

BEFORE THE EXPERT PANEL

IN THE MATTER	of the Fast-track Approvals Act 2024 (FTAA)
AND	
IN THE MATTER	of an application for approvals under the FTAA for the Bendigo-Ophir Gold Project FTAA-2507-1089

**SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF ENVIRONMENTAL DEFENCE
SOCIETY INC**

21 September 2026

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Introduction

1. These legal submissions are filed on behalf of the Environmental Defence Society Inc. (EDS) in accordance with Minute 48. Minute 48 provides an opportunity for parties / invitees to respond to the Applicant's further legal submissions filed on 14 September 2026, or address any new legal issues that have arisen since the filing of legal submissions in April 2026, by 21 September 2026.¹
2. Minute 48 says:

[10] It is appropriate that there be a final "wash up" of any legal issues which have emerged since the April hearings. We anticipate these are few.

...

[11] To be clear, the Panel is not inviting or expecting MGL to provide a submission which readdresses any legal issues which were the subject of comprehensive submissions in the March/April period (and in respect of which advice has already been taken from Ms Carruthers KC). Nor is it inviting a submission which comments on the evidence with a view to persuading the Panel on the merits. The focus is to be on any new legal issues exclusively. The same applies to the permitted responses and reply.
3. In EDS's view, the closing legal submissions for the Applicant filed on 14 September 2026 extend beyond the narrowly defined scope of that direction. EDS is mindful of the Panel's direction that the Applicant's legal submissions and the responses from invitees are to "focus on new legal issues exclusively" and that the Panel is "not inviting a submission which comments on the evidence with a view to persuading the Panel on the merits".
4. Accordingly, these legal submissions are not a general "wrap up" of the evidence and overall assessment. Nor do these submissions address legal matters already raised in earlier comments and submissions, in relation to which advice has been sought from Bronwyn Carruthers KC.² They focus on new legal issues that have arisen since April 2026 and respond to matters specifically addressed in the Applicant's legal submissions, where that is appropriate and has been possible within the limited time available.
5. Counsel has had the benefit of reviewing draft legal submissions on behalf of Sustainable Tarras. EDS adopts those legal submissions.
6. Against that background, these legal submissions address the following matters:
 - a. The proposed adaptive management approach (in response to the Applicant's closing legal submissions);
 - b. Lack of consideration of alternatives;

¹ Minute 48 of the Expert Panel, dated 28 August 2026 (**Minute 48**), at [10].

² EDS notes that this legal advice has not been released to the parties despite likely relevance. EDS submits the advice should be released, provided parties may comment on it.

- c. Valid and lawful conditions;
- d. Adequacy of compensation for loss of wetlands;
- e. Scale of landscape assessment (in response to the Applicant's closing legal submissions); and
- f. Concluding comments on section 85 assessment.

The proposed adaptive management approach

- 7. The Applicant's closing legal submissions address the appropriateness of an adaptive management approach in relation to the management of effects on surface and groundwater, in light of the evidence before the Panel.
- 8. It is accepted that the leading authority on adaptive management is *Sustain our Sounds v The New Zealand King Salmon Company Ltd (Sustain our Sounds)*,³ however EDS disagrees that the requirements for adaptive management set out by the Supreme Court are met here, particularly in relation to the management of water and impacts on spring annuals and cushionfields.
- 9. The Supreme Court in *Sustain our Sounds* canvassed international and New Zealand-based case law and guidelines on the application of an adaptive management approach. Key principles are:
 - a. Adaptive management may allow a project to proceed, despite uncertainty and potentially adverse environmental impacts, based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.⁴
 - b. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty. They establish a regime which would permit changes, within defined parameters, to the way the outcome is achieved.⁵

³ [2014] NZSC 40. The requirements of an adaptive management approach are set out in the Legal Submissions of the Environmental Defence Society (10 April 2026), at [250] – [253].

⁴ *Sustain our Sounds*, at [123], citing Trembley-Lamer J in *Pembina Institute for Appropriate Development v Canada (Attorney General)* 2008 FC 302.

⁵ *Sustain our Sounds*, at [121], citing Preston J in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48.

- c. Conditions must clearly specify the level of effect anticipated, with provision for the activity to be adjusted if that threshold is reached.⁶
 - d. The precautionary principle may require prohibition of an activity – for example, where the potential damage is likely to be irreversible and where particularly vulnerable species or ecosystems are concerned;⁷ adaptive management will not be appropriate where effects cannot be remedied before they become irreversible.⁸ For adaptive management, the precautionary principle applies, whether reflected in planning instruments or not.
 - e. While the applicant should not have to anticipate and research all hypotheses before making an application, sufficient baseline knowledge must be collated on which an ongoing process can be built, with reasonably certain and enforceable objectives and process for meeting those objectives.⁹
10. The Supreme Court articulated a “threshold question” as to whether an adaptive management regime can even be considered. It said:¹⁰
- There must be 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.
11. It also enunciated a “secondary question” as to whether the precautionary approach requires an activity to be prohibited until further information is available, which hinges on a combination of the following factors:¹¹
- 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
 - 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.

⁶ *Sustain our Sounds*, at [107], referring to the Department of Conservation’s Guidance Note on Policy 3 (Precautionary approach) of the New Zealand Coastal Policy Statement.

⁷ *Sustain our Sounds*, at [111], referring to the International Union for Conservation of Nature (IUCN) guidelines on the application of the precautionary principle and related IUCN commentary.

⁸ *Sustain our Sounds*, at [108], referring to the Department of Conservation’s Guidance Note on Policy 3 (Precautionary approach) of the New Zealand Coastal Policy Statement.

⁹ *Crest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/2009.

¹⁰ *Sustain our Sounds*, at [125].

¹¹ *Sustain our Sounds*, at [129].

12. It held that four key factors – good baseline information, conditions that provide for effective monitoring using appropriate indicators, thresholds to trigger remedial action before effects become overly damaging and whether effects can be remedied before they become irreversible – should be considered to determine whether risk and uncertainty can be sufficiently diminished (in terms of (d) above), at least in the case before it.¹²
13. Applying the Supreme Court’s propositions to applications to take groundwater, the Environment Court in *Burgoyne/Te Taumata o Ngati Kuri Research Unit v Northland Regional Council*,¹³ accepted that the necessary features of adaptive management are:
 - a. That incremental stages of development are set out;
 - b. The existing environment is established by robust baseline monitoring;
 - c. There are clear and strong monitoring, reporting and checking mechanisms so that steps can be taken before adverse effects eventuate;
 - d. These mechanisms are supported by enforceable resource consent conditions that require certain criteria to be met before the next stage can proceed; and
 - e. There is real ability to remove all or some of the development that has occurred at that time if the monitoring results warrant it.
14. EDS submits that, particularly in relation to effects on surface water, groundwater and aquatic ecology, and indigenous vegetation the evidence does not demonstrate that either the initial threshold question (adequate evidential foundation), or the secondary threshold question as to whether the precautionary approach precludes adaptive management (including the extent of risk and whether that risk is sufficiently diminished) has been met.
15. The four factors enunciated by the Supreme Court, and referred to in the closing legal submissions for the Applicant, are addressed below in relation to water management.

Baseline information about the receiving environment

16. EDS submits that this requirement for adaptive management is not met.
17. In relation to water quality, the groundwater experts for the Applicant, Otago Regional Council (**ORC**) and EDS agreed in conferencing that there is no baseline water quality information for the Ardgour Aquifer, which is a key receiving environment.¹⁴ ORC's planner considers there is no comprehensive groundwater baseline for either flow or

¹² *Sustain our Sounds*, at [133].

¹³ [2019] NZEnvC 28.

