BEFORE THE COMMISSIONERS APPOINTED ON BEHALF OF THE OTAGO REGIONAL COUNCIL, CENTRAL OTAGO DISTRICT COUNCIL AND QUEENSTOWN LAKES DISTRICT COUNCIL

Under	The Resource Management Act 1991 (the **Act**)
In the Matter	Application for Resource Consent to undertake Gold Dredging
Between	**COLD GOLD CLUTHA LIMITED**
	Applicant
AND	**OTAGO REGIONAL COUNCIL (RM22.434)**
	Regional Council
	QUEENSTOWN LAKES DISTRICT COUNCIL (RM220834) AND CENTRAL OTAGO DISTRICT COUNCIL (RC220255)
	District Councils

OPENING SUBMISSIONS OF COUNSEL ON BEHALF OF COLD GOLD CLUTHA LIMITED

DATED 8 NOVEMBER 2023

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OPENING SUBMISSIONS OF COUNSEL ON BEHALF OF COLD GOLD CLUTHA LIMITED

May it please the Commission:

INTRODUCTION

1. This application relates to the suite of consents required by Cold Gold Clutha Limited (**Cold Gold**) to conduct dredging within the Clutha River between the Luggate Bridge and Lindis River Confluence. The Applicant currently holds consent for the same activity within a lower section of the Clutha River. Consents are required from 3 territorial authorities as follows:

   (a) Otago Regional Council (**ORC**) in relation to the disturbance of the river bed (dredging (Rule 13.5.3.1) and slipway construction (13.5.3.1)), take and use of water (12.1.5.1), discharge of contaminants (12.C.3.2(i)).

   (b) Queenstown Lakes District Council (**QLDC**) in relation to mineral exploration or mining activity under 21.4.34 and establishment of a structure or mooring pursuant to rule 21.15.8.

   (c) Central Otago District Council (**CODC**) of a maritime vessel for commercial use under standard 5.7.4B, earthworks and vegetation removal within 10m of a water body standard 5.7.2(b) and (c) and Commercial activity requiring more than 3 people pursuant to standard 4.7.6B(b).

2. The Section 42A report officers have both recommended that the consents required be declined. In the case of the ORC this is on the basis that there was inadequate information to determine the application, with respect to cultural effects.[1]

[1] Otago Regional Council section 42A staff recommending report at 88.

3. The section 42A officer for the District Councils has recommended the consents also be declined on the basis that effects on cultural values and noise had not been adequately established.[2]

4. The Applicant disagrees with these conclusions and considers that the suite of consents can be granted, subject to conditions.

Matters addressed in these submissions

5. In these submissions, the following matters will be addressed:

   (a) The Decision-making framework:

   (b) Activity status

   (c) Permitted Baseline

   (d) Receiving environment

   (e) Adequate Information section 104(6)

   (f) Te Mana o Te Wai

   (g) Section 107

   (h) Matters raised in the Cultural Impact Assessment

   (i) Landscape Matters

   (j) Noise

   (k) Part Conduct

   (l) Term

[2] Joint CODC and QLDC section 42A report at 83.

(m) Conditions

Decision making framework

6. It is submitted that the applications all fall to be assessed as a discretionary activity. Therefore, the applications must be assessed in accordance with section 104 and then the consent may be granted or declined, pursuant to section 104B. If consent is granted, then section 104B allows a consent authority to impose conditions, in accordance with section 108.

7. In terms of section 104(1)(b) there are a number of statutory documents in play including:

   (a) National Policy Statement Freshwater Management 2020 (**NPSFM**).

   (b) Partially Operative Regional Policy Statement 2019.

   (c) Proposed Regional Policy Statement 2021.

   (d) Otago Regional Plan Water.

   (e) Central Otago District Plan.

   (f) Queenstown Lakes Operative District Plan.

   (g) Queenstown Lakes Proposed District Plan.

8. With respect to the regional policy statements, it is submitted that the Partially Operative RPS must be given the most weight. Whilst it does not directly implement the NPSFM 2020, it was prepared in accordance with the earlier iterations of the NPSFM, so its provisions do go some way to implementing the higher order direction. Direct regard must be had to the NPSFM 2020 which ensures the differences in the NPS's is accounted for.

