum received, dated 28 August 2026, at

<sup>4</sup> Memorandum of Counsel on behalf of Matakanui Gold Limited responding to Minute 46, at paragraph 8.

- b. The Applicant's proposed Wildlife Approval conditions as they relate to lizards.
5. Given the significance of the changes to lizard management proposed by the Applicant, DOC has commissioned a further review of the Applicant's revised proposal by its independent lizard expert, Dr Mandy Tocher. Dr Tocher's further statement of advice<sup>5</sup> is filed with this memorandum.

*A revised approach to managing the impacts of the BOGP on lizards*

6. In essence, the Applicant now intends to replace the previously proposed 38ha Ardour pest exclusion area, with a larger proposed 52ha Battery Hill pest exclusion area. Lizards are now to be relocated into this pest proof sanctuary, and the 29ha Bendigo pest exclusion area. Lizards will no longer be released into unfenced areas subject to pest control. The numbers of lizards to be salvaged and relocated has been significantly reduced, by an order of magnitude, from the previous proposal to salvage and relocate over 100,000 Kowarau Gecko, Southern Grass Skink, and McCann's Skink, to the current proposal to salvage and relocate less than 10,000 Kowarau Gecko and Southern Grass Skink.

*Statutory Scheme*

7. As the Supreme Court has observed, the Wildlife Act "is the principal means by which wildlife in New Zealand, including many of its most endangered species, are protected."<sup>6</sup> It is the "mainstay of statutory protection of animals in the environment".<sup>7</sup> All protected wildlife is owned by the Crown.<sup>8</sup>
8. In the context of the BOGP, if the Panel is minded to grant approval, *effects on wildlife habitat* would be authorised by the RMA approvals (resource consents).
9. However, it is the proposed wildlife approvals that would authorise the *disturbance and/or killing of protected wildlife*. As signalled by Mallon J in *Solid Energy New Zealand Ltd v The Minister of Energy*:<sup>9</sup>

*[112] Under the RMA a land use consent authorises a person to make a "use" of the land that would otherwise contravene a district or regional plan. Because a "use" of*

<sup>5</sup> Dr M Tocher, Further Statement of Advice to Bendigo-Ophir Fast-track Panel, 7 September 2026.

<sup>6</sup> *Shark Experience Ltd v PauaMac* NZSC [2019] NZSC 111, at [45].

<sup>7</sup> *Shark Experience Ltd v PauaMac* NZSC [2019] NZSC 111, at [46].

<sup>8</sup> Section 57(3) of the Wildlife Act 1953.

<sup>9</sup> *Solid Energy New Zealand Ltd v The Minister of Energy & Ors*, High Court of New Zealand, Wellington Registry, Mallon J, CIV-2007-485-001381, 18 June, 10 December 2008, at [112], [116] and [117].

*land includes “any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land”, potentially a land use consent can be granted to carry out such destruction, damage or disturbance which, absent the consent, would otherwise contravene the relevant district or regional plan. Destruction of a habitat is likely to involve some harm to animals within it. The RMA does not empower a consenting authority to authorise that harm. Rather, the consenting authority is empowered to impose conditions to address adverse environmental effects of the proposed use of land. Thus the harm to plants and animals from a proposed use may be addressed either by refusing consent to the use or by imposing conditions to address the harm. In this way the RMA process is intended to achieve its purpose of sustainable management of our natural and physical resources (which includes plants and animals).*

...

*[116]...The requirement that these conditions be met in order to use the land according to the consent is not “lawful authority” to take the actions that the conditions entail. The Environment Court was not empowered by the RMA to authorise the “hunting or killing” or the “possession” of wildlife. Its power was to authorise a land use and to impose conditions upon which that use was subject.*

*[117] The Director-General of Conservation was, however, empowered by s 53 of the Wildlife Act to authorise the catching alive or killing of the wildlife...*

