

**To** Marie Payne; DOC Programme Lead Fast track Applications  
**From** Dean van Mierlo, Barrister  
**Re** Management Plan Conditions, Bendigo-Ophir Gold Project  
**Date** 9 April 2026

## **Introduction**

1. In its s 51 report in relation to a proposed Wildlife Approval for the Bendigo-Ophir Gold Project (BOGP) the Department of Conservation (DOC) raised various concerns about the Applicant's draft management plans, and proposed management plan conditions,<sup>1</sup> and foreshadowed that it would "provide broader commentary on the structure of management plans in its section 53 comments".<sup>2</sup>
2. This memorandum considers legal issues arising out of the proposed structure of management plan conditions proposed by the Applicant for the BOGP, with a particular focus on the Wildlife Approval, and other conservation approvals sought.

## **Summary**

3. Management plans are a standard and common place requirement for consenting large scale projects.
4. The orthodox approach is for certification of management plans to occur following the grant of a consent or other approval, not as part of the approval process.
5. Case law developed under the RMA regarding the contents of management plans, is generally applicable to management plans prepared as a requirement of conditions of a conservation approval.
6. Substantive decision making relevant to whether a consent or approval should or should not be granted cannot be delegated to a subsequent management plan approval or certification process.
7. Where a management plan sets out how the approval holder will comply with a DOC administered conservation approval (such as a Wildlife Approval) it is appropriate that DOC holds the role of certifying the management plan, or any amendment to that plan.
8. There will be other instances, where management plans are relevant to both conservation approvals and resource consents, where a dual approval role is more appropriate, or where DOC may not have sufficient interest in the matter to warrant having a certification role.

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<sup>1</sup> See DOC s 51 Report, BOGP Wildlife Approval, at paragraphs 3.2, 8.3.5-8.3.11, 9.4.1, 10.1.5 – 10.1.6.

<sup>2</sup> DOC s 51 Report, BOGP Wildlife Approval, at paragraph 10.4.3.

9. Where DOC is not directly involved in a certifying capacity in relation to a management plan, or its amendment, it may still be appropriate that DOC is consulted by the approval holder, or certifying agency, in relation to the management plan, and any future changes to it.

### General principles

10. A management plan requirement can be imposed as a condition of a resource consent under s 108(1) of the Resource Management Act 1991 (RMA), see *Morgan v Whangarei DC*<sup>3</sup>. Also, under s 108(3) of the RMA, a consent authority can include as a condition of a consent that the holder of a resource consent supply the consent authority information relating to the exercise of the consent. As noted by the Environment Court in *Wood v West Coast Regional Council*<sup>4</sup>

*“a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent. So, for example, in the case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However, because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent.”*

11. A management plan approach can also be imposed under the Fast-track Approvals Act 2024 (FTAA). When setting conditions on a resource consent under the FTAA, s 108 of the RMA applies to the Panel, subject to all necessary modifications.<sup>5</sup>
12. In accordance with the case law that has developed in the context of management plans under the RMA, an FTAA panel, when setting conditions under s 81(1)(a) of the FTAA, can delegate the *administrative* function of ensuring that appropriate standards are met to a third party, most likely an officer of a consent authority (i.e. a power of certification), via a condition. That third party need not be formally delegated with such a power, as the certifier is not exercising a statutory power of decision-making.
13. It is not lawful for a Panel, when setting conditions, to delegate the function of making of substantive decisions – being decisions that are sufficiently important to have a bearing on whether the consent should be granted or not. As the Environment Court said in *Royal Forest and Bird Protection Soc v Gisborne DC*:<sup>6</sup>

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<sup>3</sup> (2007) 14 ELRNZ 35, [2008] NZRMA 115 (HC) at [47] - [48].

<sup>4</sup> [2000] NZRMA 193 (EnvC) at pgs 6 – 7.

<sup>5</sup> Fast-track Approvals Act 2024, Sch 5, cl 18.

<sup>6</sup> (W26/2009), [2013] NZRMA 336, [2009] ELHNZ 109.