9. The Proposed Regional Policy Statement 2021 has been through a highly contested process where the matters of relevance to this hearing were directly at issue. No decision has been made and therefore the final outcome remains highly uncertain. On this basis it is submitted that little weight should be placed on its provisions at this point in time.[3]

10. With respect to the Queenstown Plans, it is submitted that the Proposed District Plan should be given more weight in this decision process due to the fact that it has been through the hearing and decision making process, and in most cases, matters resolved on appeal to the Environment Court. This is particularly with respect to the policy framework applicable to Outstanding Natural Features and Rural Character Areas which are now settled.

Activity status

11. It is non-contentious that the activity status for the applications to ORC and CODC are for discretionary activities. The circumstances in QLDC are slightly different. Which I will discuss further below.

12. At the time the applications were lodged the activity status for suction dredge mining in Rule 21.11.1.2 of the QLDC's Proposed District Plan was non-complying:

	Table 8 – Standards for mining and extraction activities	Non-Compliance Status
21.11.1	21.11.1.1 The activity will not be undertaken on an Outstanding Natural Feature. 21.11.1.2 The activity will not be undertaken in the bed of a lake or river.	NC

[3] *Keystone Ridge Ltd v. Auckland CC* HC Auckland AP24/01 3 April 2001, and *Stevens v. Tasman DC* W043/92 (PT)

13. However, since then Rule 21.11.1 has been revoked by way of an Environment Court Consent Order.[4] Under the rules that are now operative the application is a discretionary activity.

21.4.34	Any mineral exploration or mining activity other than provided for in Rules 21.4.32 and 21.4.33	Discretionary

14. The position advanced in the section 42A reports is that the consent must continue to be assessed as non-complying activity pursuant to section 88A of the Resource Management Act 1991.[5]

15. It is submitted that this is the incorrect approach in this instance.

16. The purpose of section 88A is to protect applicants by avoiding retrospective effect of rules. This is consistent with section 12 of the Interpretation Act 2019 which provides that legislation does not have a retrospective effect. In doing so, section 88A protects applicants from being subject to a harsher activity status than the status when they originally lodged their application. However, there is a question about whether this same rationale applies when an activity status becomes less stringent.

17. The jurisprudence in relation to this question has been relatively unsettled, with Environment Court decisions appearing to diverge depending on whether it is the Council or the Applicant who is advantaged by the outcome. This question was tested in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35 (***Infinity***). In *Infinity* water permits were applied for, at the date of application the activity was a non-complying activity. The consent was declined, and the applicant appealed to the Environment Court. While the Court was deliberating, a plan change became

[4] Cardrona Alpine Resort Limited and Others v Queenstown Lakes District Council NZEnvC Christchurch 30 November 2021
[5] District Councils section 42A report at [48].

operative that changed the activity from being non-complying to being discretionary.

18. The Court found that section 88A(1A) needs to be read by adding at the end of the sub section “unless the previously operative plan has become inoperative”.[6] Section 88A effectively becomes irrelevant because consent is not required under an inoperative plan, and under the new plan the application was discretionary.

19. The Court held that local authorities do not need the protection of section 88A.[7] The provisions purpose is not to protect local authorities from their own plans. This approach was followed by the Court in *Pierau v. Auckland City Council* [2017] NZEnvC 90 where the Court stated:

> *[18] Our reasoning is as follows. In Waiheke Marinas Limited' the Environment Court presided over by the presiding Judge in the present case, described the role of s 88A as a "shield", in circumstances where the applicant for consent sought to introduce new elements into the activities applied for, after the planning instruments had changed through the introduction of new provisions. In the present case we accept the submission of the appellant that in circumstances such as here, to preclude an appellant from relying on a more enabling activity status reached after a fully notified planning process, would transform the function of s 88A from a shield to a "straitjacket".*
>
> *[19] We also accept the argument of the appellant that it would not make sense for an application to continue to be assessed as say, a non-complying activity, when the whole planning framework has moved on and been replaced by a new operative plan that provides for the activity in a somewhat more enabling manner. There cannot be any sensible point in an application being hamstrung by the activity status found in a superseded plan that has become inoperative and having no ongoing relevance to the assessment of the application. We add that*

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[6] *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35 at [93].
[7] at [82].