10. The FTAA does not change this underlying legal position. Accordingly, fast-track RMA approvals (resource consents) authorise the land use activities giving rise to disturbance or killing of wildlife, but they do not authorise that disturbance or killing of the wildlife itself. That is the role of wildlife approvals.
11. In the DG’s submission, a key question for the Panel is: what standard should the applicant be required to achieve under the wildlife approvals, if the Panel is minded to grant those approvals? This is an important question, not only for the purposes of what the Panel needs to decide regarding the parameters of the wildlife approvals themselves, but also for the way the wildlife approvals and their conditions would interrelate with the other fast-track approvals sought.
12. This question is brought into focus, and assumes particular significance, given the Applicant’s amended approach to lizard effects management, and the very significant reduction of the lizard numbers proposed to be salvaged and relocated out of harm’s way.
13. At a practical level, the requirements set out in the wildlife approval conditions influence (and can even drive) the outcomes to be achieved under the conditions of the RMA approvals. The standards and requirements set out in the wildlife approvals must not be undermined by inconsistent conditions, standards or methodologies set out in the RMA approvals (and vice versa). Approvals, and conditions, need to work in an integrated manner.

*Schedule 7 FTAA requirements*

14. The DG submits that the information requirements, criteria, and condition-setting powers for wildlife approvals as set out in Schedule 7, when read together and in light of the purpose and other relevant provisions in the FTAA as required, envisage that Panel's will set a high standard of wildlife protection through conditions.
15. Clauses 5 and 6 of Schedule 7 provide as follows;

**5 Criteria for assessment of application for wildlife approval**

For the purposes of [section 81](#), when considering an application for a wildlife approval, including conditions under [clause 6](#), the panel must take into account, giving the greatest weight to paragraph (a),—

- (a) the purpose of this Act; and
- (b) the purpose of the [Wildlife Act 1953](#) and the effects of the project on the protected wildlife that is to be covered by the approval; and
- (c) information and requirements relating to the protected wildlife that is to be covered by the approval (including, as the case may be, in the New Zealand Threat Classification System or any relevant international conservation agreement).

**6 Conditions**

- (1) A panel may set any conditions on a wildlife approval that the panel considers necessary to manage the effects of the activity on protected wildlife.
  - (2) In setting any condition under subclause (1), the panel must—
    - (a) consider whether the condition would avoid, minimise, or remedy any impacts on protected wildlife that is to be covered by the approval; and
    - (b) where more than minor residual impacts on protected wildlife cannot be avoided, minimised, or remedied, ensure that they are offset or compensated for where possible and appropriate; and
    - (c) take into account, as the case may be, the New Zealand Threat Classification System or any relevant international conservation agreement that may apply in respect of the protected wildlife that is to be covered by the approval.
16. Schedule 7 is consistent with and reflects other important provisions in the FTAA that are relevant to conditions setting and decision making. In particular,
    - a. Reference in cl 5(a) and it's chapeau to the purpose of the FTAA, and the requirement that it be given the greatest weight, reflects s 81(2)(b) and the requirement to apply the applicable schedules, and directions as to weighting contained within them, when making decisions on approvals.
    - b. Reference in cl 6(1) to conditions being necessary to manage the effects on protected wildlife, reflects s 83 and the requirement that conditions be no more onerous than necessary to address the reasons for which they are set.

17. In the context of the BOGP, the DG submits that there can be no question that comprehensive conditions to manage the adverse effects on protected wildlife will be 'necessary' if the project is to be approved. The DG submits that this is evident from the extremely high numbers of absolutely protected species that will be killed (whether before or after the Applicant's proposed conditions are applied), and the threat classification status of Kowarau Gecko (At Risk, Declining) and Southern Grass Skink (At Risk, Declining).
18. Necessity, in this context, is not ameliorated by the requirement to give the greatest weight to the purpose of the FTAA (cl 5(a)). Comprehensive conditions to address impacts on lizards would not threaten the viability of the BOGP, and as such the DG submits that such conditions would be consistent with the purpose of the FTAA.
19. Even if that were not the case, the DG submits that significant adverse impacts are not automatically outweighed by the purpose of the FTAA, despite the greatest weight being required to be given to that purpose. See for example, the Bledisloe Wharf fast track decision<sup>10</sup> (acknowledging that Panel Fast-track decisions do not have legal precedent effect) –
  - a. *While the greatest weight is to be placed on the purpose of the FTAA, we must be careful not to rely solely on that purpose at the expense of due consideration of the other matters listed in (b) to (c): Enterprise Miramar, at [41].*
  - b. *Clause 17 requires us to consider the matters listed in clause 17(1)(a)-(c) on an individual basis, prior to standing back and conducting an overall weighting in accordance with the specified direction: Enterprise Miramar, at [52] – [53].*
  - c. *The purpose of the FTAA is not logically relevant to an assessment of environmental effects. Environmental effects do not become less than minor simply because of the purpose of the FTAA. 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 benefit, or they may not: Enterprise Miramar, at [55].*
20. Clause 6(2) sets out a stepped process for setting conditions on a wildlife approval that are necessary to manage the effects of the activity on protected wildlife, being:

---

<sup>10</sup> [Port-of-Auckland-Fast-track-Application-Decision-of-Expert-Panel-including-Minor-Corrections-8.9.25.pdf](#) at paragraph 121.

- a. First, to **consider** “whether the condition would avoid, minimise, or remedy any impacts on protected wildlife that is to be covered by the approval” (cl 6(2)(a)); and then
  - b. Second, where more than minor residual impacts on protected wildlife cannot be avoided, minimised, or remedied, to **ensure** “that they are offset or compensated for where possible and appropriate.” (cl 6(2)(b)), and
  - c. Third, to **take into account** “the New Zealand Threat Classification System or any relevant international conservation agreement that may apply in respect of the protected wildlife that is to be covered by the approval” (cl6(2)(c)).
21. Panels have a broad discretion to set *any* conditions that are necessary to manage the effects of the activity on protected wildlife. (cl 6(1)). In the case of the BOGP, residual adverse effects on lizards are very significant, with an estimated 590,000 lizards expected to be killed. In the DG’s submission it is clearly necessary to manage the effects of the activity on this protected wildlife.
22. A Panel is required (“*must*”) consider whether conditions would avoid, remedy or mitigate any impacts on protected wildlife covered by the approval. And, if adverse effects would be more than minor, then the Panel *must ensure* that the adverse effects are offset or compensated where possible and appropriate. Clause 6(2)(b) is couched in highly directive language.
23. To *ensure* means “to make something certain to happen”.<sup>11</sup>
24. What offsetting and compensation is *possible* will involve matters of fact. In the context of the BOGP it is submitted that considerably greater offsetting or compensation for significant residual adverse effects on lizards than that proposed by the Applicant to date is possible.<sup>12</sup>
25. What offsetting and compensation is *appropriate* will require the consideration of matters of fact, in light of the various relevant mandatory and discretionary considerations under the Act.
26. The purpose of the Wildlife Act, which is the protection of wildlife<sup>13</sup>, is a mandatory relevant consideration when considering conditions (cl 5(b)). The DG’s submission is that the Applicant’s proposed management of impacts of the BOGP on lizards is inconsistent

---

<sup>11</sup> Cambridge Online Dictionary.

<sup>12</sup> See Dr M Tocher, Further Statement of Advice, e.g. at [8], [22] – [23], or [63] – [66].

<sup>13</sup> *Shark Experience Ltd v PauaMac Inc* [2019] NZSC 111 at [44] – 46.

with the purpose of the Wildlife Act. The scale of residual impacts is so great, that it cannot be said that the proposed Wildlife Approval protects the lizards on site. The DG submits that substantive changes to the proposed Wildlife Approval, and its conditions would be required, along with a comprehensive offset and compensation package, before it could be regarded as being consistent with the statutory purpose of protecting wildlife.

27. The effects on wildlife, which include potential adverse and cumulative effects, as well as any positive effects, are another mandatory relevant consideration (cl 5(b)). The DG submits that the effects on protected wildlife will be extremely significant. The vast majority of absolutely protected lizards on site will be killed, with no steps taken to prevent harm to them. If approved, the level of lizard mortality authorised under this Wildlife Approval would be the largest ever authorised under the Wildlife Act. The BOGP contemplates an unprecedented level of lizard mortality for a Wildlife Approval.

