

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

**MEMORANDUM OF COUNSEL FOR ENVIRONMENTAL DEFENCE SOCIETY INC IN
RESPONSE TO MINUTES 46, 47 AND 48**

8 September 2026

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Introduction

1. This memorandum is filed by the Environmental Defence Society Inc. (**EDS**) in response to Minutes 46, 47 and 48, which allow for parties to respond to the 28 August 2026 version of conditions.¹
2. The purpose of this memorandum is to provide high-level comments on the 28 August 2026 version of conditions, in the event the Panel is minded to grant consent. Without belabouring the point, EDS's fundamental position is that the evidence as a whole demonstrates that the adverse impacts of the proposal are sufficiently significant to be out of proportion to its benefits, taking into account the proposed conditions, and do not support the granting of consent. EDS does not consider these effects can be sufficiently addressed through the adoption of (legally valid) conditions. These comments are, of course, without prejudice to that position.
3. Given the complexity of the conditions, interactions with complex management plans (which EDS understands have not yet been updated in line with the latest set of conditions, with final versions to be provided on 14 September 2026²) and the limited time available, these comments are necessarily targeted and are not exhaustive. Due to the resourcing required, the conditions have not been reviewed by EDS's experts other than (at a high-level) Dr Morgan and Prof Webster-Brown.
4. Counsel notes that section 53 parties have been provided the opportunity to file further legal submissions on 21 September 2026, addressing legal issues that may have emerged since the Cromwell hearing.³ EDS's concerns with respect to the legal validity of some conditions are signalled in this memorandum, but will be addressed in further detail (if that remains necessary) following the final version of conditions being filed on 14 September 2026.

Water conditions

5. Technical comments on the water-related conditions are addressed in the supplementary evidence of Dr Morgan⁴ and Prof Webster-Brown.⁵ That evidence is relied upon without being repeated in detail below.
6. In summary:
 - a. D.02 (Bendigo Aquifer Take) - The duration of the permit to take groundwater should not extend beyond mine operations;
 - b. D.02 (Bendigo Aquifer Take) Conditions 9 – 10 - The alternative groundwater water supply conditions do not extend to the full potentially affected radius and

¹ The minutes requested that comments be provided by 7 September 2026 on a voluntary basis.

² As required by Minute 48.

³ Minute 48.

⁴ Supplementary evidence of Dr Leanne Morgan (7 September 2026)

⁵ Supplementary evidence of Prof Jenny Webster-Brown (7 September 2026)

- the ORC method for setting this radius has not been used to establish this. It also does not ensure continuity of supply for affected parties while investigations are being undertaken;
- c. D.04 – Conditions 66 – 70 – The conditions should identify how seepage from the Shepherds Creek Valley Fill that is not captured by its primary underdrainage will be intercepted and conveyed to treatment; mine waste storage facilities not currently proposed to be covered by the secondary seepage collection system should be;
 - d. D.04 – Conditions 23 – 24 – Monitoring sites GW01 and GW02 may not be suitable compliance monitoring locations as the evidence suggests they may not reliably identify or quantify impacts from the mine site and monitoring as the Base Bore for the Bendigo Aquifer is not suitable on its own as it will be affected by the consent holder’s own pumping;
 - e. D.04 – Condition 25 – continuous monitoring of water level and electrical conductivity is required;
 - f. D.04 – Conditions 26 – the seepage bypass network and contaminant pathway network may not be sufficient to reliably detect contamination;
 - g. There do not appear to be any conditions requiring a groundwater baseline to be established before mining commences, which is required to demonstrate whether the proposal has caused a material adverse change in the environment;
 - h. D.04 – Condition 31 – the 3D contaminant transport modelling studies required prior to final detailed design of Mine Waste Storage Facilities should be subject to external peer review;
 - i. Proposed compliance limits will not detect full extent of contaminants moving off site;
 - j. D.02 - All conditions relating to water monitoring and reporting (e.g., in Section 15 permits) should specify the use of reliable sampling methods and sample storage procedures. Reference to NZ NEMS (National Environmental Monitoring Standards) or alternative reputable methodologies is required;
 - k. D.04 - Attachment 5 - The proposed surface water compliance limits will not control the full load of contaminants leaving the mine site. They do not include a limit for sulphide or for mercury and, for most of the contaminants, specify that only the dissolved fraction of the contaminant needs to be measured; and
 - l. No post-closure monitoring appears to be proposed for the residual pit lakes and TSF wetland.
7. In addition, the conditions do not make the transition from active treatment to passive treatment, including the trigger or parameters for that transition, clear. The requirement to continue active treatment until the relevant trigger for transitioning to passive treatment is reached should be made explicit (D.02 Discharge from water treatment plants).