> *we can see no basis upon which Parliament could have intended that an applicant be put to the cost of bringing an entirely new, but identical, application, simply to overcome such hurdle. Such a pointless and expensive "workaround" should hardly be needed to serve the purpose of the Act'.*

20. This approach has subsequently been confirmed in the by the High Court in *Kawau Island Action Incorporated Society v. Auckland Council* [2018] NZHC 3306 at [68]

> *[68] I accept Ms Hartley's submission that where, as in Pierau v Auckland Council, there has been a change in the planning framework with provision for an activity in a somewhat more enabling manner, an applicant should be able to rely on that and not be hamstrung by the activity status in a superseded plan.*

21. The findings of the Environment Court and High Court are binding.

22. As rule 21.11.1.2 is now revoked, consent is not required under it. Consent is now required under the rule 21.4.34 which makes the activity status discretionary, and the application should be assessed as such.

Permitted Baseline

23. Pursuant to section 104(2) consideration of the permitted baseline is a discretionary consideration. It is submitted that in this case there are a range of activities that take place within the environment that are relevant and should be taken into account with respect to each part of the application. Those are:

    (a) ORC consents:

        (i) Permitted suction dredging activity pursuant to Rule 13.5.1.7 of the Otago Regional Plan Water. Obviously, the proposed dredge is larger than that contemplated by the

permitted activity rule. However, the effects arising are not dissimilar.

(ii) Permitted consumptive take of 100l/s and 1M L/day.[8] Whilst the proposed take is larger than the permitted activity rule provides for, it is non-consumptive. Therefore, unlikely to give rise to any effects from an allocation perspective. It is submitted that the proposal has effects that are less than the permitted baseline with respect to this element.

(iii) Discharge of contaminants that comply with requirements for there to be no conspicuous change in colour or clarity or noticeable increase in sedimentation.[9] The terms of this rule are inherently difficult to apply as the metric is a narrative one. As the applicant proposes to ensure that the area of mixing with within 100m for the most part, and between 100 and 200m on occasion. It is submitted that it is the differences that are the key consideration in the assessment. Based on the evidence of Mr Hamer and Ms Mckenzie these will be minor or less than minor.

(b) Central Otago Consents

(i) Mr Sycamore and Ms Royce appear *ad idem* on the likely number of dredges that reasonably fall within the permitted baseline. They differ slightly on where they might work relative to one another. It is submitted that this difference is of no great moment as under either scenario there will be effects (whether concentrated to one area of the river), or spread more widely. It is submitted that Ms Royce's assessment of the effects of permitted dredges is overly blunt. Other water users need to encounter the dredge for it

[8] Rule 12.1.2.2 of the Otago Regional Plan Water.
[9] Rule 12.C.1.1.

to affect them. It is submitted that the locationally constrained nature of the effects of the dredge in each instance, and its transient nature mean that the likely impacts of the proposal versus multiple smaller dredges are similar.[10]

(ii) The CODC plan also anticipates a level of commercial activity occurring on the water surface, and the noise standards set an anticipated level of amenity.[11]

(iii) The CODC plan allows for earthworks outside of 10m a water body.[12] The limits on earthworks are excavation of material in excess of 20m^3 volume and/or disturbing any land 50m^2 in area or greater in any one hectare.[13] To the extent that slipway earthworks occur beyond the set back they are within the permitted baseline.

(c) Queenstown Lakes District Council

(i) Once again there is a permitted activity rule for the operation of a smaller dredge which means a level of dredging activity is anticipated within the area.[14]

(ii) As with CODC there are noise limits that set an anticipated level of amenity.[15]

(iii) The QLDC proposed District Plan allows the use of motorised craft on the water for the purpose of hydrological survey, resource management monitoring or water weed control. It is important to note that control of water weeds

[10] Rule 5.7.4B of the CODC District Plan.
[11] Rule 5.7.4C and 4.6.7E.
[12] Rule 5.7.2(b).
[13] Rule 4.7.6L.
[14] Rule 21.4.32 of the QLDC proposed District Plan.
[15] Rule 36.5.2 and Rule 36.5.14.

often uses techniques like that of the dredge.[16] With divers and suction equipment being used to clear the weeds. In those circumstances a vessel may be present in an area for a period of time before moving on to the next area.

