



To the Hearing Panel 16 November 2023

Addendum to Staff Section 42A Recommending Report

Hearing of Application – RM22.434

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Addendum to Section 42A Report

My overall recommendation on the application remains unchanged to that in my section 42A (s42a) report, in that I recommend that the application be declined using the discretion provided for in section 104(6) of the Resource Management Act 1991 (RMA) on the basis of having inadequate information to determine the application.

This addendum to my s42a report presents my revised assessment of the application in light of information that I have heard and considered during this hearing. I will address the permitted baseline, effects on cultural values, effects on landscape values, effects on ecology and effects relating to the anchoring system of the dredge. I will also address the conditions proposed by the Applicant and changes to my assessment against Part 2.

1. Permitted baseline

Based on information that I have heard and considered during this hearing, I am now of the opinion that the permitted baseline under Rule 13.5.1.7 of the Regional Plan: Water for Otago is not applicable. With respect to my pre-circulated s42A report and s42A addendum relating to landscape effects I relied on the permitted baseline only in relation to the effects of the sediment discharge on landscape values.

The principal reason why I have reconsidered this assessment matter is due to fact that I have come to understand that a 'permitted activity suction dredge' could not physically operate within the part of the riverbed in which the Applicant seeks to dredge, because the permitted activity dredging activity uses divers and cannot operate in high velocity water. I also consider that there is a significant size difference between the permitted activity suction dredge nozzle (150mm) and that proposed (350mm) which allows for much greater throughput of gravels.

I will address this matter below in relation to how it affects my previous assessment of effects on landscape values presented in my landscape addendum.

2. Effects on cultural values

Mr Sycamore states in paragraph 38 of his opening statement "*It would be helpful had the s42A authors specified what aspects of cultural values are incomplete, rather than making a broad statement without any context to enable further assessment*". I consider that the aspects requiring further assessment were clearly outlined in my s42A report, where I state in bold "*I recommend that the Applicant further*

engages with Aukaha on this matter prior to any hearing of this application being held” in sections 6.1.12.a (page 31) relating to wāhi tupuna and ara tawhito values, section 6.1.12.b (page 34) relating to wai māori values and 6.1.12.c (page 36) relating to archaeological values. I observe that the applicant has had ample clarity and opportunity prior to this hearing to engage on these matters and seek, if not resolution, clarity around the position of mana whenua on these matters.

Ms Irving in her legal submissions has made reference to the decision of *Wakatu Inc v. Tasman District Council [2012] NZEnvC 75*. She states that biophysical effects need to be more than minor before concerns about metaphysical effects are engaged and weighed.

I have based my assessment of adverse effects on cultural values on the more recent decision of *SKP Incorporated v Auckland Council [2018] NZEnvC 81* at [157] which states “*persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters. We approve of that approach*”. This is of importance because the decision explicitly states that it is mana whenua who are best placed to assess the effects of a proposal, and I note that the Applicant has attempted to assess cultural values through a western lens with reference to other expert evidence such as ecology and landscape effects.

I also note that the changes to the National Policy Statement for Freshwater Management (NPSFM) were made in 2020, after the decision that Ms Irving references. The NPSFM represents a shift in freshwater management, with the first priority being the health and wellbeing of waterbodies and freshwater ecosystems.

I also have considered *Tauranga Environmental Protection Society Incorporated v Tauranga City Council [2021] NZHC 1201* at [65] whereby it is open to the decision-maker to test and assess the credibility and reliability of this evidence. With respect to this, I have considered where potential effects are unlikely to occur (such as through the species not being located there) or where conditions could manage adverse effects.

I understand that Aukaha consider that there has not been sufficient information provided for them to assess the effects of the proposal on cultural values. I refer to the following provisions of the Partially Operative Regional Policy Statement (PO RPS) and the Proposed Regional Policy Statement (P RPS) which provide some guidance on this matter and that I have considered when making my assessment below:

PO RPS: Policy 5.4.3 Precautionary approach to adverse effects - Apply a precautionary approach to activities where adverse effects may be uncertain, not able to be determined, or poorly understood but are potentially significant or irreversible.

P RPS: IM-P6 – Acting on best available information - Avoid unreasonable delays in decision-making processes by using the best information available at the time, including but not limited to mātauraka Māori, local knowledge, and reliable partial data.