Ecological compensation

8. D.03 Schedule 1 – Common Conditions to CODC and ORC consents - contains conditions relating to compensation for wetlands (C59 - relating to the Shepherd's Creek wetland and C60 – relating to the TSF wetland), cushionfields and spring annuals.
9. C29 and C60 require the consent holder to provide additional funding to the BOGP Biodiversity and Heritage Enhancement Committee to be used for the enhancement of other wetlands in the Dunstan Ecological District if the rehabilitation of those wetlands is not successful (i.e., specified areas of wetlands are self-sustaining) after a certain period of time. The quantum of additional compensation is \$30,000 per “non-self sustaining hectare of wetland” for the Shepherds Creek wetland and \$50,000 per non-self sustaining hectare of wetland.
10. Compensation must relate to the values being lost or impacted. It does not appear that the Applicant has provided probative evidence to support the proposed quantum as appropriate compensation for the values affected.
11. In the case of spring annuals and cushionfields, if success criteria are not achieved by passive closure, the consent holder must:
 - a. where cushionfields success criteria are not met, purchase land that contains suitable cushionfield habitat that is equivalent to the area of land for which the cushionfield success criteria have not been achieved (as certified by the councils) and implement appropriate legal mechanisms to protect the habitat in perpetuity; and/or
 - b. where spring annual success criteria are not met, purchase land that contains suitable spring annual habitat equivalent to the residual shortfall in specified metrics (as certified by the councils) and implement appropriate legal mechanisms to protect the habitat in perpetuity.
12. It is not clear whether, in the event neither spring annual nor cushionfield success criteria are met, these requirements can be fulfilled by the same piece of land or whether the land requirements are cumulative.
13. There is substantial uncertainty associated with these conditions, such as the absence of any identified land within scope of the proposal that is available for this purpose, and has been assessed as suitable. EDS submits that the proposed future compensation mechanisms are invalid or otherwise unlawful, rely on future third party (landowner) agreement, and may require regulatory approvals once (if) the land is secured.

Bond and Trust conditions

14. Conditions C141 - C15x (D.03 Schedule 1 – Common Conditions to CODC and ORC consents) provide for a bond in favour of the councils to be provided and maintained

until the Matakinui Trust is established. Up to \$50 million is to be contributed to the Trust for the purpose of managing effects and maintaining conditions and covenanted ecological outcomes beyond the term of the consents, including maintaining the Tailings Storage Facility and engineered land forms, maintaining active and/or passive water treatment, maintaining pest control and monitoring and reporting.

15. The evidence of Dr Bill Kaye-Blake (for EDS) and Mr McNerney (for the Councils) is that the quantum to be provided to the Trust is likely to be inadequate to achieve that purpose. While Condition C157 provides that, if those funds are insufficient, the consent holder must provide additional funding to the extent required, this condition is inherently problematic because it relies on the Applicant's assurance to address a future shortfall. EDS submits that such a condition is invalid and uncertain. If the Applicant wishes to rely on this mechanism, then there needs to be sufficient certainty of funding for the Trust to carry out the closure obligations.
16. Provision of a fund to a third party Trust is not a substitute for a bond in favour of the regulatory bodies to access funds to ensure any remaining obligations are fulfilled, in the event that the Trust cannot or will not do so.

Management plan conditions

17. Requirements of adaptive management were addressed in EDS's section 53 comments. EDS remains concerned that the fundamental legal requirements for an adaptive management approach set out in *Sustain our Sounds v The New Zealand King Salmon Company Ltd*⁶ are not met, particularly in relation to water and ecology-related matters. There is an insufficient evidential foundation to have reasonable assurance that an adaptive management approach will sufficiently reduce uncertainty and adequately manage remaining risk, adequate baseline information is lacking and there is no certainty that effects can be remedied before they become irreversible.