¹⁴ Bendigo-Ophir Gold Project Groundwater Joint Witness Statement, 14 and 15 May 2026, at [96]–[97].

quality in Shepherds Valley. Professor Webster-Brown considers baseline water quality has not been adequately characterised at or downstream of the site.¹⁵ The Applicant's water quality expert accepts that the recent sampling does not yet show seasonal conditions.¹⁶

18. Groundwater levels have not been measured for long enough to show seasonal change or confirm flow directions. EDS's and ORC's groundwater experts consider that key aquifer properties needed to estimate how fast seepage would move have not been measured.¹⁷ In the absence of this information, the model is built on limited data and effects cannot be reliably predicted – which is one of the reasons the Applicant's model is of the lowest confidence class.¹⁸ These gaps were identified in conferencing and remain largely unaddressed, and all five groundwater experts agreed further characterisation was needed to confirm flow directions and seepage containment.¹⁹
19. The Applicant has proposed a new condition requiring "existing" background water quality information to be gathered over at least six months before mining.²⁰ This does not address baseline information required in relation to groundwater levels or aquifer properties. Guidelines for establishing a groundwater baseline recommend at least two years of data.²¹ A baseline also has to enable seepage to be distinguished from natural variation. The Applicant's detection strategy assumed background sulfate and nitrate would be far lower than in seepage - but recent sampling shows higher background concentrations than expected. As a result, ORC's groundwater expert considers the approach needs re-evaluation.²² Without an adequate baseline, a change caused by seepage could not be distinguished from natural variability.²³
20. In addition, the information provided to the Panel in response to RFI 11 contains errors and is not appropriately calibrated. Field work and modelling undertaken in response to RFI 11 were run at the same time, so the new data were not available when the model was built. This is accepted as a limitation. The shallow model was not calibrated at all.²⁴

¹⁵ Planning Memorandum of Ms McDonald, 7 September 2026, at [10(e)]–[10(f)]. Supplementary Evidence of Professor Webster-Brown, 7 September 2026, at [8].

¹⁶ Memorandum of Ms Palich, Hydro Geochem Group Ltd, Document J-H-NZ0238-012-M-Rev0, 13 September 2026, at p 3.

¹⁷ Supplementary Evidence of Dr Morgan, 7 September 2026, at [25], [37] and [40]–[41]. Technical Review of Ms Badenhop, 7 September 2026, at ss 2.1 and 3.6.

¹⁸ Morgan Supplementary Evidence, 7 September 2026, at [9], [44] and [55]–[56].

¹⁹ Groundwater Joint Witness Statement, 14 and 15 May 2026, at [28] and [34].

²⁰ Proposed Conditions, Schedule Two, General Conditions for ORC Consents (D.04), 14 September 2026 (track changes), Condition 21(a).

²¹ Morgan Supplementary Evidence, 7 September 2026, at [38] and [160]. EPA South Australia, *Guideline 3: Establishing baseline groundwater quality* (2024), at p 15.

²² Badenhop Technical Review, 7 September 2026, at s 4.2. McDonald Planning Memorandum, 7 September 2026, at [30].

²³ Morgan Supplementary Evidence, 7 September 2026, at [19] and [38]. Groundwater Joint Witness Statement, 14 and 15 May 2026, at [81].

²⁴ See Memorandum of Mr Dumont, KSL, 14 September 2026, at sections 2 and 3; Morgan Supplementary Evidence, 7 September 2026, at [45] – [465] and [102]; McDonald Planning Memorandum, 7 September 2026, at [11(e)].

Questions 2 and 4 of RFI 11 were therefore not adequately addressed and the Panel does not have the information it considered necessary, and therefore requested from the Applicant via RFI 11.

Effective monitoring

21. The Applicant's position is that the recent investigations confirm seepage will stay in shallow groundwater where it can be detected.²⁵ Other groundwater experts interpret the recent data differently.
22. Monitoring can only detect seepage that passes a bore, so the bores must be on the seepage pathway. The seepage pathway has not been established, and the recent investigations increased uncertainty rather than resolving it, because hydraulic conductivity was higher than assumed and vertical flow directions differed between locations in ways that were not anticipated.²⁶ ORC's groundwater expert also considers the new data change the conceptual understanding of the Shepherds Creek valley.²⁷ As noted above, the Applicant's groundwater model is of the lowest confidence class and its calibration depended on groundwater level data that was described as high confidence, but which the modeller now accepts contained errors. The modeller considers the model remains a good representation of the system despite this.²⁸
23. The monitoring network is designed on the assumption that seepage stays shallow. However, the groundwater experts agreed further modelling was needed to test whether dewatering of the pit and underground workings could instead draw seepage deeper, beneath the monitoring bores. This has not been adequately done.²⁹
24. Several experts identify SC01 – which is the surface water compliance site where Shepherds Creek leaves the valley through a narrow bedrock gap and flows onto the Ardgour Aquifer – as a key area of uncertainty. It was previously accepted as the last practicable point to detect and intercept seepage, but ORC's groundwater expert considers that is now less certain following the recent investigations.³⁰ The Applicant's modeller considers that seepage bypassing the primary collection system may also bypass SC01.³¹ The new bore next to SC01 shows a deep water table (about 11 m below

²⁵ Matakanui Gold Limited, Response to Submissions on RFI 11, Closing Legal Submission, 14 September 2026, at [46(b)].

²⁶ Morgan Supplementary Evidence, 7 September 2026, at [34]–[36], [59], [63], [102] and [142].

²⁷ Badenhop Technical Review, 7 September 2026, at s 2.1. McDonald Planning Memorandum, 7 September 2026, at [10(a)] and [10(c)].

²⁸ Morgan Supplementary Evidence, 7 September 2026, at [64]–[68]. Kōmanawa Solutions Ltd, *Updated Groundwater Modelling for Bendigo Ophir Gold Deposit*, Report Z20111.m3, 14 August 2026, Appendix A.5 at p 43. Memorandum of Mr Dumont, Kōmanawa Solutions Ltd, Response to Responses on RFI 11, 14 September 2026, at s 6.

²⁹ Morgan Supplementary Evidence, 7 September 2026, at [78]–[79]. Groundwater Joint Witness Statement, 14 and 15 May 2026, at [28]. Badenhop Technical Review, 7 September 2026, at ss 2.1 and 3.1.

³⁰ Groundwater Joint Witness Statement, 14 and 15 May 2026, at [19] and [74]. McDonald Planning Memorandum, 7 September 2026, at [21]. Badenhop Technical Review, 7 September 2026, at s 3.9.

³¹ Dumont Memorandum, 14 September 2026, at section 11 (p 19).

ground) and downward flow, and ORC's groundwater expert considers seepage there is likely to follow deeper paths.³² The Applicant's hydrogeologist considers that seepage will nonetheless surface at SC01, but no bore has been drilled at the gap itself, so conditions there are inferred.³³

25. Dr Morgan has also identified a material error in Mr Burgess's calculation of natural groundwater flow, which is the subject of her further statement of 18 September 2026. Mr Burgess's conclusion that seepage will surface at SC01 relies in part on his estimate that natural flow is small relative to unrecovered seepage. Once corrected, natural flow exceeds the estimated seepage rather than being exceeded by it, so the comparison he relies on does not support his conclusion. On the evidence of Dr Morgan and ORC's groundwater expert, seepage may instead pass beneath SC01 undetected.
26. The monitoring network is also incomplete. There are only two groundwater compliance bores for the whole site, and the experts for EDS and ORC have both raised concerns about their locations.³⁴ Most of the seepage bypass performance monitoring bores, meant to give earliest warning near the sources, are not yet installed, and their monitoring depths are not specified in the conditions.³⁵ Without a reliable understanding of where seepage will flow, monitoring bores cannot be placed with confidence.
27. As a result, the monitoring regime proposed will be ineffective to determine whether adverse effects are occurring or likely to occur in the receiving environment.

Appropriate thresholds/ triggers

28. The Applicant relies on performance monitoring upstream of the compliance sites to identify emerging effects before limits are reached.³⁶ The expert evidence raises several issues as to whether there will be sufficient warning to respond, what the appropriate triggers should be, and the appropriate response to seepage detection.
29. All groundwater experts agreed in conferencing that further work was needed to establish the timeframes for seepage moving down the catchment. ORC considers those timeframes are still not known with any certainty.³⁷ ORC's groundwater expert considers seepage could reach SC01 in under a year, rather than the eight years

³² Hydro Geochem Group Ltd, BOGP Groundwater Site Investigation Memorandum, Document J-H-NZ0238-010-R-Rev0 (RFI 11 Question 2a), at pp 9–10. Badenhop Technical Review, 7 September 2026, at ss 3.5 and 3.9.

³³ Memorandum of Mr Burgess, Hydro Geochem Group Ltd, Document J-H-NZ0238-011-M-Rev0, 14 September 2026, at Attachment A, p 7.