P RPS: IM-P15 – Precautionary approach - Adopt a precautionary approach towards proposed activities whose effects are uncertain, unknown or little understood, but could be significantly adverse, particularly where the areas and values within Otago have not been identified in plans as required by this RPS.

I consider that a precautionary approach should be applied, as there are uncertainties as to the effects that the proposal will have on cultural values, and that these uncertainties could be further clarified through more in depth engagement with mana whenua.

In the following sections I provide an update to the assessment of effects presented in my s42A report from information that I have heard, or not heard, during this hearing.

i. Wāhi tūpuna and ara tawhito values

In my s42A report (section 6.1.12.a) I concluded that there was inadequate information to assess the level of effect on wāhi tūpuna and ara tawhito values.

Mr Vial states in his evidence that *“the proposal does not safeguard the relationship of mana whenua with this significant awa”*. He states that the issues of concern for mana whenua in relation to wāhi tūpuna and ara tawhito are clearly expressed in the CIA and submission, which states *“inadequate information has been provided to enable mana whenua to assess whether the effects of dredging on wāhi tūpuna and ara tawhito ... will be addressed”*. Mr Vial states that these matters were not raised by Mr Sycamore during the further consultation meeting nor in the follow-up email.

As such, I still have inadequate information to assess the level of effect of the proposal on those values.

ii. Wai māori values

In my s42A report (section 6.1.12.b), I concluded that there was inadequate information to assess the level of effect on wai māori values, based on the advice in the CIA which states that *“overall, mana whenua are unable to assess whether the proposed dredging activity provides for the mauri of the Mata-au and gives effect to Te Mana o te Wai due to the paucity of information provided in the application”*. Aukaha stated this further in their submission on the application (paragraph 10.6).

In the cultural evidence of Mr Parata, he stated that he believed that the Applicant *“has applied an inappropriate framework for assessing cultural values and impacts of the proposed activity on cultural values; and misunderstood key concepts including mauri and mahinga kai”*. He considers that the proposal does not accord with wai māori and considers that the proposal could have significant impacts on cultural values but advised there is inadequate information to complete that assessment.

With respect to mahinga kai, Mr Parata states that the Applicant has relied upon overseas studies and there has been no assessment of impact on kanakana and no assessment of impact of the activity on mahinga kai in the Mata-Au. Mr Parata, when speaking, advised that there isn't sufficient evidence to say that it will deplete mahinga kai, which is why more evidence is requested. I note that whilst it is the aim of mana whenua to have kanakana re-introduced in this portion of the river, it is my understanding that they are not currently there and as such do not form part of the existing environment and so have not placed great weight on that specific matter when drawing my conclusion below.

With respect to mauri, Mr Parata states that *“a cornerstone for mana whenua in exercising kaitiakitanga in the Mata-au (Clutha River) is to avoid activities which further degrade the mauri of the river and to seek to improve or restore it”*. He considers that putting a dredge in the proposed location where there is not currently a dredge will adversely affect the mauri of the river, and acknowledges that the matter for decision is where these effects sit relative to all matters considered under the RMA. Mr Parata, while

speaking, stated that any human activity will affect the mauri of the natural processes of the river but the scale of that effect would depend on the nature of the type of activity.

During his submission, Mr Parata advised that past activities have degraded Kāi Tahu access to the river and its natural resources, and therefore the concern is to minimise any effect that any activity will have on migration, spawning, habitat, connectivity and rehabilitation of the taonga to the area. He spoke to the fact that the way effects on cultural values are assessed is taking information provided by the applicant and studies, etc. In Mr Parata's opinion there has not been enough evidence provided to give a good account of what the effects to cultural values would be.

Mr Edwards, in his evidence, raises concern relating to unquantified risks of noise impact to eel movement, particularly during times of darkness. He considered that a reduction in the hours of operation would go some way to addressing this effect. Mr Edwards also retained a concern about the potential impact of the health of the eel population from entrainment.

Mr Edwards considers that the artificial removal of macroinvertebrate species from the streambed does not put the health and wellbeing of the Mata-Au first, and the human-induced loss of macroinvertebrate communities from the base of the foodweb reduces the energy sources available to the rest of the ecosystem and does not support the mauri of the river.