*The Applicant's revised RFI 11 approach*

28. The DG considers that the Applicant's approach, as outlined in its response to RFI 11, fails to avoid, minimise or remedy adverse effects on protected lizards. The Applicant seeks wildlife approval to "disturb, injure or kill [absolutely protected lizards] when unavoidable".<sup>14</sup> The disturbance, injury or killing will result from the removal of vegetation and topsoil within the direct disturbance footprint, and other ancillary activities, such as construction of the pest exclusion fences. The Applicant's own evidence is that an estimated 600,000 absolutely protected lizards are currently present within this area. Under the Applicant's revised lizard impact management proposal, that means that an estimated 590,000 lizards will be killed as mine development proceeds. While less than 10,000 lizards would be salvaged, it is difficult to see how the proposal avoids, minimises or remedies impacts on the remainder, which is the substantial majority of the impacted population.
29. Even for those lizards to be relocated, survival uncertainty is acknowledged but won't be resolved in the Applicant's RFI 11 response. Predator-free release is expected to improve individual survival, but there is no evidence basis for survival probability.<sup>15</sup>

---

<sup>14</sup> Schedule 1 Authorised Activity. Draft wildlife approval filed by Matakanui Gold Limited 28 August 2026.

<sup>15</sup> See Dr M Tocher, Further Statement of Advice, at [30].

30. And nor is the level of killing of wildlife being contemplated “unavoidable”. The Applicant’s earlier proposal illustrates that higher levels of salvage and relocation are possible and practicable. For example, the Applicant has not provided any explanation as to why the Rise and Shine pest exclusion area has now been discontinued (and cannot be used as another possible relocation area), why larger or additional pest exclusion areas are not proposed, or why relocation cannot be undertaken into wider areas outside the DDF where lizard carrying capacity is enhanced through long term habitat enhancement and pest control.<sup>16</sup>
31. Ultimately, it appears that the impediments to more effective and meaningful management of impacts on lizards come down to cost and timing. Salvaging and relocating more lizards is possible, but would take time and money. But in the context of the BOGP, there is no suggestion that these costs would render the project unviable, or result in it not being able to proceed.
32. The Applicant has acknowledged that the revised proposal does not address the significant residual impacts on lizard populations that the BOGP would cause. Rather, it’s position appears to be that the revised approach outlined in its response to RFI 11 would not result in a significant reduction in residual adverse effects when compared to its original approach.<sup>17</sup>
33. Dr Tocher’s further statement of advice sets out 13 gaps, in relation to which she recommends amendments are required to the proposed Wildlife Approval<sup>18</sup>. It is the DG’s submission that without amendments to address each of these gaps, the proposed Approval would not avoid, minimise or remedy adverse impacts of the BOGP on lizards, and would be inconsistent with the purpose of the Wildlife Act.

---

<sup>16</sup> See Dr M Tocher, Further Statement of Advice, e.g. at [8], or [22] – [23].

<sup>17</sup> See MGL response to RFI 11, re Q10, at pg 13 “MGL experts do not, however, contend that these refinements will materially reduce the magnitude of no net loss. Rather, experts consider the residual magnitude of net loss for lizards will remain High, albeit at the lower end of that category than the effects management package proposed at lodgement.”

<sup>18</sup> See Dr M Tocher, Further Statement of Advice, at [49] – [61]. The 13 gaps identified by Dr Tocher are (1) absence of a comprehensive lizard-specific outcomes framework; (2) scope certainty; (3) mapped evidence requirements before works commence; (4) species-identification certainty; (5) enforceable avoidance; (6) release-site readiness and carrying capacity; (7) treatment of McCann’s skink; (8) response to unexpected or higher-risk species; (9) salvage implementation detail; (10) long-term monitoring and reporting; (11) adaptive-management certainty; (12) approval pathways for monitoring methods; and (13) DOC-controlled review and amendment. These are each discussed in greater detail in Dr Tocher’s Further Statement of Advice.