³⁴ Proposed Conditions, Schedule Two (D.04), 14 September 2026, Condition 34 and Attachment 4. Morgan Supplementary Evidence, 7 September 2026, at [145] and [149]–[152]. Badenhop Technical Review, 7 September 2026, at s 4.1.1.

³⁵ Proposed Conditions, Schedule Two (D.04), 14 September 2026, Attachment 4. Morgan Supplementary Evidence, 7 September 2026, at [156].

³⁶ Matakanui Gold Limited Closing Legal Submission, 14 September 2026, at [49(c)(ii)].

³⁷ Groundwater Joint Witness Statement, 14 and 15 May 2026, at [68]. McDonald Planning Memorandum, 7 September 2026, at [11(e)(i)] and [20].

assumed by the Applicant, which significantly reduces the time available to identify and react.³⁸

30. No seepage triggers have yet been set, and ORC's groundwater expert cannot confidently suggest any now, given the lack of a baseline, as set out above.³⁹ Condition 21 leaves triggers to be developed by an expert and certified by ORC, creating validity and enforceability concerns. It does not require the triggers to be numerical.⁴⁰ ORC's freshwater expert recommends numerical triggers set stringently enough to reflect the need for close to 100% seepage capture, so that it is clear when a response is required.⁴¹ Fish and Game's water quality expert notes the absence of clearly defined and enforceable triggers across the water management framework, and that treatment infrastructure may take around 26 months to commission once a trend is confirmed.⁴²
31. The expert evidence also raises questions about the responses in the event seepage is detected. The last-resort measures in Condition 26 apply only once all other measures have failed and seepage continues to be detected, and no timeframe for response is specified.⁴³ The measures are therefore only triggered by seepage that the monitoring network finds.

Whether effects can be remedied before becoming irreversible

32. EDS submits that the evidence before the Panel demonstrates that the potential groundwater contamination effects would be difficult to reverse.
33. Professor Webster-Brown's evidence is that groundwater contamination cannot be reversed, and ORC's planner considers there are few if any options to remediate a contaminated aquifer.⁴⁴ The Applicant's modelling of the Ardgour Aquifer shows plumes taking decades to dissipate and a large plume with little dilution extending towards the Lindis and Clutha rivers, in aquifers used for drinking water, stock water and irrigation.⁴⁵ There is no plan to remediate contaminated groundwater, and the backstop measures apply only on site, upgradient of the receiving aquifers.⁴⁶

³⁸ Badenhop Technical Review, 7 September 2026, at s 3.6. McDonald Planning Memorandum, 7 September 2026, at [10(d)].

³⁹ Badenhop Technical Review, 7 September 2026, at s 4.2. McDonald Planning Memorandum, 7 September 2026, at [30].

⁴⁰ Proposed Conditions, Schedule Two (D.04), 14 September 2026, Condition 21.

⁴¹ Memorandum of Dr Greer for Otago Regional Council, 4 September 2026, at ss 2.1.3 and 2.2. McDonald Planning Memorandum, 7 September 2026, at [28]–[29].

⁴² Statement of Ms McArthur for Otago Fish and Game Council and New Zealand Fish and Game Council, 7 September 2026, at [66]–[68].

⁴³ Proposed Conditions, Schedule Two (D.04), 14 September 2026, Condition 26.

⁴⁴ Evidence in Chief of Professor Webster-Brown, 10 April 2026, at [92]. McDonald Planning Memorandum, 7 September 2026, at [22] and [34].

⁴⁵ Evidence in Chief of Dr Morgan, 10 April 2026, at [122] and [124]. Webster-Brown Evidence in Chief, 10 April 2026, at [48]. Badenhop Technical Review, 7 September 2026, at s 3.7.

⁴⁶ Morgan Evidence in Chief, 10 April 2026, at [143(g)]. Proposed Conditions, Schedule Two (D.04), 14 September 2026, Condition 26.

34. The expert evidence indicates the risk increases after mining ends. Seepage stays above water quality limits for over a century for some contaminants, and the drains are expected to degrade.⁴⁷ The water and load balance model has not been updated for the closure and post-closure phases, when the waste facilities are at their full extent, seepage rates are highest and underdrain failure may occur.⁴⁸ The closure model still assumes all seepage is captured, and the ability to respond is likely to be more limited after closure than during mining.⁴⁹
35. EDS submits that the potential environmental risk of this project is significant – requiring a high level of understanding of the receiving environment, the movement of groundwater in that environment, the potential effects of the proposal on surface and groundwater quality and whether those effects can be adequately managed using an adaptive management approach.
36. Considering the questions posed by the Supreme Court, EDS submits that:
 - a. The threshold question of whether there is 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 is “no”; and
 - b. The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, taking into account the factors identified by the Court, is “yes”.
37. In addition, given the level of uncertainty as to whether the risk of effects on surface water and groundwater can be adequately managed, EDS submits that the Panel cannot be certain that the discharge of contaminants meets the requirements of section 107 of the Resource Management Act 1991 (**RMA**). In ordinary RMA processes, section 107 precludes consent from being granted if the activity is likely to render freshwater unsuitable for consumption by farm animals or have significant adverse effects on aquatic life after reasonable mixing. The aquifers are used for stock water and irrigation.⁵⁰ The Panel must therefore have regard to the fact that consent would normally be declined under clause 17(4) of Schedule 4 of the FTAA. The Panel retains a discretion to decline for inconsistency with section 107 RMA.

Consideration of alternatives

38. It is common ground among the landscape, ecology and heritage experts that the proposed open pit mines will have significant adverse effects on Outstanding Natural Landscape (**ONL**) values, indigenous biodiversity (including Threatened or At-Risk lizard

⁴⁷ Webster-Brown Evidence in Chief, 10 April 2026, at [42]. Badenhop Technical Review, 7 September 2026, at ss 3.1 and 3.4.

⁴⁸ McDonald Planning Memorandum, 7 September 2026, at [12(c)].

⁴⁹ Morgan Supplementary Evidence, 7 September 2026, at [94] and [146].

⁵⁰ Evidence in Chief of Prof Jenny Webster-Brown, 10 April 2026, at [48].

and plant species) and historic heritage. These are not marginal effects – they are accepted as being adverse impacts of serious magnitude, notwithstanding the mitigation, offsetting and compensation measures proposed.

39. Several of the Applicant’s witnesses also accepted, under cross-examination, that if an underground mining method were adopted instead of open pit methods, some of the more significant adverse effects – for example, impacts on ONLs and significant indigenous biodiversity such as spring annuals and cushionfield habitat, and on water quality in terms of water quality in pit lakes and contaminant load resulting from waste rock – would be avoided.⁵¹
40. Despite this, none of the Applicant’s experts had undertaken a consideration of alternative methods that would involve underground mining for all proposed pits. Mr Chrisp conceded that, despite the statement in the Joint Witness Statement that there had been extensive consideration of alternatives, there was no evidence of that before the Panel and he did not meaningfully resist the proposition put to him that the assessment of alternative methods involving underground mining was inadequate. He nonetheless accepted that there is an obligation to consider alternatives as part of an application of this nature.⁵² Mr Patterson conceded that he had not considered the economic impact, in terms of profitability of the project and therefore impact on the project benefits, of alternatives.⁵³
41. Some witnesses for other parties expressed surprise that underground mining was not considered as an option,⁵⁴ and some considered that the absence of an alternatives assessment was a significant gap in the application, that there should have been a documented assessment of the methods considered and that such an assessment would assist in understanding of extent to which some material impacts could be avoided.⁵⁵
42. The choice between open pit and underground extraction was not the product of an independent and considered assessment of options by the Applicants’ relevant technical witnesses. Several of the Applicant’s experts conceded that they only considered the proposal as designed by their client – it was a ‘client brief’. This is a surprising and major omission in a project with effects of this magnitude on values of national importance recognised by section 6 RMA. As noted, many of these effects could be easily avoided by undergrounding. The experts have therefore had to design

⁵¹ See Landscape Hearing Transcript (9 June 2026) – Girvan cross examination, p 115; Ecology Hearing Transcript (12 June 2026) – Simcock cross-examination, pp 107; Water Hearing Transcript (15 June 2026), Weber cross-examination, p 105; Geotechnical Hearing Transcript (16 June 2026) – Torvelainen cross-examination, p 52.

⁵² Planning Hearing Transcript (18 June 2026), pp 41 – 42.

⁵³ Economics Hearing Transcript (19 June 2026), p 74.