(iv) The QLDC plan anticipates farm buildings, structures and buildings being built within an identified wāhi tūpuna area, subject to standards regarding height and location.[17]

(v) The QLDC plan provides for earthworks within 10m of the bed of any water body that does not exceed 5m^3.[18]

Receiving Environment

24. The environment against which an application must be assessed is what is now commonly known as the 'Hawthorn Environment'. That is, the environment as it exists on the ground today[19], and including the effects of any consents that have been granted or permitted activities that are likely to be exercised. This assessment must be a real-world analysis.[20]

25. For the purposes of this assessment, this is the Clutha River / Mata Au as it we see it, with its associated environmental qualities, species composition etc and the existing impacts of historical mining, hydrogeneration etc.

26. It is not appropriate to assess potential effects on species that do not exist within the area for example, or to cast back to a past point in time, absent the effects of previous mining, or the damming of the river for the purposes of hydro-generation.

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[16] Rule 25.5.19.
[17] Rule 39.4.1, 39.4.2, 39.4.3 and 39.5.
[18] Rule 21.15.2.
[19] *Contact Energy Ltd v. Waikato Regional Council* ENC Auckland A004/00, 24 January 2000 at [38].
[20] *Royal Forest and Bird Protection Society of New Zraland Inv v. Buller DC* [2013[NZHC 1346.

27. There is a suggestion in the evidence filed by Kā Rūnaka that the assessment of potential effects on cultural values, such as Mahika kai must account for the effects of activities that have already occurred or are being undertaken by others. For example, the fact that Lamprey Eels are no longer found in the upper catchment, or that long fin eel populations have been impacted by the dams. That is not the case.

28. No doubt Kā Rūnaka are frustrated that conditions imposed to address effects of the dam structures have not yielded better outcomes, but that is no fault of this applicant. It is accepted that while these issues persist Kā Rūnaka are unlikely to see their values fully restored. However, this application must be assessed against the environment as it is, not as we might wish it to be. Addressing the issues that have arisen within the receiving environment as a result of historical activities goes well beyond the scope of the consents at issue.

29. The same applies in relation to any potential for bike and walking tracks to be extended along the River. Whilst they have been foreshadowed for some time there is no substantive proposal being progressed. Therefore, the extent of public access and the population likely to be affected by the proposal needs to be based on what we understand occurs on the ground now.

Adequate information

30. Both section 42A reports ultimately conclude that the proposed consents need to be declined on the basis that there is inadequate information to assess the cultural effects of the proposal, these conclusions rely on the Cultural Impact Assessment (**CIA**) and content of submissions from mana whenua.

31. Since that time the following information has been provided:

    (a) E3 scientific memorandum dated 19 April 2023 which responds to a number of concerns raised in the CIA.

(b) Evidence of Ms Mckenzie regarding landscape and visual amenity

(c) Evidence of Mr Hamer

(d) Evidence of Mr Sycamore.

32. There have also been a number of refinements to the proposal, such as operational hours, nesting bird management etc.

33. With respect to the discretion under section 104(6) of the Act, it is noted that the exercise of this discretion must be reasonable and proportionate. Section 104(6) does impose an obligation to supply adequate information, that does not mean that it must exhaustively address every possible issue. The fact a submitter continues to oppose a proposal cannot be directly equated with a lack of information.

34. This is particularly relevant with respect to the assessment of cultural effects. Good evidence in relation to key issues associated with ecology, landscape, and visual amenity etc has been filed. This evidence addresses identified cultural values in so far as it can and with reference to the prevailing circumstances within the Clutha River / Mata Au.