*Offsets and compensation*

34. Dr Tocher confirms (and the Applicant acknowledges) that a high level of residual adverse effects on lizards will remain. No lizard focussed offsetting or compensation has been proposed by the Applicant to address the residual effects of the BOGP on lizards, including the killing of an estimated 590,000 absolutely protected individuals.
35. The Applicant has emphasised that its proposed Biodiversity and Heritage Enhancement Fund is not intended as environmental compensation. Furthermore, while lizard related work is potentially within scope of the purpose of this fund (which is proffered on an *Augier* basis, see below), there is no certainty that any of its funds will be expanded on lizard related work.
36. Any benefits for lizards arising out of works in the proposed Ecological Rehabilitation and Enhancement Area would be incidental to vegetation enhancement or pest control. Net positive, or net gain is not envisaged (or required) for lizard species under the applicant's revised offsetting and compensation conditions in the common resource consent conditions for CODC and ORC. The Applicant's experts have acknowledged that residual effects for lizards are significant. The RFI 11 response does not show that the revised package will materially reduce residual loss.<sup>19</sup>
37. As has been highlighted in these submissions, Cl 6(2)(b) of Schedule 7 FTAA is framed in mandatory language. A Panel must ensure that more than minor residual impacts on protected wildlife that cannot be avoided, minimised or remedied, are offset or compensated for where possible and appropriate, (while taking into account the various relevant considerations in ss 81, 83 and cl 5).
38. In the DG's submission, if the Panel is minded to grant approval for the BOGP, then provision of a substantial lizard focussed compensation package is both possible and appropriate.
39. In the absence of an appropriately scaled environmental compensation package that realistically addresses the magnitude of residual adverse effects on absolutely protected lizards, then the DG submits that the proposed Wildlife Approval is inconsistent with the purpose of the Wildlife Act. That inconsistency, alongside the significant residual adverse effects of the BOGP on protected wildlife, are matters that must be taken into account in

---

<sup>19</sup> See Dr M Tocher, Further Statement of Advice, at [63].

deciding whether or not to grant the Wildlife Approval pursuant to ss 81(2) and 85 of the FTAA.

**The Panel may use resource consent conditions to set any conditions on covenant revocation or amendment**

40. The Applicant has sought to amend or revoke, in part, the Bendigo Conservation Covenant (Covenant) under s42(4)(g) of the FTAA and has now provided further information in response to the Panel's requests<sup>20</sup> which addresses the information required in Schedule 6, clause 42. The DG's s51(2)(b) covenant report provides further information to support the Panel, along with comments provided under s53 including those from the Minister of Conservation, the New Zealand Conservation Authority, the Otago Conservation Board, and Kā Rūnaka.
41. FTAA Schedule 6 clause 45 states the criteria for assessing the application to revoke the Covenant, and legal submissions on behalf of the DG on the Covenant<sup>21</sup> set out the approach it is submitted the Panel should take in applying the criteria. Those submissions do not address relevant considerations should the Panel wish to set any conditions on the amendment or revocation of the Covenant under clause 46:

**46 Conditions**

- (1) A panel may set conditions relating to the use of land on the amendment or revocation of a conservation covenant, including—
    - (a) in the case of the revocation of a covenant, the protection by the applicant of equivalent land outside the area of the covenant:
    - (b) in the case of the variation of a covenant, the carrying out by the applicant of works to enhance conservation values on land remaining within the covenant.
  - (2) If the substantive application is lodged by more than 1 authorised person, the reference to the applicant in subclause (1) must be read as a reference to the authorised person who will benefit from the amendment or revocation of the conservation covenant.
42. Clause 46(2) confirms conditions may be appropriate for the Panel to impose as an applicant will benefit from the amendment or revocation of a conservation covenant.<sup>22</sup> It is submitted the Applicant will benefit from the partial revocation of the Covenant, as this

---

<sup>20</sup> RFI 2 dated 1 April 2026, RFI 5 dated 21 May 2026, RFI 9 dated 28 May 2026, and RFI 11 dated 25 June 2026.

<sup>21</sup> [DOC s51\(2\)\(b\) Covenant Report – Appendix C – Legal Submissions dated 25 March 2026](#), at paragraph 53

<sup>22</sup> In *Dellar v Canavan* [2026] NZHC 967, Venning J, 16 April 2026, in the context of a restrictive covenant the High Court assessed the windfall benefit resulting from an amendment or revocation of a covenant and what resulting compensation could be appropriate, at [41].

will enable it to undertake the project despite compromising values of regional and national significance which would otherwise be protected by the Covenant.<sup>23</sup>