⁵⁴ See Geotechnical Hearing Transcript (16 June 2026), where Prof Emmerman queried why underground mining was not considered given the high waste rock to ore stripping ratio (p 45 – 46), and Dr McAlpine considered it necessary to understand the options in terms of open cast versus underground mining (pp 47 – 49).

⁵⁵ Planning Hearing Transcript (18 June 2026) (Allen, Williams and McDonald), pp 8 – 9, 12 and 16 – 17.

mitigation packages which do not adequately address the significant adverse effects of the proposal – instead, the Applicant relies entirely on the economic benefits of the proposal to justify the unprecedented extent of the project’s effects.

43. The High Court has accepted that, while a decision maker can only take into account the effects of the particular activity under consideration, the requirement to assess alternatives allows the decision maker to be fully informed at the macro level before granting any consents in relation to a limited resource⁵⁶ (or, in this case, where the effects of the proposal on nationally important values before the decision maker are so significant).
44. While there is no explicit requirement to provide information on alternatives for projects with significant adverse effects under the FTAA as there is under the RMA, EDS submits that this does not preclude the need for alternatives to be considered for a project of this nature. Moreover, a requirement to consider alternatives can be imported by:
 - (a) Alternative methods of discharge, under clause 6 of Schedule 5. As noted by Sylvia Allen in planning evidence, underground mining would have lesser discharges and much reduced impacts on the environment, including the ONL;⁵⁷
 - (b) The relevant planning framework (which must be considered under Clause 17 of Schedule 5);
 - (c) The requirements of expert code(s) of practice, such as Te Tangi a te Manu (**TTaM**), and Engineering Codes of Practice.⁵⁸
45. The Courts have also consistently held that it is particularly important to consider alternatives where matters of national importance are involved.⁵⁹ The Supreme Court, in *Environmental Defence Society v King Salmon*⁶⁰ (**King Salmon**) held that whether the consideration of alternatives is necessary is contextual and will be determined by the nature and circumstances of the case and the reasons advanced in support of it. It considered that the obligation to consider alternatives in that case (a plan change) arose from the requirements of the New Zealand Coastal Policy Statement and of sound decision-making, rather than a specific provision of the RMA.
46. Further, the effects management hierarchy in the NPS-IB requires the Applicant to demonstrate that it is not practicable to avoid adverse effects on significant indigenous

⁵⁶ *Queenstown Lakes District Council v Lakes District Rural Land Owners Society Incorporated* [2002] NZRMA 81 (HC).

⁵⁷ Evidence of Sylvia Allen, Planning Issues Statement (April 2026) at paragraphs [20], [75], [76]

⁵⁸ See for example, JWS Geology / Geotech / Engineering (12 May 2026) at paragraphs [16]-[17], [18] relating to options for disposal of tailings and waste rock, and the corresponding expert evidence of those participants.

⁵⁹ For example, see *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331 (EnvC), where the Court granted consent to take potable water for a reduced term on the basis that a feasible alternative water supply existed that had not been adequately considered; see also *Man O’War Station Ltd v Auckland City Council* [2010] NZEnvC 248, where the Court found that where matters of national importance were strongly present, it was incumbent on the application to assess possible alternatives.

⁶⁰ [2014] NZSC 38.

biodiversity.⁶¹ The High Court in *Tauranga Environmental Protection Society Incorporated v Tauranga City Council*⁶² held that the Environment Court was legally required to examine alternatives, and to satisfy itself that alternatives were not practicable, in light of policies that required the avoidance of effects where it was “practicable” to do so.⁶³

47. In this case, EDS submits that:
- a. The requirement to recognise and provide for the protection of significant indigenous biodiversity and ONLs as matters of national importance requires a robust consideration of alternatives – namely underground mining as an alternative to open pit mining – that would better achieve the requirements of section 6 RMA;
 - b. Further, the NPS-IB requires the Applicant to demonstrate that it is not practicable to avoid adverse effects on significant indigenous biodiversity. This requires consideration of whether alternative methods of mining would avoid those effects;
 - c. The Regional and District plan frameworks anticipate and require assessment of alternatives in relation to impacts on ONLs;⁶⁴ and
 - d. Expert Codes of practice or best practice anticipate an alternatives assessment, such as development options with a diminished open-pit component, no larger than required to provide a secure underground mine portal.⁶⁵
48. This information is simply not before the Panel because the Applicant did not want the Panel to have the opportunity to assess underground mining for all proposed pits. As candidly acknowledged, this was the client brief.
49. The Panel is not however bound by the dictates of a client brief, when assessing adverse impacts on matters of national importance.
50. EDS therefore submits that the Panel is not in a position to reach a final view on whether it is practicable to avoid the significant adverse effects of this project, and whether benefits of the project – particularly those that are derived from the adverse effect being generated (i.e., the benefits of open pit mining as compared with the adverse effects of open pit mining) – justify the effects on matters of national importance.

⁶¹ See clause 3.16 and the definition of “effects management hierarchy”.

⁶² [2021] NZHC 1201.

⁶³ Other relevant policies included that adverse effects were required to be avoided if “possible” or where there were no “practical alternatives”, however the High Court did not distinguish between these policies – it consistently referred to the “practical”, “practicable” and “possible” language for its determination that consideration of alternatives was required in order to demonstrate practicality, practicability and possibility.

⁶⁴ For example, the relevant provisions are identified by Stephen Brown in his preliminary assessment (March 2026), Statutory context at part 3, pages 19-21.

⁶⁵ See for example, Dr Alexander McAlpine, Geoscience Review (04 April 2026) at pp8-9; Dr Steven Emerman, Evidence, (March 23 2026) in respect of backfilling tailings and related international standards.

51. Put another way, the Applicant has failed to provide material and reasonable information on alternative methods, this being information solely available to the Applicant under its project design and client brief, and the Panel can and must draw the adverse inference that the proposal should be declined by reason of failure by the Applicant to take practicable steps to prevent (avoid) avoidable harm to values of national significance.

Conditions – lawfulness, validity and *Augier* conditions

52. Any conditions imposed by the Panel must meet the requirements for conditions under sections 108 and 108AA of the RMA and the principles for valid conditions developed through relevant case law.
53. The starting point for valid conditions is section 108AA, which provides that conditions must either:
- a. Be directly connected to one or more of the matters set out in section 108AA(1)(b) – the relevant matter in this case is “an adverse effect on the activity on the environment”. The Environment Court has interpreted this to mean that a condition must be connected to the avoidance, remediation or mitigation of an actual or potential effect in a way that is not indirect or remote;⁶⁶
 - b. Relate to administrative matters that are essential for the efficient implementation of the consent; or
 - c. Be agreed by the applicant – this requirement codifies the law relating to *Augier* conditions, as set out in the Department of Conservation’s comments on conditions and enables conditions to be imposed which are not directly connected to one of the matters specified in section 108AA(1)(b) if offered or agreed to by the Applicant.
54. The *Newbury*⁶⁷ tests are relevant (although have been codified in part by section 108AA) – and require the condition to fairly and reasonably relate to the development or activity authorised by the consent; be for a resource management (or planning) purpose and not an ulterior or unrelated purpose; and not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.
55. In addition to these requirements, conditions must be sufficiently certain to be enforceable, not leave central obligations or standards for compliance so vague that they depend solely on the discretion of the consent holder or the authority, not rely on

⁶⁶ *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130, at [65] – [70].

⁶⁷ *Newbury District Council v Secretary of State for the Environment* (1981) AC 578. In *Housing New Zealand Ltd v Waitakere City Council* (Court of Appeal), the court confirmed that the Newbury test remains of general application in the context of the RMA and that New Zealand courts should continue to apply it when considering the validity of resource consent conditions.

third party approvals and must not unlawfully delegate the Panel's adjudicative functions. The Environment Court in *C J Industries v Tasman District Council* [2025]⁶⁸ provided the following useful summary of the some of the relevant principles:

[340] A useful starting point for considering conditions is the Practice Note. Clause 10.4 outlines key principles for standards of good practice. Importantly, a resource consent, including its conditions, must stand on its own and be capable of being interpreted and applied independently. The conditions of consent must not undermine the consent itself or unreasonably restrict individual rights.

[341] Conditions presented to the court must be clear, coherent, certain, enforceable and properly justified. They should specifically reflect the activity for which consent is sought, including any modifications suggested or offered throughout the hearing, and must promote sustainable management.