35. The CIA notes there may be effects on Māori archaeological values. The information provided is relatively general regarding the use of the Clutha River/Mata Au as a migration and trade trail etc. No specific information is provided that indicates there might be archaeological sites within the proposed mining area (being the riverbed, as opposed to the wider river margin). In this respect the applicant cannot be asked to prove a negative.

36. In *Wakatu Inc v. Tasman DC* [2012] NZEnvC 75 the Court confirms that the correct approach for assessing effects on cultural values was to consider the evidential basis for mana whenua's concerns. It found

that it would be necessary for biophysical effects to be more than minor before concerns about metaphysical effects could be engaged and potential impacts on Mauri weighed in the assessment. Similarly in *Sea-Tow Ltd v. Auckland RC* EnvC A066/06 the empirical evidence satisfied the Court that there were no direct adverse effects on the resources protected by section 6(e). The proposed extraction activity in that case would not have direct physical effects, or adverse effects on customary activities, as such concerns about adverse effects on beliefs were not relevant. It is submitted that the current application falls into a similar category.

37. This approach is consistent with the framework of the Resource Management Act 1991 itself. Which seeks to manage effects on the natural and physical environment. The evidence of Mr Parata asks you to assess effects relative to a concept, being Wai Maori. With respect, that is not how the RMA framework operates.

38. It is submitted that effects on cultural values need to find their roots in effects on the natural and physical environment. The consequences of those physical effects may take on different significance through the eyes of mana whenua, but in the absence of them there cannot be said to be effects on cultural values. Cultural values do not provide a trump card where sustainable management is otherwise achieved.

39. The Court in *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* rejected the Trust's position on consultation as effectively a right of veto.[21] The Environment Court held that the section 6(e) consideration in the RMA regarding the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga did not give the Trust a right to veto. The Court said:

> *Further, the approach advanced by Mr Mikaere that the Trust should effectively have a veto over the application unless the outcome it sought was attained is*

[21] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232 at [122].

> *contrary to the long recognised position that there is no right of veto and that s 6(e) considerations do not trump all other matters. To some extent we concur with Mr Mikaere's observation that "in the resource management area things have progressed quite a long way since 1991" in terms of recognition of Treaty matters, but that progress has not extended to the creation of a right of veto.*[22]

40. The Court acknowledged the Trust and its constituent hapu exercise of kaitiakitanga over the waters of Tangitu. However, the Court held that kaitiakitanga does not extend to a right of veto over any proposals and as the amenity values and the quality of the environment would be maintained, the Court granted the consent.[23] It is submitted that the Panel follows the decision of the Environment Court and rejects the right of veto that Kā Rūnaka are essentially asking for here. As previously established, there are no adverse environmental effects more than minor, and the mauri of the water is not being adversely affected.

41. The question of adequate information was also raised in relation to noise. The Applicant has not sought consent to breach the noise standards in either district. Based on the information it has from its previous operations, the work it is undertaking to further reduce noise generated from the barge it is confident that it will comply with the relevant standards. The Commission only need be satisfied on the balance of probabilities. The Court in *Contact Energy Ltd v. Waikato Regional Council*[24] stated:

> *On the question of standard of proof as such, we adopt the submission of counsel for the respondents, Mr Taylor, that in these proceedings there is no burden of proof on any party, only an obligation on a party who asserts a fact to present evidence in support of it, and the standard of proof required is on the balance of probabilities, and should reflect the gravity of the situation.*

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[22] at [126].
[23] at [212].
[24] *Contact Energy Ltd v. Waikato Regional Council* ENC Auckland A004/00, 24 January 2000 at [48].

42. The burden of proof is on Applicants to demonstrate that the proposed activity can meet permitted activity standards. However, the Applicant only needs to establish, on the balance of probabilities, that the proposed activity meets the necessary standards.[25] It is apparent from the data available that compliance can be achieved. It may require the operator to maintain setbacks from some notional boundaries, which it will be incumbent on the operator to manage. As discussed in the evidence the Applicant intends to undertake further works on the dredge to reduce noise levels emanating from it. At that stage a similar process of testing will be undertaken to determine what if any setbacks from notional boundaries are required in order to maintain compliance.