43. Turning to clause 46(1), the Panel has a broad discretionary power to set conditions relating to the use of land on the amendment or revocation of the Covenant. Paragraphs (a) and (b) set out options the Panel may consider in the case of revocation or amendment respectively. However, this does not limit conditions the Panel may impose or how such conditions may be incorporated into any approvals granted by the Panel.
44. The DG submits, as any conditions are to relate to the use of land, then one way the Panel may set conditions on revocation or amendment of the Covenant is to incorporate them into the resource consent land use conditions. Including such conditions within the resource consent has the advantage of any conditions then being enforceable, as a compliance matter, by CODC or other persons. If conditions on revocation or amendment are imposed outside resource consents, as there is no compliance framework within the FTAA, this could leave it to the DG to attempt to enforce conditions as a civil matter through legal action in the courts.
45. The Applicant did not identify any conditions relating to the use of land which it proposed might be imposed on the revocation of the Covenant. In its updated Common Conditions to the CODC and ORC Resource Consents dated 28 August 2026, D.03 and its updated CODC Land Use Consent Conditions, D.01; the Applicant has included conditions which relate to the use of land. These include:
  - a. the Biodiversity and Heritage Enhancement Fund (BHEF) – C135, D.03
  - b. maintenance of public access to the Bendigo Conservation Area and an easement in favour of the Minister of Conservation – New 48A and 49, D.01
46. In comments on its updated condition sets the Applicant maintains these conditions are proffered on an 'Augier' basis. The Augier principle is derived from an English case where an applicant gave an undertaking to fulfil a condition and planning permission was granted on that basis. It was not then open for the applicant to subsequently argue the council did not have powers to require compliance with the condition.<sup>24</sup>
47. Part of the basis for an Augier condition in a resource consent context is that it is proffered by an applicant where it cannot separately be imposed or enforced by a consent authority

---

<sup>23</sup> DOC s51(2)(b) Covenant Report – at 6.4

<sup>24</sup> *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD)

(here the Panel in place of the Councils) and the applicant wishes to offer it anyway. Because these conditions are proffered by agreement, it is only the applicant who can subsequently amend an Augier condition.<sup>25</sup>

48. The DG submits by asserting these are Augier conditions the Applicant is implying these conditions are not directly connected to an adverse effect of the activity on the environment which can be addressed as a condition of the resource consents.<sup>26</sup>
49. Where conditions are imposed relating to the revocation or amendment of the Covenant, the DG submits these do relate directly to the adverse effect of the activity on the environment, being a response to the removal of legal protection of that part of the environment currently provided by the Covenant. The removal or amendment of the Covenant itself results in an adverse effect of the activity on the environment<sup>27</sup> and in terms of the FTAA is an adverse impact.
50. Accordingly, the DG submits conditions may be set by the Panel on revocation or amendment of the Covenant and incorporated into the resource consents. This is consistent with the procedural principles set out in s10 FTAA by promoting an efficient and consistent outcome.
51. These conditions would not be Augier, in the RMA sense, and may be set by the Panel including having regard to the benefit the applicant will receive on revocation or amendment of the Covenant resulting in the activity having a direct adverse effect on the environment.
52. The DG submits conditions for the proposed Biodiversity and Heritage Enhancement Fund<sup>28</sup> and the proposed easement to secure public access from Thomson Gorge Road past Mt Moka to the Bendigo Conservation Area may both be considered by the Panel as conditions it may impose relating to use of land should it decide to revoke the Covenant. The DG further submits the Panel is not constrained or limited by what the Applicant proposes and the Panel may set its own conditions relating to use of land on any amendment or revocation of the Covenant if that is what the Panel decides to do.

---

<sup>25</sup> *Meridian Energy Limited v Canterbury Regional Council* [2026] NZEnvC 140, at [302]

<sup>26</sup> cf. s108AA(1)(b)(i) RMA

<sup>27</sup> Having regard to the broad definition of “effect” in section 3 RMA

<sup>28</sup> Refer the Expert Panel decision on Stella Passage Development dated 7 September 2026 at [108] (e) confirming that Panel’s view that a financial payment to a third party specifically required to address an adverse effect on the environment is not an Augier condition.



Dean van Mierlo



Pene Williams

Co-Counsel for the Director-General