[342] Conditions should apply specifically to the elements or aspects of the activity requiring resource consent and should not simply list all documents presented with the application.

[343] It is important that conditions explicitly state clear performance standards (as opposed to leaving these to be determined at a later date). Where expert certification or oversight is required, the condition must state clear parameters and specified standards in relation to this.

[344] Any condition volunteered by an applicant that could not normally be imposed (e.g., an *Augier* condition) must be specifically identified, along with the basis for its inclusion.

56. The Environment Court, in *Royal Forest and Bird Protection Society v Gisborne District Council*⁶⁹ articulated the need for conditions to ensure certification does not replace decisions that ought to be made in the first instance:

[88] A condition must also be certain. It can leave the certifying of detail to a delegate, using that person's skill and experience, but cannot delegate the making of substantive decisions. Under the approach in the current set of conditions it is difficult to see how the Council will be acting in a certifier role, rather than making decisions that should have been made at first instance.

57. EDS raised, at a high level, concerns with respect to the validity and lawfulness of several conditions proposed by the Applicant in the 28 August version of the conditions. The revised version of conditions has neither directly addressed the issues raised by EDS, nor allayed its concerns.
58. Uncertain conditions may mean that the effects authorised by the consent (if granted) are ill-defined. In other words, the effects that could arise as a result of the consent could be greater than anticipated by the Panel. The Environment Court has said that "*it is essential that there is no uncertainty about the approved proposal and what the consent conditions require*".⁷⁰

⁶⁸ NZEnvC 213; not overturned on appeal: [2026] NZHC 2202.

⁶⁹ [2013] NZRMA 336.

⁷⁰ *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232 at [402].

59. Such uncertainty is exacerbated where, for example, the conditions authorise activities that are not specifically listed but are said to be authorised by Condition 3⁷¹ - which refers to all information provided to the Panel listed in Attachment 1.
60. While it is the case that the scope of an application defines what can be authorised by a consent, the documentation referred to in Attachment 1 is extensive, was incomplete at the time of lodgement,⁷² has substantially evolved throughout the process and been superseded in parts, and has been found to contain errors.⁷³ It is entirely unrealistic to expect the consent authority or any other person with an interest in ensuring the consents are properly monitored and enforced to rely upon a general “Condition 1” condition to provide the outer bounds of authorised effects – the consent conditions must clearly fulfil this function.
61. Uncertainty as to the scope of effects being authorised may also be exacerbated where, for example, exploratory drilling is authorised but effects have not been assessed, or where effects have been assessed on a temporal basis, but the conditions do not include a temporal restriction (for example, where the land use consent is not limited in duration but effects of the land use consent have been assessed having regard to their duration).

Unlawful delegation of adjudicative functions

62. The principle that a court or tribunal entrusted with judicial duties cannot delegate the performance of such duties, unless authorised by the statute⁷⁴ applies to the Panel. In a resource management context, one test that has been applied is whether the condition requires the decision maker as certifier or arbitrator. For example, this test is commonly expressed as:
 - a. Conditions must not delegate the making of any consenting decision, but may authorise a person to certify that a condition of consent has been met or complied with;⁷⁵ or
 - b. A condition may leave the certifying of detail to a delegate, using that person’s skill and experience, but cannot delegate the making of substantive decisions.⁷⁶

⁷¹ D.01 – Central Otago District Council Land Use Consent and Conditions.

⁷² Minute 46 of the Expert Panel, dated 19 August 2026, at [13].

⁷³ See for example, Supplementary Evidence Dr Leanne Morgan, dated 7 September 2026, at [55], [62], [66], and [81]; and Supplementary Evidence Dr Leanne Morgan, dated 18 September 2026.

⁷⁴ *Director General of Conservation v Marlborough District Council* [2004] 2 NZLR 127, at [27].

⁷⁵ *Turner v Allison* (1970) 4 NZPTA 104, at 128.

⁷⁶ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336.

63. The High Court, in *Director General of Conservation v Marlborough District Council*, held that it is the essence of a judicial function that the adjudicator will be required to make findings of fact. The Court said:⁷⁷

If the function of making a finding on facts which are essential to the decision is delegated, then there is a delegation of the judicial function. That may occur in circumstances where the delegate is not explicitly deciding a dispute between the parties. The role of the delegate as certifier may conceal the fact that what is being delegated is the power to certify a matter which is an essential element of the decision which should be made by the tribunal. It is necessary to examine the real nature of the decision which the delegate is required to make, rather than the form in which the power to make that decision is conferred.

64. EDS submits that the identification of actions to avoid, remedy, mitigate, offset or compensate for adverse effects of the proposal, where those actions are essential to the decision, are the role of the Panel. In other words, where conditions are necessary to manage effects so as to ensure they are not out of proportion to the project's benefits, those actions must be determined by the Panel and specifically provided for in conditions with sufficient certainty that they can be relied upon to be achieved. They are not matters of certification, or for later determination by the Peer Review Panel. Unlawful delegation of such powers cannot be cured by the Applicant's agreement to them, or the proffering of such conditions on an *Augier* basis.
65. EDS's comments on conditions raised concerns that conditions C127 and C128,⁷⁸ relating to spring annuals and cushionfields compensation at passive closure, amounted to an unlawful delegation. Those conditions require:
- a. A factual finding or predictive assessment, at passive closure, as to whether the success criteria for spring annuals / cushionfields are likely to be achieved;
 - b. If not, requirements to:
 - i. for cushionfields, establish (unspecified) alternative rehabilitation objectives and rehabilitate the area for an (unspecified) alternative vegetation type; and
 - ii. identify⁷⁹ land that contains "suitable" spring annual/ cushionfield habitat and implement legal mechanisms for its protection; and
 - c. A factual finding as to the extent of habitat required to be protected.

⁷⁷ *Director General of Conservation v Marlborough District Council* [2004] 2 NZLR 127, at [27]

⁷⁸ Conditions C127 and C128, D.03 – Schedule 1 – Common Conditions to the CODC and ORC Resource Consents (14 September 2026).

⁷⁹ Note that these conditions have been amended from the requirement to "purchase" land (in the August conditions set) to the requirement to "identify" land in the September conditions set, which does not substantively address the issue relating to lack of certainty.

66. The significant residual effects on Nationally Threatened spring annuals and cushionfield habitat, which is accepted by all experts – and which, on the evidence, may accelerate the extinction of *C.pungens*⁸⁰ – are such that they will inevitably be central to the Panel’s ultimate decision, i.e., whether the adverse impacts of the proposal are sufficiently significant to be out of proportion to the project’s regional or economic benefits, even after taking into account conditions imposed by the panel or agreed to by the Applicant.
67. In that context – and in light of the significant non-compliance with the offsetting and compensation principles of the NPS-IB – it is submitted that the determination of appropriate remediation of those effects and / or compensation for them is a matter essential to the Panel’s decision under section 85(3).
68. EDS submits that conditions C127 and C128⁸¹ (which relate to compensation for spring annual and cushionfield habitat):
- a. Unlawfully delegate the Panel’s decision-making function with respect to whether further compensation is required to address effects of the proposal on spring annuals and cushionfield habitat and how compensation is to be calculated;
 - b. Are uncertain and unenforceable because the requirement to establish “alternative rehabilitation objectives” and “rehabilitate the area for an alternative vegetation type” is so vague – these objectives and alternative vegetation types are left entirely to the consent holder with no objective criteria, oversight or certification process;
 - c. Relies upon third party approvals and is therefore unenforceable – there is no guarantee that “suitable” spring annual/ cushionfield habitat can be either identified or secured by way of covenant in the future; and
 - d. Cannot be considered in the context of the Panel’s section 85 decision under section 85(3)(b)(i) and (ii).
69. The Expert Panel on the Haldon Solar project granted consent on the basis of a similar condition, i.e., that the need for further compensation would be determined by a peer review panel in the future, with a requirement to secure and protect an unidentified area of land for compensation purposes. EDS and the Royal Forest and Bird Protection Society Inc have appealed that decision on the basis that the Panel has unlawfully delegated its decision making.

⁸⁰ See Max Crowe, Further Statement of advice, dated 13 August 2026, at [28]; and Nicholas Head, Supplementary Statement of Evidence, dated 17 August 2026, at [48].