*“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.”*<sup>7</sup>

14. Even if conditions can provide a power of certification, that power must not constitute approval.<sup>8</sup> It is for the Panel to make a final decision, and it is the Panel, and no one else, that can exercise the power to grant approvals under the FTAA. The Panel cannot delegate to the council or DOC to make elements of the decisions, but a condition could allow an officer to “certify” the completion of a management plan or changes to management plan documents, in appropriate circumstances.<sup>9</sup>
15. The completion or amendment of management plans via certification after consent has been granted creates a risk of unlawful delegation. The Environment Court in *Crest Energy Kaipara Ltd v Northland Regional Council* said:

*“The question of whether consent should be granted at all hinges on an ability to create an EMP that will adequately address the issues. We are not prepared to effectively transfer responsibility for this crucial area of assessment to a delegated officer of the respondent.”*<sup>10</sup>

16. The case law around the use of management plan conditions has been developed in the context of consent conditions imposed under the RMA. I am not aware of any judicial consideration of this approach in the context of authorisations granted under conservation legislation.<sup>11</sup> My view, however, is that (in the absence of specific legislative provisions to the contrary) the general principles described above (that an approval can include a condition that delegates a certification function but cannot purport to delegate the function of making substantive decisions) would apply equally to approvals granted under conservation legislation, and equally therefore to the “conservation approvals” provided for under the FTAA<sup>12</sup>.

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<sup>7</sup> See also *Mount Field Ltd v Queenstown Lakes District Council* [2012] NZEnvC 262 at [77].

<sup>8</sup> Giles, Hilke; Barton, Barry --- "Adaptive Management Under the RMA: The Tension Between Finality and Flexibility" [2020] NZJLEnvLaw 2; (2020) 24 NZJEL 1, at 22.

<sup>9</sup> *Turner v Allison* [1971] NZLR 833 (CA) at 856 line 24.

<sup>10</sup> *Crest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/2009, 22 December 2009 at [222]. See also *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC) at [28].

<sup>11</sup> Being the Conservation Act 1987, or the Acts listed in the first schedule to the Conservation Act.

<sup>12</sup> In the context of the BOGP, the conservation approvals provided for under the FTAA are; - concessions (s42(4)(e)), an amendment to or revocation of a conservation covenant (s42(4)(g)), a wildlife approval (s42(4)(h)), and an approval, dispensation or authorisation in respect of a complex freshwater fisheries activity (s42(4)(j)).

## **Bendigo-Ophir Gold Project; proposed Wildlife Approval**

17. The proposed Wildlife Approval for the Bendigo-Ophir Gold Project (BOGP)<sup>13</sup> cross references numerous management plans, and the Assessment of Ecological Effects provided as part of the substantive application.
18. These documents are referred to in the description of the ‘Authorised Activity’<sup>14</sup>, under the heading “Methodology; methods set out in...”, and in the special conditions.
19. Special Condition 1<sup>15</sup> states that “*All activities authorised by this Wildlife Act Approval must be undertaken in accordance with the following management and monitoring plans<sup>16</sup>.... or any amended versions ...*”
20. Accordingly, the management plans both define the activity that is authorised under the proposed Wildlife Approval, and specify how those activities are to be undertaken.
21. The Applicant, Matakanui Gold Limited (MGL) seeks that the initial suite of management plans be approved by the FTA Panel as part of its substantive decision on the BOGP application under the FTAA.
22. Special Condition 2 of the proposed Wildlife Approval provides that the objective of each of the plans listed in special condition 1 “is to outline ecological management actions designed to appropriately minimise and mitigate the potential ecological effects associated with disturbance and killing of native wildlife and their habitats at the BOGP”.
23. Special Condition 3 of the proposed Wildlife Approval, provides that the Approval Holder may make amendments at any time to the management plans referred to, provided that the “Manager” (effectively DOC) is to be invited to a collaborative workshop, and failing agreement on any proposed amendments to any of the management plans, the implementation of a dispute resolution (arbitration) process.

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<sup>13</sup> BOGP Substantive application. D11.

<sup>14</sup> The management plans referred to in D11 Schedule 1, item 1 are B.08 Assessment of Ecological Effects, G.03 Habitat Impact Management Plan, G.04 Avifauna Management Plan, G.05 Lizard Management Plan, G.07 Landscape and Ecological Rehabilitation Management Plan, G.08 Ardour Restoration Area Management Plan, G.09 Matakanui Sanctuary Management Plan, and G.10 Mammalian Pest Management Plan.

<sup>15</sup> D11. Schedule 3, Special Condition 1.

<sup>16</sup> The list of management plans included at schedule 1 item 1 is not the same as the list included at schedule 3, special condition 1. The schedule 1 list includes the B.08 Assessment of Ecological Effects, but this is not included in the Schedule 3 list. Conversely, the Schedule 3 list includes the G.12 Biodiversity Outcome Monitoring Plan, but this is not included in the Schedule 1 list. This lack of consistency further serves to emphasise the uncertainty and unworkability of the approach to management plan references discussed further in this memorandum.