Mr Vial, in his planning evidence, considers that the effects of the proposal on the mauri of the Clutha River / Mata-Au are uncertain and a precautionary approach (which he confirmed would be to decline the application for consent) should be taken to give effect to Te Mana o te Wai and to protect the mauri of the river. Mr Vial also stated that there was insufficient evidence on the effects of dredging on instream benthic environments and therefore on taoka species and their survival.

Based on the information I have before me, I consider that I still have inadequate information to determine the level of effect on wai māori values, including effects on mauri and Te Mana o te Wai.

iii. Archaeological values

I understand from Mr Vial's evidence is that he was concerned regarding the disturbance of potential archaeological values on the banks of the river, rather than within the bed of the river. As the dredge operates with a draft of 0.8m, it is just the area of the proposed slipway where there will be a disturbance of the river banks. Mr Vial did not identify any specific archaeological site of concern at the proposed slipway location.

I have completed a review (15 November 2023) of the ArchSite website hosted by the New Zealand Archaeological Association of the site of the proposed Queensberry slipway. I note that there is a site (G40/161, mining tailings) which appears to be in very close proximity to the site of the proposed slipway, however the attached report states that it is located on the true-left bank of the river.

The Applicant has proposed the inclusion of an accidental discovery protocol, to be followed in the event of any discovery of archaeological material.

Based on the inclusion of the accidental discovery protocol condition, I consider it would be appropriate to draw the conclusion that adverse effects on archaeological values will be less than minor.

iv. Summary of effects on cultural values

In summary, I consider case law context directs that mana whenua are best placed to identify the effects of the proposal on cultural values, and that should be tested by the decision maker to assess the credibility and reliability of the evidence.

The NPSFM 2020 brought a significant shift in the way that freshwater is to be managed under the RMA, bringing the health and wellbeing of waterbodies and freshwater ecosystems to the forefront.

Due to the evidence from mana whenua that they do not have adequate information to determine effects on cultural values, I consider that a precautionary approach should be applied.

3. Effect on landscape values

Following my reconsideration of the application of the permitted baseline to this application as discussed above, I consider that my s42A addendum relating to effects of the proposal on landscape values (dated 13 November 2023) with respect to the effects of the proposed sediment discharge is no longer correct, and I provide an update of my assessment on the effects of the proposal on landscape values here.

For reference, I note from Ms McKenzie's evidence that the the Clutha River / Mata-Au Outstanding Natural Feature (ONF) includes very high biophysical values including water quality and high aesthetic values including "*intense water colour contrasting surrounding vegetation*".

Mr Denney has advised me through further conversation that if the permitted baseline which allows for a visible plume of 100m does not exist, then he considers that the plume would be considered a new element and adverse effects on visual effects would be higher than 'low' (which was the level of effect concluded when relying on the permitted baseline).

Mr Denney advised that, with the Applicant's proposed conditions of consent (condition 5 of the discharge permit), he does not believe that adverse effects will be 'low' or less. Using the Te Tangi a te Manu: Aoteaoroa New Zealand Landscape Guidelines, any adverse effect above 'low' would equate to 'minor', 'more than minor' or 'significant'.

I do not consider that at this time that I have sufficient information to determine the level of effect of the proposed sediment discharge on landscape values.

I also do not consider that I have enough information to determine whether it is consistent with the policy framework, which requires that adverse effects from mineral extraction on the values that contribute to the significant or outstanding nature are avoided (Policy 5.4.8 of the Partially Operative Regional Policy Statement) and the values that contribute to the natural feature being outstanding are maintained (Policy 3.2.4). I note that these are just two policies to provide an example of further assessment required, but there are other applicable provisions that would need to be re-assessed.

4. Effects on ecology

I requested that Ms Barnett review the changes to the conditions proposed by the Applicant on behalf of ORC with respect to effects on ecology values. Ms Barnett advised that the only condition change that she had concerns with was the condition relating to managing adverse effects on birds. There appears to have been a formatting error when the document has been PDF'd so for clarity, this is referred to as condition 17e of PDF page 4 of the Applicant's proposed conditions.

Based on the advice of Ms Barnett, I am not comfortable that the adverse effects on indigenous birds would be less than minor using the condition proposed by the Applicant. I note that this would likely also have flow-on effects to the policy assessment. I have not identified all of the relevant provisions that it might affect due to the timeframes associated with preparing this response, however am able to do so if requested.