⁸¹ Conditions C127 and C128, D.03 – Schedule 1 – Common Conditions to the CODC and ORC Resource Consents (14 September 2026).

70. The decision of the Expert Panel decision on the Ryans Road Industrial Development⁸² is the subject of an appeal and judicial review on similar grounds. That industrial development borders the Christchurch International Airport and may have impacts on aviation safety. Consent was granted on conditions that provided:
- a. Activities authorised by the consent must not result in unacceptable adverse effects on aircraft safety;
 - b. A suitably qualified expert must undertake an aviation risk assessment which identifies and evaluates any aviation safety issues associated with the implementation of the development not already addressed by the conditions of consent and ensure compliance with the requirement above;
 - c. The consent holder must implement mitigation measures identified in that report that are within its control; and
 - d. Disputes regarding those findings are ultimately resolved by an independent person.
71. The Panel considered it had sufficient evidence to be satisfied that unacceptable effects on aircraft safety could be avoided.
72. Airways Corporation of New Zealand has appealed the conditions on the basis that they unlawfully delegate the assessment the Panel was required to undertake, they lack the certainty necessary to be enforceable and the Panel failed to properly and lawfully conduct the balancing exercise required by section 85(3) of the FTAA.⁸³
73. While the Ryans Road Industrial Park conditions contain an “arbitration” clause, where the Applicant’s proposed cushionfield / spring annuals compensation and seepage trigger conditions do not, EDS submits the Applicant’s conditions are nevertheless invalid as they defer material decisions and should be made by the Panel.
74. Examples of other conditions that unlawfully delegate adjudicative functions are set out in EDS’s comments on conditions – for example, requirements for actions to be taken “unless otherwise agreed with the council”, or conditions requiring management plans are to “avoid, remedy or mitigate adverse effects” without clear, enforceable parameters - are unorthodox, create an uncertain level of discretion and are likely to be an unlawful delegation.

Uncertain, vague and unenforceable conditions

75. While some degree of judgment or generality of conditions is permissible in conditions, the condition must have a sufficient level of certainty that it can be understood, practically applied and enforced. EDS’s comments on conditions addressed several uncertain, vague and unenforceable conditions.

⁸² Decision of the Expert Panel: Ryans Road Industrial Development (7 May 2026).

⁸³ *Airways Corporation of New Zealand v Expert Panel* [2026] NZHC 2545.

76. For example, Condition 10⁸⁴ relating to the commissioning of the active water treatment plant is vague, uncertain and unenforceable because:
- a. The plant must be commissioned if a water surplus condition is developed that is “not being adequately managed by engineering controls”;
 - b. It is not clear what “adequately managed “ means, so the trigger for commissioning the plant is not objectively defined; and
 - c. In the absence of an objectively defined trigger, the consent authority is unable to enforce the condition.
77. The Applicant was, until its response to RFI 11 was prepared, unaware that there is likely to be a water surplus at the site. This condition has been included to address an issue that has arisen extremely late in the piece, and for which the Applicant has not identified an appropriate management response. EDS submits that this is representative of the overall manner in which this application has been pursued – i.e., on the basis of insufficient information to understand the site, the receiving environment, the likely adverse effects and the appropriate management response.
78. Condition 21: Mine Circuit Water Seepage Management⁸⁵ is also vague, uncertain and unenforceable and represents an unlawful delegation because it:
- a. requires a suitably qualified person to “develop a process for managing seepage”, including developing triggers and responses, “appropriate parameters” that “are likely to be a clear indicator” of seepage to use for triggers, determine the most appropriate monitoring locations and bore depths that are “most likely to detect” seepage bypass, develop triggers that are “suitably low” as to indicate the smallest measureable volume of seepage bypass, and prescribe an appropriate monitoring frequency;
 - b. there are no clear, objective criteria for what are “appropriate parameters”, what is “likely to be a clear indicator” of seepage, what the “most appropriate” monitoring locations are, what the “most appropriate” bore depths are and what “suitably low” means;
 - c. this condition therefore contains no clear criteria for certification by a consent authority, nor is enforceable by a consent authority.
79. Further, Condition 23: Mine Circuit Water Seepage Modelling Studies⁸⁶ requires 3D contaminant transport modelling studies to be undertaken to support the design of seepage collection elements “to achieve appropriate levels of seepage collection to

⁸⁴ D.02 – Otago Regional Council Consents and Conditions (14 September 2026).

⁸⁵ D.04 – Schedule 2 – General Conditions for Otago Regional Council Consents (14 September 2026).

⁸⁶ D.04 – Schedule 2 – General Conditions for Otago Regional Council Consents (14 September 2026).

ensure downstream receptors are not adversely affected”. It is submitted that whether downstream receptors are likely to be adversely affected and to what extent is a matter the Panel should understand prior to granting consent, and the conditions should define the maximum level of effect on those receptors.

80. Condition 26: Additional Mine Circuit Water Seepage Management Measures⁸⁷ then requires, once primary and secondary seepage interception measures are “exhausted” but seepage is still being detected, the installation of “any necessary infrastructure/ seepage collection systems” at “the most appropriate locations”. In this case, no suitably qualified person is required to undertake this exercise and the council is not required to certify the measures or monitoring locations proposed. There is no guarantee that any tertiary seepage collection measures will be successful, following the failure of primary and secondary measures.
81. EDS respectfully submits that these conditions demonstrate that:
- a. the Panel does not have sufficient information to either understand the potential effects of seepage on surface water and groundwater, or be assured those effects can be appropriately managed to avoid significant and irreversible effects; and
 - b. the parameters for triggers, monitoring location and bore depth and monitoring frequency should be determined by the Panel and included in the conditions and not deferred to a future expert determination and certification by the council (particularly in the absence of any clear and certain certification criteria).

Augier conditions

82. The Applicant has identified two conditions in the 14 September 2026 condition set as being proffered on an *Augier* basis. These are:
- a. C135 – relating to the quantum of funding for the Biodiversity and Enhancement Fund; and
 - b. C157 – relating to the quantum of funding for the Matakinui Trust.
83. The *Augier* principle is set out in comments on conditions from the Department of Conservation and EDS agrees with that analysis.⁸⁸ In short:
- a. an *Augier* condition is one that cannot be imposed by the consent authority, but is nevertheless offered by the Applicant anyway. Provided there is a clear undertaking that the condition is being volunteered and will be complied with, the

⁸⁷ D.04 – Schedule 2 – General Conditions for Otago Regional Council Consents (14 September 2026).

⁸⁸ Legal submissions for the Director-General re RFI 11 and updated conditions (7 September 2026), at [46] – [52].

Applicant is estopped from arguing the consent authority did not have the power to impose the condition;⁸⁹ and

- b. because the condition could not ordinarily be imposed by the consent authority and is offered voluntarily by the Application, the Applicant must also agree to an amended *Augier* condition.⁹⁰

84. To the extent that the Applicant is, by identifying these as *Augier* conditions, suggesting the Panel cannot amend the quantum proposed in those two conditions, EDS does not accept this. In that regard, the Expert Panel in the Stella Passage Fast Track Decision was required to specifically consider whether a condition requiring a financial payment to address adverse effects was an *Augier* condition and whether it could be amended by the Panel. The Panel said:⁹¹

“The Panel sees no reason why a financial payment to a third party that is specifically required to “address an adverse effect of the activity on the environment” can only be imposed as a condition when an applicant agrees or offers the same. The Panel has amended the conditions proposed by the Applicant, including those it indicated were offered on an *Augier* basis.”

85. Therefore, provided the financial payment is required to address an adverse effect, EDS submits that the Panel can impose such a condition, or amend a condition that has been proposed by the Applicant (including as to quantum).
86. In terms of whether a condition that is “directly connected” to an adverse effect of the activity on the environment, the Environment Court in *Lindis Catchment Group* considered that there was “little or no difference between the ‘directly connected’ test in section 108(1)(b)(i) RMA and the ‘logically connected’ principle in *Estate Homes*”.⁹² The reference to *Estate Homes* is a reference to the Supreme Court decision in *Waitakere City Council v Estate Homes Ltd*⁹³, in which the Court said:⁹⁴

We consider the application of common law principles to New Zealand’s statutory planning law does not require a greater connection between the proposed development and conditions of consent than they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under section 108 is simply that the ecouncil must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition is required for the purpose of the subdivision.