24. Issues associated with the Applicant’s proposed management plans are described in various technical expert reports submitted to the EPA as part of DOC’s s 51 reporting response on the BOGP. For example, Mr Crowe’s report on vegetation and flora;<sup>17</sup>

*“95. Very few of the management plans act as standalone documents, and many defer key biodiversity outcomes relevant for compliance monitoring to other sources, creating a labyrinthine network of interrelationships that are highly complicated to follow, and which obfuscates biodiversity outcomes and timeframes creating significant compliance risk.*

*96. As currently set out, all of these plans reference details set out in at least one other plan, and several reference the entire suite of management plans. Several area-specific plans are more comprehensive in scope than others and contain subject- or process-specific information that other area-specific plans lack. Where specified, very few of the biodiversity outcomes have clear success criteria or strict timeframes for when the outcomes must be achieved. Collectively, these management plans give the impression of having been developed independently by different experts based on high-level aspirations, with little consideration of how they might be practically implemented, or how compliance will be monitored.”*

25. There are a number of legal issues which arise out of the Applicant’s proposed approach to management plans, and the proposed drafting of the Wildlife Approval in relation to management plan matters.

*Lack of objective standards, controls or parameters.*

26. The proposed Wildlife Approval does not include clear, objective standards, controls or parameters in its conditions. Consequently, the management plans do not set out information about the way in which the approval holder intends to comply with those requirements. There is a fundamental structural misalignment, and departure from the more orthodox approach where the approval sets out what is required to be complied with, and the management plan articulates how the approval holder intends to meet those requirements.

27. Consequently, the objectives of the management plans are set out in vague and general terms only. They are to *“outline ecological management actions designed to appropriately minimise and mitigate potential ecological effects associated with the disturbance and killing of native wildlife and their habitats at the BOGP”*.<sup>18</sup>

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<sup>17</sup> 10 March 2026, see paragraphs 92 – 102 for a fuller discussion of ecological issues associated with the Applicant’s management plan approach. In the interests of succinctness, only paragraphs 95 and 96 are set out above.

<sup>18</sup> D.11, Applicant’s proposed Wildlife Act Approval, Schedule 3, Special Condition 2.

*Certification of subsequent amendments.*

28. MGL seeks a 35-year term for its proposed Wildlife Approval. It is inevitable that, given the term proposed, amendments to management plans will be required. However, the absence of clear standards, controls or parameters in the proposed Wildlife Approval, means that there are no objective requirements against which to certify any future proposed amendment to a management plan.
29. It is possibly for this reason that MGL has not proposed a 'certification' process for giving effect to future changes to management plans, but has instead proposed a somewhat novel 'collaborative workshop' and, in the absence of agreement regarding proposed changes to the management plan(s), reference to arbitration.<sup>19</sup>
30. There are no parameters defining the extent of changes that may in future be made to management plans. As noted, under the proposed Wildlife Approval, the management plans define both the nature of the authorised activity, and how it may be carried out.
31. MGL's proposed mechanism for amending management plans is not a certification process, against an objective standard. It is not a situation where a delegate would be certifying that a proposed amendment meets the specific controls or parameters laid down in the conditions of the approval, because the Approval does not specify specific controls or parameters. Rather it simply states, in very general terms, that the objective of each plan is to outline ecological management actions designed to minimise and mitigate potential ecological effects.
32. In the absence of specific standards, controls or parameters being stated in the conditions of the proposed Wildlife Approval, the mechanism proposed for future changes to relevant management plans is in effect a mechanism that provides for the (unlawful) delegation of a substantive approval role, either to the DOC manager, or to an arbitrator.
33. It is for the Panel to identify the standards to which effects are to be addressed as part of the Panel's decision, not a delegate of DOC, as the administering agency of the Wildlife Approval, post decision. Under the proposed conditions, the Applicant's approach delegates to "the Manager" the judicial function of determining requirements for possible future changes to mitigation of adverse effects, and the extent of effects that would be acceptable. What effects are considered acceptable is fundamental to whether Wildlife Approval can and should be granted in the first place. Reliance should not be placed on unenforceable qualitative objectives of management plans.
34. A solution may be to include more of the content of the plan as conditions or to improve the drafting of the conditions to provide objective standards that are appropriate for certification. However, at this stage, advice from DOC's technical advisors is that much of

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<sup>19</sup> I note that the Wildlife Act does not provide for arbitration, and this is consistent with Wildlife Approvals being regulatory in nature rather than civil agreements.

the information and level of detail necessary to develop appropriate objective standards has not been provided by the applicant.