If the Hearing Panel is of the mind to grant the consent, I consider that conditions 18 and 19 proposed in Appendix A of my s42A report should be used to manage adverse effects on indigenous birds such that they are less than minor.

5. Effects relating to the anchoring system of the dredge

It is noted through the reading of submissions and hearing lay evidence that a lot of concerns relate to health and safety of river users. I acknowledge these are genuine concerns raised by submitters, and I consider they fall best for consideration under the relevant health and safety legislation, the ORC Navigational Safety Bylaw and Ms Royce’s assessment on behalf of the district councils.

6. Conditions

With respect to the Applicant’s changes to the proposed conditions provided as Appendix A to my s42A report, I have the following comments.

I note that the Applicant is yet to provide their proposed condition outlining how they intent to monitor water clarity and any limits that they consider required to meet the requirements of the proposed condition 5 of the discharge permit. I also note that given the potential adverse effects of the discharge on landscape values where the permitted baseline is not relied upon, condition 5 as currently written may not be adequate to manage effects or align with the policy framework.

RM23.434.01 Land Use Consent to disturb the bed of the Clutha River/ Mata-Au associated with suction dredging		
Condition	Draft wording including Applicant’s changes	Assessment
17.	<p>To manage the effects on native birds, if suction dredging is planned to occur within 250m of the sites identified in table 1 below between 1 July and 31 March each year the Consent Holder must have a survey of indigenous bird habitat completed suitably qualified and experienced ecologist conduct a survey within 10 working days prior to commencing work to determine whether within 10 working days prior to undertaking any suction dredging. The survey must extend from 250 metres upstream to 250 metres downstream of the area proposed to be dredged during the period between 1 July and 31 March each year. The survey must identify any of the following species are utilising the area for nesting.</p> <ul style="list-style-type: none"> a. <u>Black-billed gulls</u> b. <u>Black fronted terns</u> c. <u>Australasian crested grebe</u> d. <u>South Island Pied Oystercatcher</u> 	<p>Based on the advice of Ms Barnett, I do not consider that this condition will adequately manage effects on indigenous birds. See section 4 above.</p>

	<p>e. <u>Pied Stilt</u></p> <p>f. <u>Banded Dotterel</u></p> <p>g. <u>Southern Black-backed Gull</u></p> <p>h. <u>Caspian Tern and map:-</u></p> <p>c. <u>All potential river bank and braid bars (river islands) that may be used for breeding by native birds;</u></p> <p>d. <u>Any river banks and braid bars that support native nesting birds; and</u></p> <p><u>Where repeat survey(s) may be required to coincide with timing or staging of works along the river and the details, including date and location, of the repeat survey(s).</u></p> <p><u>e. If any of the species are found to be utilising the areas for nesting no suction dredging activity may commence within 250 m of the nesting area and the consent holder must establish at least 6 pest traps around the nesting area in locations specified by the ecologist. Following placement, the traps must be checked at least weekly and reset if necessary. Placement of the pest traps is subject to consent being given by the landowner of the site where the nesting birds are located. If landowner consent is not given, the consent holder is not required to place traps.</u></p>	
19	<p>Following the survey(s) required by condition, a suitably qualified and experienced ecologist must prepare a report that includes:</p> <p>a. Maps and GPS co-ordinates in NZTM 2000 of all potential river bank and braid bars (river islands) that may be used for breeding by native birds and/or that support nesting native birds</p> <p>b. A statement that either:</p> <p>i. no breeding native birds are identified from the survey and the activity may proceed with no additional restrictions; or</p> <p>ii. breeding native birds are identified, and therefore a 250 m works exclusion zone around the identified area within which no works are to occur until such time that a suitably qualified and experienced ecologist has confirmed that any nests have failed, or chicks have</p>	