87. Regardless of whether the “logically connected” test remains or has been modified by the “directly connected” test, EDS submits that:

⁸⁹ *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD).

⁹⁰ *Meridian Energy Limited v Canterbury Regional Council* [2026] NZEnvC 140.

⁹¹ Decision of the Expert Panel on the Stella Passage Development Project, at [108(e)].

⁹² *Lindis Catchment Group Incorporated v Otago Regional Council* [2020] NZEnvC 130, at [72].

⁹³ [2007] 2 NZLR 149.

⁹⁴ *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, at [69].

- a. The funds for the Matakinui Trust are required in order to fulfill the obligations under the conditions, which are required to avoid, remedy or mitigate the adverse effects of the proposal;
- b. While the Biodiversity and Heritage Enhancement Fund does not meet the principles for biodiversity compensation in the NPS-IB, it is clearly designed to generate positive effects on biodiversity, cultural and heritage values in the area surrounding the proposed mine to counter the adverse effects on heritage, cultural and ecological values – including threatened and at-risk species (including lizards) in the Dunstan Ecological District, which are the very values threatened by the project;
- c. Therefore, neither the Matakinui Trust, nor the Biodiversity and Heritage Enhancement Fund, are “indirect” or “remote” from the effects of the proposal – they are “logically connected” to the project and “directly connected” to effects of the project;
- d. The Panel can therefore require a financial payment, or amend the quantum of a proposed payment, to a third party as a condition of consent.

Compensation for loss of wetlands

88. EDS’s comments on the 28 August condition set addressed the proposed payment to the Biodiversity and Heritage Enhancement Committee for the enhancement of wetlands in the event that rehabilitation of those wetlands is unsuccessful.
89. Conditions C59 and C60⁹⁵ set a monitoring and remediation sequence in the first instance, followed by a cash payment to the Biodiversity and Heritage Enhancement Committee if after, 10 years for the Shepherds Creek wetland and 15 years for the TSF wetland, the Councils and Peer Review Panel agree the wetland will not become self-sustaining. \$30,000 and \$50,000 are payable per non self-sustaining hectares for the Shepherd’s Creek and TSF wetlands respectively.
90. EDS submits that the proposed payment demonstrates that there is no certainty that the remediation proposal will achieve the intended outcomes.
91. EDS’s comments on the conditions noted that there does not appear to be any probative evidence supporting the quantum of additional funding in terms of the values being lost or impacted. No further evidence was filed in response to EDS’s comments. There is therefore no evidence before the Panel as to how these figures were arrived at or how they relate to the ecological values (including vegetation cover, habitat function, or cultural values) that would be lost if the wetlands are not self-sustaining. There is no

⁹⁵ Conditions C59 and C60, D.03 – Schedule 1 – Common Conditions to the CODC and ORC Resource Consents (14 September 2026).

evidence in respect of a valuation methodology or a comparable wetland enhancement costing. There is therefore no evidence that the principles for compensation set out in the NPS-IB, requiring positive effects to biodiversity that outweigh the adverse effects,⁹⁶ are achieved.

92. EDS therefore submits that the Panel can neither be confident that the remediation outcomes for the Shepherd's Creek and TSF wetlands will be achieved, nor reasonably conclude that the proposed payments are an appropriate response that avoids, remedies, mitigates, offsets or compensates for the loss of those wetlands. This has an impact on the Panel's section 85 assessment, including that these conditions cannot be taken into account in terms of section 85(b)(i) and (ii).

Scale of landscape assessment

93. The closing submissions for the Applicant addressed the appropriate scale for assessment of effects on ONL values. The submissions refer to case law which cautions against "dicing" the landscape into small components and suggest the scale of landscape assessment is driven by the direction in the District Plan. The legal submissions assert that Mr Girvan has followed that judicial guidance and used the specific reasons for the ONL's recognition in the District Plan as a starting point for the scale of landscape assessment, referring specifically to a paragraph from Schedule 19.6.2 of the District Plan.⁹⁷
94. It is not clear whether this is Mr Girvan's evidence, as his evidence is not cited and nor do Mr Girvan's reports or evidence appear to refer to him following judicial guidance and/or that he has used the District Plan schedule as a starting point for scale. In any event, the Joint Statement of Expert Witnesses: Landscape Architecture (18, 27 and 28 May 2026) (**May Landscape JWS**) records that the experts agreed on the relevant landscape scales, being a nested approach in which all landscape scales are relevant and have to be considered. The May Landscape JWS says:

C. What is the 'relevant landscape' scale (being an issue raised by Ms Gilbert and Ms Lucas) which should inform an assessment of this proposal, and do you all agree with this?

20. All experts consider that a nested approach is the appropriate approach i.e. all different scales have their relevance and have to be considered (starting at a broad level and working down to site level). There is no one landscape scale (refer page/section 5.15 – 5.20 of TTATM).

21. All experts agree that the hierarchy of levels (from most broad to least broad) to assist an understanding of existing and potential landscape values is:

⁹⁶ NPS-IB, Appendix 4, Principle 3.

⁹⁷ Closing Legal Submissions on behalf of Matakau Gold Limited, at [60] – [62].

(a) the Dunstan Mountains as one of the five mountain ranges of Central Otago; and together with the Mata-au Clutha (and its tributaries), make up the distinctive broader character of Central Otago;

(b) the Dunstan Mountains as an ONL;

(c) the Bendigo - Tarras Basin of which the ONL and SAL is part of, as well as other rural landscape;

(d) the central western part of the Dunstan Mountains, as very roughly indicated in the snip below (noting that NP, APR, SB, AS and BG consider the central western area of the range is defined by Cloudy Peak to the north east, Mt Apiti to the south west, Rocky Point by Lake Dunstan to the west, and the mouth of Wainui Creek valley to the north west (below Cloudy Peak); whereas RG considers Mt Moka is a more appropriate south west reference point than Mt Apiti as the northern edge of the peneplain (noting this is not illustrated in the snip below)); and

...

(e) the two valleys of the site (which includes part of the Conservation Covenant area at a finer scale again).

22. AS, BG, SB, APR, and NP consider that the hierarchy of levels to assist an assessment of landscape effects (i.e. the 'relevant landscape') is:

(a) the Dunstan Mountains as an ONL;

(b) the Bendigo - Tarras Basin of which the ONL and SAL is part of, as well as other rural landscape;

(c) the central western part of the Dunstan Mountains;

(d) the two valleys of the site (which include the site); and

(e) the conservation covenant area which straddles the two valleys of the site and parts of the central western Dunstan Mountains at a finer scale.

23. RG generally agrees with [22] (a)-(e) above, however he considers that (c) and (d) have similar values and spatial scale.

95. This reflects the approach directed by TTaM which is guidance prepared by experts and post-dates the decisions referred to by counsel for the Applicant.

96. Mr Girvan does not refer to the District Plan scale as being the starting point for the scale of landscape assessment undertaken in the May Landscape JWS. Further the Joint Statement of Expert Witnesses: Reconvened Landscape Architecture (8 June 2026) (**June Landscape JWS**) records that all landscape architects, including Mr Girvan, have undertaken a landscape assessment at each of the scales referred to above (see Appendix A to the June Landscape JWS).

97. TTaM warns against understating effects by diluting effects across an unreasonably wide area or overstating effects by concentrating on an unreasonably narrow context.⁹⁸ The weight that Mr Girvan places on the broader scale assessment fails to acknowledge that, in this particular case, focus on the broader landscape scales overlooks the fact that the significant values, particularly cultural and heritage values and potentially ecological values, are concentrated in the area of and around Rise and Shine and Shepherds Creek valleys.⁹⁹ The principle cited by the legal authorities referred in the Applicant's closing legal submissions is entirely context dependant and those authorities have little relevance in the present circumstances.

98. In addition, Mr Girvan acknowledges the limited and outdated nature of the landscape assessment completed for the purposes of the District Plan. His report acknowledges:¹⁰⁰

The Central Otago District Rural Review Landscape Assessment was completed in 2007 and was undertaken in response to possible adverse effects from rural subdivision and other development with a focus on landscape sensitivity, rather than landscape value. The purpose of the assessment was to identify landscape units based on their landscape characteristics, assess landscape values, and determine the visual absorption capacity and its vulnerability to change for each landscape unit.