43. Failure to comply with the standards will be a matter for enforcement.

Te Mana o Te Wai

44. The National Policy Statement for Freshwater Management 2020 (**NPSFM**) establishes Te Mana o Te Wai as a fundamental concept at the centre of New Zealand's freshwater management system. Te Mana o Te Wai as a concept is defined in the NPSFM to mean:

> *1.3 Fundamental concept*
>
> *Concept*
>
> *(1) That refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o Te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.*

45. Te Mana o Te Wai is intended to be a multi-faceted concept that includes consideration of *both* use and protection.[26] It is not intended to operate as a strict hierarchy, as this would fail to achieve the

[25] *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247 at [115].
[26] Action for healthy waterways section 32 evaluation report, at 7.2.3.

purpose of the Resource Management Act. Te Mana o Te Wai recognises that protecting the health of freshwater, then protects mauri and *restores balance* between water, the wider environment and the community.

46. In the NPSFM Te Mana o Te Wai is achieved through the single objective setting out a hierarchy of priorities[27]:

    (a) First, the health and well-being of water bodies and freshwater ecosystems.

    (b) Second, the health needs of people (such as drinking water).

    (c) Third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and into the future.

47. The assessments available in relation to the health and wellbeing of the water body and ecosystems conclude that effects from the proposal will be low or minor. This is a consistent conclusion between the evidence of Mr Hamer, and the section 42A reports. On this basis it is submitted that the obligation of the first priority has been satisfied.

48. It is apparent that Mr Parata does not agree with this – paragraph 75 of his evidence identifies the nub of the issue. Mr Parata notes that the mere presence of the dredge in the Upper Clutha will detract from the Mauri of the Mata-Au. To accept this proposition would be inconsistent with the obligations under the Act. Which is to assess the effects, and in particular, whether it will affect the health and wellbeing of the water body, as distinct from the cultural values assigned to them by the community.

49. There is no suggestion that the proposed activity will affect the health needs of people, so the question comes down to whether the proposal

[27] NPSFM at 1.3(5).

will allow people and communities to provide for their social, economic and cultural well-being.

50. With respect to cultural wellbeing, we inevitably circle back to whether the proposal affects the water in way that compromises mana whenua's ability to exercise its cultural practices, share matauraka including gathering food (where it exists), utilising the river for recreational, passage purposes etc. The answer is of course, 'no'.

51. In the context of the NPSFM Mauri appears twice. In the fundamental concept, as an outcome of Te Mana o Te Wai and in respect of the compulsory Mahika kai value in appendix 1A. Appendix 1A sets out what the consequence of intact Mauri is.

> *"customary resources are available for use, customary practices are able to be exercised to the extent desired and tikanga and preferred methods are able to be practised."*

52. It is accepted that customary resources within the Upper Clutha / Mata Au are likely diminished which affects the extent to which mana whenua can carry out customary practices. However, that is not a consequence of this application. Nor does the evidence point to this proposal giving rise to further effects of concern with respect to these issues.

53. Mr Hall gives evidence in relation to the employment created by the dredge. The proposed activity will support the social and economic wellbeing of the applicant, its employees and those that it engages to assist with its operations.

54. It is submitted that the proposal implements the objective of the NPSFM and is consistent with Te Mana o Te Wai.

Section 107

55. As a discharge consent is required which engages section 107 of the Act. This section prohibits a discharge consent being granted if, after reasonable mixing the contaminant is likely to give rise to, relevantly:

    (a) Any conspicuous change in the colour or visual clarity

    (b) Any significant adverse effects on aquatic life.

56. This begs the question about what 'conspicuous' means. This matter was considered by the Court in *Maugaharuru-Tangitu Trust v Hawkes Bay Regional Council.*[28] The Court concluded that:

    [54] The word conspicuous is not defined in the Act. In considering its meaning, we have had regard to dictionary definitions in:

    The Concise Oxford English Dictionary - "clearly visible, attracting notice or attention";

    The New Zealand Oxford Dictionary - "clearly visible; striking to the eye";

    Collins Concise Dictionary - "1. clearly visible. 2. attracting attention because of a striking feature."