Uncertainty, deferral/delegation of adjudicative functions

18. Many conditions are drafted in a manner that gives rise to uncertainty and/ or inappropriately defer or delegate adjudicative functions to certifying bodies or consent authorities in the future. For example (note: these are examples only of drafting issues that arise throughout the proposed conditions):
 - a. D.02 Discharge from water treatment plants, Conditions 9 and 17 - The active and passive water treatment plants must be designed to be "resilient to extreme weather events (taking into account the expected effects of climate change)" and include "safeguards" to minimise the risk of "physical failure" and "process failure" or "avoid or minimise adverse effects on the receiving environment in the event of a failure". The council is required to certify the design treatment systems to meet these requirements, but in the absence of specific parameters.

⁶ [2014] NZSC 40

- b. D.02. Discharge from water treatment plants, condition 10 - The active water treatment plant is required to be constructed and commissioned no later than 12 months after the specified trigger has been reached “unless otherwise agreed between the Consent Holder and the Otago Regional Council”. This wording is unorthodox and creates uncertain discretion. The condition does not specify the basis on which Regional Council might agree not to require a water treatment plant or to delay its construction. The more orthodox and correct approach would be to impose the obligation (on the basis that the consent holder may seek a formal variation under s127 RMA if a preferable alternative to water treatment plant arises following exercise of the consent).
 - c. D.02. Discharge from water treatment plants, condition 10 - A trigger for the commissioning of the active treatment plan is that there is a water surplus condition “that is not being adequately managed by engineering controls”. It is not clear what “not being adequately managed” means, who determines this and how;
 - d. D.04, Condition 17 - the Tailings Storage Facility, diversion channels, pipes, culverts and ponds must make allowance for climate change on the basis of climate change scenario RCP 8.5 “unless a clear justification is provided why an alternative RCP is appropriate”. There are no parameters given. As drafted, there is no certifier role for the consent authority, and the consent holder could simply provide what it considers to be a “clear justification”.
19. As noted, these types of conditions are both uncertain and likely invalid or unlawful. Uncertainty of legal effect means that the impacts of the proposal are uncertain and may be different to, and greater than, those anticipated by the Panel in making its proportionality assessment under section 85.⁷ It is submitted that the Panel is unable to rely upon invalid or legally uncertain conditions for the purposes of section 85(3)(b)(i) and (ii).

Objectives, limits, standards, requirements, targets, success criteria and outcomes

20. The proposed conditions refer to objectives, limits, standards, requirements, targets, success criteria and outcomes. It is frequently unclear which of these terms relate to requirements that must be achieved versus those that are aspirational. Some examples are set out below.
21. Condition C46 (D.03 Schedule 1 – Common Conditions to CODC and ORC consents) provides that:

“The methods used to achieve the landscape and ecological rehabilitation objectives in C44 must not undermine the water quality outcomes for the ELFs as required by Condition 22 (Surface Water Quality Compliance Limits), Condition 27 (Groundwater Quality Compliance Limits) and Condition 83 (ELF Oxygen Ingress Limits) of the **Schedule Two** Conditions which apply to all of the resource consents within the jurisdiction of the Otago Regional Council.

⁷ Fast Track Approvals Act, s85(3)(b)(i) and (ii).

In the event of an incompatibility between the landscape / ecological outcomes and the water quality outcomes, the water quality outcomes prevail.” [Underline added]

22. As a starting point, it is unclear why the landscape, ecological and water quality outcomes cannot all be achieved, as would be common practice for consent conditions. It is unorthodox to allow the consent holder an “out” or loophole in circumstances where one set of outcomes is not being achieved, despite this being a requirement of the consent conditions.
23. There is also a measure of uncertainty in terminology. “Objectives” and “outcomes” in relation to landscape and ecological rehabilitation appear to be used interchangeably in this condition, i.e., “objectives” referred to in the first paragraph appear to be the same thing as “outcomes” in the second paragraph.
24. In some contexts, ‘objectives’ may suggest aspirational targets, rather than an enforceable requirement prescribed by a consent condition. The use of the term “outcomes” in other conditions (for example, in relation to matters that must be achieved via management plans) suggest requirements that must be met.
25. The condition also suggests a trade-off approach, in that there may be some landscape or ecological outcomes required by the conditions that can be waived or not met. This is unacceptable in relation to matters of national importance under s6 RMA, and suggests a lack of confidence by the Applicant in their ability to meet these conditions. It is not clear who decides whether this is appropriate, against what parameters and what the effects of the proposal will be in the event that those anticipated landscape and ecological “outcomes” do not eventuate.
26. Condition C51 (D.03 Schedule 1 – Common Conditions to CODC and ORC consents) provides that:

“(a) The Consent Holder must achieve the following targets by hectare of ecosystem within each MRZ Management Unit at 35 years after the commencement of consents once all ecological restoration and enhancement measures are completed...

...

(b) If the Peer Review Panel considers any of the ecosystem targets in this condition are unlikely to be met by the 30th anniversary after the commencement of the consents, the Consent Holder must prepare a MRZ Target Report that sets out recommended alternatives and / or additional measures that are proposed to achieve the ecosystem targets in the table above, or suitable alternative ecosystem targets to ensure similar ecological outcomes will be achieved.

(c) The MRZ Target Report must be certified by the Councils and implemented over the following 5 years until the 35th anniversary of the commencement of the consents.”

[Underline added]
27. The comment from Mitchell Daysh suggests that the “targets” that the condition requires be “achieved” are not, in fact, strictly required to be achieved (as currently intended). It says:

In Progress - MGL to consider whether this condition can instead refer to minimum areas to be achieved for the main high value vegetation types.

28. In addition, the second paragraph of Condition C51 suggests that where targets are not being met, alternatives can be set that achieve “similar” ecological outcomes. This condition allows only 5 years in which to attain the new (as yet undefined) targets, following (up to) 30 years of failure to achieve the previous targets. Given those targets are not defined, it is not clear that they can be met within the timeframes provided for.

29. Condition C122 (D.03 Schedule 1 – Common Conditions to CODC and ORC consents) requires:

At Year 35, a final Biodiversity Outcome Monitoring Compliance Report must be submitted to Central Otago District Council and Otago Regional Council to confirm completion of the biodiversity outcome monitoring programme.

...

Should the final Annual Biodiversity Outcome Monitoring Report provided in Year 35 indicate that outcomes stated in Condition C118 have not been achieved despite implementation of adaptive measures, contingency management and associated monitoring measures will be required to be developed, including the type, quantum and location of contingency measures and associated monitoring requirements.

30. As with other conditions, there is a substantial element of uncertainty (contingency measures for contingencies) tending to suggest invalidity. There is significant uncertainty as to whether any “additional adaptive measures, contingency measures and associated monitoring requirements” will achieve the outcomes set out in Condition C118 if the consent holder has failed to achieve those outcomes by year 35.
31. To the extent that targets (or outcomes, objectives, success criteria, etc) are aspirational, or the achievement of targets, outcomes, objectives, success criteria, etc are not certain (such as in relation to Conditions C51 and C122 addressed above), then EDS submits that they cannot be relied upon as avoiding, remedying, mitigating, offsetting or compensating the adverse effects in terms of the assessment required under section 85(3)(b)(i) and (ii).

Peer review panel

32. The scope and functions of the peer review panel are set out in D.03 Condition C15. The functions of the panel do not accurately reflect functions ascribed to it in other conditions, creating internal inconsistency. For example, the peer review panel has a role in reviewing the detailed design of the passive water treatment system which would not strictly fall within the scope and functions as set out in Condition C15.
33. The scope and functions of the peer review panel should be sufficiently wide to enable independent review of the wide-range of information being produced by the Applicant,

post commencement of the consent.⁸ This is most likely to assist the Councils in their certification role (assuming the consent conditions are otherwise valid, which is itself at issue as noted above).

34. In summary, Counsel's comments are necessarily high level and targeted, given the complexity of the proposal, and the proposed conditions themselves, and the limited time (and resourcing) available. EDS is nevertheless grateful to the Panel for the opportunity to comment on the proposed conditions.

Dated this 8 September 2026

Rob Enright/ Jen Vella

⁸ This relevantly includes the studies, reports, plans, designs, models, etc that it is contemplated will be produced after commencement of consent.