	<p>naturally fledged the natal site shall apply.</p> <p>The survey report must be provided to the Consent Authority prior to dredging commencing during the period of 1 July and 31 March each year. Where repeat surveys are required, the Consent Holder must undertake the recommended repeat survey by the date stated and provide the findings of the survey to the Consent Authority within five working days of completion of the report.</p>	
Table 1	<u>Table of beaches where endemic riverine bird surveys should occur prior to suction dredging within 250 m during the breeding season.</u>	
21	The Consent Holder must place an advertisement in the local newspapers (Otago Daily Times, The News Central Otago and Wanaka Sun) and online on any relevant social media platform stating the activity, location and hours of operation, and contact name and number of the operator at least 10 working days prior to commencing any suction dredging activities authorised under this consent.	While conditions have been proposed on the district council consents relating to the installation of signage, I consider it would be beneficial for this condition to remain, even if reduced to an extent to only relate to relevant social media platforms, so the public are aware of any works commencing prior to operation.
22 NEW	<p><u>Prior to commencing suction dredging activity in any location the consent holder must:</u></p> <p>a. <u>Conduct a visual inspection of the area to be dredged to determine whether the area contains any <i>Lagarosiphon major</i>. Where the water is too deep to see the river bottom the consent holder must utilise the camera location on the end of the suction dredge nozzle.</u></p> <p>b. <u>If <i>Lagarosiphon major</i> is identified in the area, no suction dredging activity may be undertaken.</u></p>	Based on the advice of Ms Barnett, I consider that this condition adequately manages the effect of <i>Lagarosiphon</i> .
RM22.434.03 – Discharge Permit to discharge contaminants (sediment) to surface water of the Clutha River / Mata-Au associated with suction dredging		
5 - 8	<p>5. [method of measurement and frequency of monitoring condition]</p> <p><u>The consent holder must carry out dredging operations to ensure:</u></p> <p>6. a. There is <u>a. There must be</u> no conspicuous change in colour or visual clarity of the Clutha River / Mata-Au beyond a distance of 200 metres downstream of the point of</p>	As described in section 3, based on the information that I have, I am unable to determine the level of adverse effect of the proposed discharge on landscape values where the permitted baseline is not applied. As such, this

	<p>discharge at any time, subject to compliance with conditions <u>b7</u> and <u>c8</u>.</p> <p>7. b. If there is a conspicuous change in colour or visual clarity of the Clutha River / Mata-Au beyond a distance of 100 metres downstream of the point of discharge, the <u>consent holder must reduce the level of discharge activity or must cease the discharge</u> until there is no conspicuous change in colour or visual clarity beyond 100 metres downstream of the point of discharge.</p> <p>8. c. If there is a conspicuous change in colour or visual clarity of the Clutha River / Mata-Au beyond a distance of 200 metres downstream of the point of discharge, the discharge activity must cease and the Consent Holder must immediately notify the Consent Authority.</p> <p><u>d. The consent holder must always undertake the dredging activity in a way that minimises the extent of the sediment plume, through visual observations of the plume and active management of the rate of dredge.</u></p>	<p>condition may need to be altered to provide for those landscape values.</p>
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7. Part 2 of the Act

In this section I present only the differences to my s42A report.

- Section 5 – I consider that there is inadequate information to assess effects on cultural values and landscape values. As such, an assessment cannot be completed as to whether the proposal will sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations or whether the life-supporting capacity of the water will be safeguarded.
- Section 6(a), the preservation of the natural character of rivers and their margins and protection of them from inappropriate subdivision, use and development - I consider that further information is required to determine whether the proposal would provide for the preservation of the natural character of the Clutha River / Mata-Au from inappropriate use and development.
- Section 6(b), the protection of outstanding natural features from inappropriate subdivision, use and development - I consider that further information is required to determine whether the proposal would provide for the protection of the Clutha River / Mata-Au ONF from inappropriate use and development.
- Section 7(c), the maintenance and enhancement of amenity values - I consider that further information is required to determine whether the proposal would provide for the maintenance and enhancement of amenity values of the Clutha River / Mata-Au.

8. Recommendation

Section 104(6) provides discretion for the consent authority to decline an application on the grounds that it has inadequate information to determine the application.

I consider there is inadequate information on the effects of the proposal on cultural values with respect to wāhi tūpuna, ara tawhito values and wai māori values including mauri and whether the proposal gives effect to Te Mana o te Wai; and inadequate information on the effects of the proposal on landscape values of the Clutha River / Mata-Au Outstanding Natural Feature with respect to the discharge of sediment.

Due to the effects of the proposal on cultural values and landscape values being unclear, and a flow-on inability to assess consistency with the provisions of several of the relevant documents, I consider there is inadequate information to make a determination on the application.

As such, I recommend the application should be **declined** using the discretion provided for in section 104(6).