35. The proposed resource consent conditions as currently drafted are more specific than the proposed Wildlife Approval conditions, and are more aligned with what the case law suggests is appropriate for a management plan (and certification) process. For example, Appendix 6 of Dr M Tocher's Herpetofauna advice,<sup>20</sup> sets out details of proposed CODC resource consent conditions relating to lizard management and mitigation, including matters such as minimum lizard search effort hours and lizard salvage target numbers. These sorts of details are notably absent from the Wildlife Approval proposed conditions.
36. All standards, parameters or controls relevant to protected wildlife should be specified in the conditions of the proposed Wildlife Approval. How the Approval Holder will meet those standards, parameters or controls can be set out in the management plan. As the administering agency, it is appropriate that DOC (or a DOC officer) should be the certifying agency for any relevant management plans specified in the Wildlife Approval conditions that detail how the Approval Holder will comply with the requirements of the Wildlife Approval, and which are not approved by the Panel as part of this substantive FT application, or any subsequent (future) amendments to those management plans.
37. In my view it would be inappropriate for management plans that specify how the Approval Holder will comply with, or meet the requirements of its Wildlife Approval, or subsequent future changes to such management plans, to be solely certified by a third party, such as an officer of the CODC, or an arbitrator.
38. Ultimately, DOC will be the administering agency, and regulator, of the Wildlife Approval, if it is granted. DOC administers the Wildlife Act, and DOC will be responsible for compliance, monitoring, and enforcement. DOC has the appropriate expertise, and statutory functions to perform this function effectively.
39. In practice, this may require future amendments to some plans to be certified by more than one agency, for example both DOC and CODC in respect of some wildlife related plans, where those plans are also relevant to resource consent requirements. Such a parallel or dual certification role appears to be an unavoidable consequence of the FTAA regime whereby multiple approvals are rolled into a single application process.
40. The appropriate certifier for Wildlife Approval related management plans was recently considered by the Expert Panel determining the Southland Wind Farm application [FTAA-2508-1095] under the FTAA 2024.
41. In its decision, that Panel recorded;

*"109 However, because the LMP and TIMP are listed in the Authorised Activity section of the Wildlife Act Approval, in Schedule 3 of the Wildlife Act Approval we have*

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<sup>20</sup> 19 March 2026, submitted as part of DOC's s 51 reporting.

*required those two management plans to be certified by DOC, with any amendments to those plans being the subject of a separate variation process administered by DOC under the Wildlife Act. We consider that is an unavoidable consequence of the statutory regime applying to the Wildlife Act Approval.*

*110 We acknowledge that the dual certification of the LMP and TIMP has the potential to add complexity to their implementation. However, we envisage that Condition MP4B will ensure that DOC's interests in those two plans are addressed in the versions of the Plans that are provided to the councils for certification once the Independent Reviewer process has been completed. On that basis, DOC's subsequent certification of those two plans under its Wildlife Act responsibilities should be a straightforward exercise."*

42. The Southland Wind Farm expert Panel also described as a "reasonably novel approach" a request by the Applicant that the Panel approve, as part of its decision-making role under the FTAA, a lizard management plan, and a terrestrial invertebrate management plan. The Panel preferred the "more orthodox approach" whereby those two management plans were referred to the administering agencies for certification following the Panel's decision.<sup>21</sup>
43. In the Waihi North decision, the expert Panel made similar comments regarding the Applicant's request that it approve draft management plans. That Panel declined to do so, instead preferring the "orthodox approach". The Waihi North Panel also required that management plans relevant to the conservation estate were to be certified by DOC.<sup>22</sup>

#### *Deemed certification*

44. For the proposed Wildlife Approval, where the conditions provide for variations to the relevant management plans, MGL is proposing what effectively amounts to a "deemed certification"<sup>23</sup> process - see for example Condition 3(d) of the Wildlife Approval special conditions, which provides:

*"If the Manager has not, within 15 Working Days of receipt of the amendment, advised the consent holder that Condition 3e applies, any Works associated with the amendment may proceed."*

45. The Environment Court has expressed concern about the validity of "deemed certification" conditions that allow a consent holder to go ahead with implementing a management plan where a council had a certification role but failed to respond within the specified time period: *Re New Zealand Transport Agency – Waka Kotahi*<sup>24</sup>. The Court stated at [126] that it saw no reason to depart from its findings in *Meridian Energy Ltd v Wellington City Council*<sup>25</sup>:

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<sup>21</sup> Southland Wind Farm application [FTAA-2508-1095]. See paragraphs 83 – 85.