    [55] We consider that it is clear from the above definitions that conspicuous does not simply mean visible *but rather implies some higher degree of visibility. For the discharge to be conspicuous, we consider that it would need (in layman's terms) to catch the eye.*

57. It is apparent from the evidence, photos and discussion of Mr Hamer that the proposed activity does not reach this threshold. The ecological evidence also establishes that there will not be any significant adverse effects on aquatic life.

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[28] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2016] NZEnvC 232 at [53]-[55]

Cultural Impact Assessment

58. In the cultural impact assessment (**CIA**) undertaken by Aukaha concluded that mana whenua were unable to assess whether the proposed dredging activity provided for the Mauri of the Clutha River / Mata-Au and gave effect to Te Mana o te Wai. These factors included[29]:

    (a) Insufficient evidence on the effects of gold mine dredging on the instream benthic environments and the unknown effects on benthic species;

    (b) Require an ecological management plan prepared by a suitably qualified freshwater ecologist that should form part of the application and be reviewed annually;

    (c) Effects of dredging on wāhi tūpuna and ara tawhito, ecology and biodiversity, and archaeology;

    (d) Current dredging proposal perpetuates existing inequities in environmental outcomes.

Effects of the activity on the instream benthic environments

59. It is accepted that the activity will result in localised disturbance of the river bed, however that in and of itself does not give rise to an adverse effect as suggested by Mr Edwards[30]. Mr Hamer has assessed the likely effects of this and concludes they will be minor.

Effects of dredging on wāhi tūpuna and ara tawhito

60. The CIA identified that the Clutha River / Mata-au itself is an ara tawhito and the presence of the dredge would impinge on mana

[29] Cultural Impact Assessment at 29.
[30] Brief of Evidence of Mr Edwards at [33]

whenua's ability follow ara tawhito.[31] It is difficult to understand how this will occur.

61. The dredge operation will not impact the ability to access the Clutha River / Mata-Au, wāhi tūpuna, wāhi mahika kai or nohoanga sites[32]. Passage will remain available along the river. The Applicant has no influence over land tenure along the River, so cannot facilitate improved access to the water which may assist mana whenua in restoring some of their connections with the Mata Au.

62. The most that can be said about effects in this respect is the possibility that people will encounter the dredge whilst travelling along ara tawhito. It is submitted that this amounts to an effect on amenity values (albeit viewed through a cultural lens). As discussed in the evidence of Ms Mckenzie, the effects on landscape values and amenity are low. This is in part due to their relatively short-term and transient nature.

Archaeological effects

63. The Māori archaeological values of the Clutha River / Mata-Au are tied closely to Mahikai ka and ara tawhito. The CIA identified that sites demonstrating mana whenua associations are difficult and may not yet be identified. That is the case for all archaeology.

64. An accidental discovery protocol is the orthodox method of handling discovery of items of archaeological importance. Such a protocol is proposed in the conditions.[33]

65. There is a camera on the end of the dredge pipe and the dredge operator has good visibility of the material that is being worked on. Mr Parata questions the utility of the CIA being included in Cold Gold's induction materials for staff. It is submitted that awareness of potential

[31] Cultural Impact Assessment at 16.
[32] It is noted that no Nohanga sites are within the proposed dredging area.
[33] Cold Gold Limited Application for various resource consents at 12.

archaeological material is a good example where this is useful. If the CIA assists in understanding the nature of materials that may be present or particular parts of the River where discoveries may be more likely it allows staff to be vigilant and potentially able to identify things of interest.

66. It is also noted that the vast majority of the operation will take place within the wetted bed (excluding the slipway). As far as the Applicant is able to determine the archaeological sites that exist are along the banks of the River, rather than under the water and will not be affected by the proposal.

Landscape matters

67. The proposed activities within QLDC are limited to the dredging operation with the River. The Clutha River /Mata Au is identified as an Outstanding Natural Feature (**ONF**) in the QLDC PDP.

68. Ms Mckenzie's evidence assesses the potential effects of the activities on the qualities of the Clutha River / Mata Au ONF and concludes that the effects will be of a low degree. As such the policy framework which provides for the protection and maintenance of landscape values is satisfied.