99. EDS therefore submits that whilst landscape effects must be assessed at the appropriate scale, which may include nested scales, the Panel ought to put little to no weight on the submissions made by the Applicant with respect to the approach that Mr Girvan has taken towards the appropriate scale at which to assess landscape because:

- a. TTaM requires assessment and consideration of landscapes at all scales to avoid understating or overstating effects (reflecting the context-dependant nature of landscape assessment);
- b. All experts, including Mr Girvan, agreed that all landscape scales are relevant and should be considered;
- c. Mr Girvan's evidence does not appear to suggest that he has deliberately followed the judicial guidance cited;
- d. TTaM are guidelines prepared by the New Zealand Institute of Landscape Architects and post-date the authorities relied upon by the Applicant; and

⁹⁸ TTaM, at paragraphs 5.15 – 5.17 and 6.15.

⁹⁹ See, for example, Transcript – Landscape Hearing – 9 June 2026, at page 34 (line 30 onwards), where Ms Gilbert says that there is a concentration of the landscape values – ecological values, mana whenua values, heritage values and recreational values – in this part of the Dunstan Mountains, i.e., on the site.

¹⁰⁰ Boffa Miskell Limited, 2025. *Bendigo Ophir Mine: Landscape, Natural Character and Visual Effects Assessment*. Report prepared by Boffa Miskell Limited for Matakanui Gold Limited at Section 3.4.1.

- e. The direction in the District Plan is limited and outdated, is based on a landscape assessment that would not likely be considered best practice in terms of the guidance provided by TTaM, and is itself due for review.

Concluding comments

- 100. EDS's previous legal submissions have addressed the legal framework for the Panel's decision making, including weighting and matters that must be taken into account under section 85 (including the NPS-IB, NPS-FM and non-compliances with directive "avoid" policies, etc). Bearing in mind the Panel's directions for these submissions, counsel has resisted "wrapping up" the evidence in submissions that support the case that EDS has consistently put to the Panel, despite the approach taken by the Applicant in its legal submissions.
- 101. EDS nevertheless considers it necessary to address submissions made in the Applicant's closing legal submissions in relation to:
 - a. "strengthening" of the evidential record; and
 - b. the appropriate approach to the proportionality test.

Evidential record

- 102. The Applicant has submitted that the evidential record has been tested and progressively strengthened and, in relation to groundwater, provides greater certainty as to the conclusions reached in existing groundwater assessments. With respect, EDS submits that this submission is not borne out by the process or the evidence.
- 103. In relation to spring annuals, further information has been provided through the process, but the full extent of the DDF across a number of years (as recommended by the Applicant's expert) has not been surveyed. The information now available demonstrates that the effects on spring annuals is greater than previously expected – with approximately 40% of spring annuals being located within the DFF and 20% outside the Come in Time pit. The Applicant advises that further surveys will be undertaken in spring 2026, so further information which would inform the project is imminent, but it does not appear that this information will be available to the Panel prior to making its decision.
- 104. The Applicant was unaware of the extent of effects on spring annuals when it proposed an adaptive management approach to the Come in Time pit which made an attempt to apply the effects management hierarchy required by the NPS-IB, recognising the significant and irreversible effects on spring annuals. Now that the extent of effects on spring annuals is known, no consideration has been given to whether effects can be avoided in accordance with the requirements of the NPS-IB, including by considering alternatives to open pit mining or reducing its extent.

105. This demonstrates that:

- a. the application has been prepared without sufficient information on spring annuals, and this is a material adverse impact arising under s85(3) that cannot be resolved through proposed consent conditions (whether imposed or volunteered); and
- b. the proposal is inconsistent with the relevant provisions of the NPS-IB in relation to spring annuals, particularly in the DDF outside the Come in Time pit.

106. In relation to water related effects and assessments:

- a. significant further information was requested of the applicant which the Panel considered ought to have been provided with the substantive application;
- b. the provision of such information at such a late stage in the process has been characterised by errors, which have had to be corrected by parties and invitees;¹⁰¹
- c. the Applicant's own experts have noted the impact of time constraints on the provision of their advice;¹⁰²
- d. Dr Morgan has identified a number of instances in which information requested by the Panel has not been provided and where the models do not incorporate the relevant field data due to a lack of time to do so.¹⁰³

107. Dr Morgan has recently identified a significant (and basic) error in Mr Burgess's seepage calculations which has a significant impact on whether seepage will be detected at all under the current proposal. These calculations were provided in reply to the invitees' responses to the Applicant's RFI 11 responses. EDS has had to apply for leave to provide evidence on this error – as there are no further procedural opportunities to review and provide comment on the deficiencies of the Applicant's evidence. The Applicant has had ample opportunity to provide robust information to the Panel and it has been unable (or has declined) to do so. EDS has invested significant resources in testing the

¹⁰¹ KSL used wrong head values to calibrate the model. KSL have confirmed it and now say the dataset they had called high confidence may not be reliable. See Supplementary evidence of Dr Morgan, at [64]–[68]; Dumont memo at section 6; Note also the error zinc error referred to above and confirmed by the Applicant's expert (Palich).

¹⁰² KSL say the seepage results were put together from different sets of model runs "due to time pressures", which they have called an oversight. See Dumont memo (section 8); KSL also say that investigating the outliers behind the jump between the 90th and 95th percentiles "was not possible within the time constraints of the modelling work and this response". See Dumont memo, section 12.

¹⁰³ For example, the RFI 11 modelling wasn't informed by the RFI 11 field data. RFI 11 requested field data and 3D modelling to understand the hydrogeology (Q2), and requested the models be calibrated against existing conditions (Q4). The KSL report says the field work and modelling ran at the same time, so the new data were not available when the model was built. KSL accept this as a limitation. The shallow model wasn't calibrated at all. See also Dumont memorandum, at sections 2 and 3; Supplementary evidence of Dr Morgan at [45]–[46] and [102]; McDonald evidence for ORC at [11(e)].

Applicant's evidence – and has identified deficiencies on numerous occasions. The Panel has now issued a further RFI (RFI 12) for information relating to seepage and it is not clear whether EDS will have the opportunity to respond.

108. Time has now run out to ensure the information the Panel has before it is robust, complete and accurate. EDS submits that the Panel cannot be confident that mine water will be managed in a way that ensures significant and irreversible effects on surface and groundwater will be avoided.

Proportionality test

109. The closing legal submissions for the Applicant make the submission¹⁰⁴ that the residual effects on spring annuals are not sufficiently significant to be out of proportion to the benefits of the project. EDS submits that this is a mischaracterisation of the section 85 test.
110. It would be inappropriate to measure individual impacts against the benefits of the whole project and determine that each individual impact is not sufficiently significant to be out of proportion to the regional or national benefits of the project (and therefore the project cannot be declined). EDS submits that the appropriate approach is to consider whether the adverse impacts of the project as a whole are sufficiently significant to outweigh the relevant benefits of the project.
111. EDS further submits that it is appropriate for the Panel to consider whether the adverse impacts of individual elements of the Project, such as open pit mining, are sufficiently significant to outweigh the benefits of that element. For example, the Panel should consider whether the adverse landscape and ecological effects of the open mine pits are sufficiently significant to outweigh the benefits of the open mine pits.
112. It is open to the Panel to conclude that the adverse impacts do outweigh the benefits of this project – particularly given Mr Chrisp's evidence with respect to two specific types of effect that would outweigh the benefits, namely:
- a. the possibility of contaminating aquifers – in this case the Panel cannot be confident on the evidence this will not occur; and
 - b. the extinction of a species – in this case the evidence is that, following the provision of the 2025 survey report, open pit mining in the DFF would likely accelerate the extinction of some spring annuals.
113. The Applicant has proceeded on the basis that the more benefits a project has, the higher the level of impact the project can have. It has therefore given inadequate consideration to fundamental environmental issues that are required to be considered under the scheme of the FTAA – despite the fact that the purpose of the FTAA is to be

¹⁰⁴ Closing legal submissions on behalf of the Applicant, at [85].

given greater weight in doing so. The result is an application that has been prepared in a hurry, contains numerous errors, fails to provide adequate information for the Panel to undertake its section 85 assessment, and is premised on conditions that are uncertain, invalid and unenforceable.

114. EDS submits that the Panel ought to decline the approvals sought.

Dated this 21 September 2026

Rob Enright/ Jen Vella