<sup>22</sup> Waihi North Project decision [FTAA-2504-1046]. See paragraphs 9 and 28.

<sup>23</sup> Noting that as currently drafted, the conditions use the language of "approval" rather than certification.

<sup>24</sup> [2024] NZEnvC 133.

<sup>25</sup> [2011] NZEnvC 232 at [402].

*“It is essential that there is no uncertainty about the approved proposal and what the consent conditions require, including the details to be approved as part of the certification process in the future. The conditions referred to the process for approval of management plans which were intended to provide environmental protections. Meridian sought that if it did not hear back from the Council as to approval of a management plan within a specified time period then the management plan was deemed to be approved. This approach is not sound environmental management (or we suspect good project management), and we do not accept Meridian’s approach.”*

46. Deemed certification is inappropriate because there may be good reason for DOC to fail to meet a timeframe. It fundamentally undermines the conditions, and potentially the lawfulness of the Wildlife Approval.

**Bonds.**

47. As noted, the proposed Wildlife Approval refers to a suite of management plans.<sup>26</sup> Those management plans articulate how the Wildlife Approval will be implemented and its effects will be managed to ensure the protection of wildlife. Accordingly, the management plans are critical to managing the impacts of the BOGP on wildlife. This includes management plans that relate to the restoration of habitat for protected wildlife, and the control of pest and predator species within that habitat. Without suitable habitat, wildlife cannot be protected.
48. Given the critical nature of habitat restoration and pest management to the success of proposed strategies for protection of wildlife, DOC has an interest, as administering agency of the proposed Wildlife Approval, in the successful completion of all rehabilitation and pest management activities associated with the BOGP.
49. The Applicant is proposing that bonds will be provided to guarantee compliance with rehabilitation requirements set out in conditions. To the extent that bonds are to be provided to ensure compliance with any of the management plans referred to in the proposed Wildlife Approval including, but not limited to, the Landscape and Ecological Rehabilitation Management Plan, and the Mammalian Pest Management Plan, DOC ought to be included as a interested party in relation to those bonds, with the ability to call on the bonds and access funds to complete any works required under relevant conditions, or management plans, in respect of which the Applicant may be in default, should that ever occur.

**Concessions and management plan conditions**

50. Some proposed concessions also rely on management plans to manage adverse effects. Again, the Applicant refers to management plans certified by council officers pursuant to

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<sup>26</sup> See notes 14 and 16 above.

resource consents,<sup>27</sup> or potentially certified as part of the Panel’s approval of the Project under the FTAA, for example:<sup>28</sup>

*“The Concessionaire undertake the proposed intersection upgrade in accordance with the Temporary Construction Traffic Management Plan certified as part of the approval of the BOGP under the Fast-track Approvals Act 2024.”*

51. This approach conflates two different statutory regimes into one process. This does not acknowledge that DOC’s role in respect of concessions is as landowner, managing public conservation land and waters on behalf of the Crown.
52. In this instance, I understand that DOC does not seek a certification role under the concession conditions in relation to the Site-Specific Erosion and Sediment Control Plan or the Temporary Construction Traffic Management Plan, as these are not considered to come within DOC’s core functions. Rather I understand that DOC seeks to be consulted on these management plans, and any changes, so that it may provide feedback as landowner and appropriately signal any concerns which may need to be considered in relation to how the concession activity is to be undertaken.
53. In relation to the Willow Concession, the proposed activity does come within core DOC functions. Accordingly, I understand that DOC considers a special condition, with specified objectives, standards and parameters, for a management plan for willow removal and a certification process, is required to manage the adverse effects of the proposed activity. The current special condition does not clearly state objectives, standards and parameters for the management plan and would need to be amended to include these.<sup>29</sup>



Dean van Mierlo  
Barrister  
9/4/26

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<sup>27</sup> Refer e.g. D.06A Concession and Conditions for Ardgour Rise Access Track – 10 March 2026, Schedule 3 at special conditions 1 and 3.

<sup>28</sup> D.07A Concession and Conditions for SH8 and Ardgour Road Intersection – NZTA – 10 March 2026, Schedule 3 special condition 4.

<sup>29</sup> D.09 Concession and Conditions for Willow Management – 10 March 2026, Schedule 3 special condition 2