69. The Central Otago Plan does not identify the Clutha River /Mata Au as an outstanding natural feature or landscape. However, Mr Mckenzie concludes that is satisfies the criteria of one regardless.

70. Whether a landscape has 'outstanding' qualities is a question of fact. Therefore, in light of Ms Mckenzie's conclusions the relevant policy framework is engaged. It is noted that the CODC provisions are broadly similar to QLDC in that they anticipate activities such as the proposed occurring, subject to the maintenance and protection of landscape values.

Noise matters

71. Queenstown Lakes contains noise rules that are slightly more restrictive than Central Otago. The 'daytime' noise limits do not commence until 8am, and finish at 8pm (as opposed 7am to 10pm in CODC). The applicant seeks consent to commence operations at 7am. This typically involves getting started for the day, gaining access to the barge etc. Depending on the day and the location of the dredge this can take anywhere from 20mins to an hour.

72. The Applicant has amended the proposed operational hours to 7am – 8pm to recognise the shorter day in Queenstown Lakes and in response to some of the concerns raised in submissions.

Past conduct

73. Some of the submissions make allegations or imply that there have been breaches associated with the operation of the barge. With respect to this it is noted that if there were issues they are matters for enforcement, and are not grounds for refusing consent in and of themselves[34].

74. An applicant is entitled to have its application assessed on the basis that it will comply with conditions[35].

75. It is further noted that as set out in Mr Hall's evidence the Dredge Vessel has been subject of Maritime Transport Audits and recent Otago Regional Council monitoring neither of which have raised any compliance issues.

Term

76. As this application includes an application to take and use water it engages chapter 10 of the Regional Plan Water.

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[34] *Walker v. Manukau CC* EnvC C213/99
[35] *Guardians of Paku Bay Assn Inc v. Waikato RC* (2011) 16 ELRNZ 544

77. The Applicant proposes an expiry of 25 February 2031 which aligns with the term of the mining permits that are held by Cold Gold. This is slightly longer than the term provided for under Policy 10A.2.2.

78. It is submitted that granting this consent for a slightly longer term is appropriate.

    (a) The term sought is still relatively short, so there are unlikely to be a change or increase in the effects of the proposal during the life of the consent.

    (b) It will still facilitate a renewal being required in the short term which will implement the objective of Plan Change 7/ Chapter 10A.

    (c) The proposed water take is non-consumptive therefore is no compelling reason to align it with other water take permits in the catchment. The non-consumptive use does not affect the ability to comply with allocation limits if/when they are set in the Land and Water Plan therefore the continued exercise of this consent will not prevent the implementation of allocation limits.

    (d) The effects on water quality have been assessed as less than minor so the activity will not impede the ability for the Clutha River/Mata Au to achieve other freshwater limits that may be established through the Land and Water Plan.

    (e) It will enable the applicant to utilise the full term of its mining permits, and achieve a good return on investment for the barge which has been purpose built.

79. This short term will also provide an opportunity for the activity to be reassessed if Mahika kai species such as lamprey begin to be translocated and establish within the catchment.

CONDITIONS

80. The Applicant is proposing to provide an updated suite of conditions. At the time of filing these submissions it has been unable to confer with all its experts following the filing of evidence by submitters. In light of that it proposes to provide updated conditions at the hearing. However, it can foreshadow the following:

(a) Amended conditions relating to monitoring of the sediment plume. The purpose of these conditions will be to ensure that the activity seeks to minimise the extent of the plume (within 100m) with active management, whilst recognising the possibility that it may extend beyond 100m (but not 200m) from time to time.

(b) Amended conditions relating to nesting birds.

(c) Conditions relating to setbacks from fisher people.

(d) Amended operational hours – 7am-8pm.

(e) Noise testing condition, prior to commencement of operations.

(f) Conditions to reflect the feedback from QLDC Harbour Master.

(g) Condition to remove the vessel from the water if it is not utilised for 3 months.

Dated 8 November 2023

Bridget Irving / Hannah Perkin

Counsel for the Applicant