

**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**

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**CLOSING SUBMISSIONS OF COUNSEL ON BEHALF OF COLD GOLD  
CLUTHA LIMITED**

**DATED 19 DECEMBER 2023**

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**CLOSING SUBMISSIONS OF COUNSEL ON BEHALF OF COLD GOLD  
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**May it please the Commission:**

**Introduction**

1. These submissions will walk through the key matters requiring consideration under section 104 of the Act. They will then address the various other matters raised by the commission during the course of the hearing, where they have not already been addressed.
  - (a) Jurisdiction of the Harbourmaster
  - (b) Is the dredge a structure?
  - (c) Large Scale Mineral Extract
  - (d) Te Mana o te Wai
2. The following supplementary information is also filed:
  - (a) Letter from Marshall Day setting out the noise monitoring process that would be followed in accordance with the Applicants proposed condition.
  - (b) Memorandum from Jessica Mckenzie responding to questions from the Panel.
  - (c) Supplementary Evidence from Mark Hamer addressing matter raised in questions from the Panel.
  - (d) Supplementary Evidence of Peter Hall setting out proposed changes to the dredge to address navigational safety matters (including subsequent discussions with the Harbourmasters),

providing some further information on river usage and responding to questions from the panel.

- (e) Update conditions with comments explaining reasons for changes or proposed new conditions.

### **SECTION 104(1)(a)**

3. Obviously, the starting point for an assessment is to determine the effects. These effects must be assessed against the receiving environment, being the environment within which the effects will accrue. Counsel's opening submissions set out the framework for determining the receiving environment. Those submissions stand and are not repeated.
4. Permitted activities are relevant to establishing the receiving environment. In this case Cold Gold hold the mining permit for the proposed dredging area. This is an exclusive right. However, they may allow 3<sup>rd</sup> parties to carry out dredging within their permit area, and have undertaken permitted dredging themselves to assess the viability of establishing the larger dredge in the area.
5. Permitted dredging activity is also Cold Gold's 'Plan B' in the event this consent is declined so that it may recoup the costs associated with obtaining the mining permit. It will establish a small fleet of permitted dredges. These dredges will have to operate within the terms of the permitted activity rules, but will not be subject to the various controls promoted by the Applicant such as the exclusion areas. They will also necessarily operate in the shallower, more ecologically sensitive areas of the river that would not be worked by the proposed dredge.
6. Therefore the alternative options are:
  - (a) The proposed dredging operation with proposed conditions including exclusion areas, controls on the operation of other

dredges within the consented area and surrender of the existing downstream consents. As against,

- (b) A fleet of small dredges operating in accordance with the permitted activity rules but without the various other controls.
7. The extension of the Southern Lakes Trail is not part of the receiving environment. The trail extension does not meet the criteria to form part of the receiving environment, It is not known what consents may be required to develop it or when construction may commence.<sup>1</sup> It is submitted that it clearly does not fall within the *Hawthorn* environment.

### ***Effects matters***

#### *Ecological Effects*

8. It is submitted that the ecological effects are relatively non-contentious when all the evidence is scrutinised. The ecologists engaged by the Applicant and the Otago Regional Council are largely *ad idem* with respect to the key ecological matters. Ms Barnett's Response to questions from the Panel provides a useful summary of the key issues.

#### *Effects on Macroinvertebrates*

9. Obviously with the disturbance of the bed there will be disturbance of the creatures that occupy this area. However, that does not necessarily give rise to significant adverse effects.
- (a) The macroinvertebrates within the gravels are typically at larval stages so are transitory anyway.
  - (b) The area being worked by the dredge at any one time is small (relative to the whole application area and the wider catchment) and effects are highly localised.

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<sup>1</sup> As discussed with Ms Royce during the hearing

- (c) There will be ample undisturbed habitat surrounding the activity to enable fast recolonisation of dredged areas by macroinvertebrate species. As set out by Mr Hamer, periodic disturbance is beneficial for macroinvertebrates.
10. With respect to the sampling that has been undertaken, ORC peer reviewers noted that due to the nature of the Clutha River /Mata Au in the application area, sampling is challenging, and further sampling would provide little extra valuable information<sup>2</sup>. Since the hearing Mr Hamer has been able to obtain the NIWA data for the Luggate Bridge site which confirms similar MCI values, reinforcing his earlier conclusions and supporting the conclusions in the Babbage review.

*Water Clarity/turbidity*

11. Conditions are proposed by the Applicant that will ensure water clarity is not affected more than 200m behind the dredge (predominantly no more than 100m). Once again, the effects are transitory and localised. The application area is 30km. At most 200m will be affected at any one time amounting to .006% of the application area.
12. Whilst the Clutha River/Mata Au is known for its clarity, the section below the Red Bridge is not as clear as the upper section between the Outlet and Albert Town. This is reflected in the standards in schedule 15 of the Otago Regional Plan.<sup>3</sup>
13. As highlighted by Ms Barnett, the clarity within the Clutha River/Mata Au is highly variable<sup>4</sup>. It is submitted that Mr Young somewhat overstated the level of clarity within the River, and was perhaps more focussed on the upper reaches (Wanaka outlet to red bridge) than the application area.

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<sup>2</sup> Technical Ecology Report – Cold Gold dated 10 October 2022 at para 6.

<sup>3</sup> Clutha River above Luggate has a turbidity standard of 3NTU, whilst the Clutha River below Luggate has a Turbidity standard of 5NTU. These standards are met when 80% of the samples taken at or below median flow over a rolling 5-year period.

<sup>4</sup> Treffery Barnett response to questions from Panel at para 3.

14. Mr Hamer and Ms Barnett agree that a turbidity monitor is the best option for the proposed circumstances, allowing subjectivity to be removed from the equation and is the easiest option to deploy in the river conditions. The Applicant has proposed a two-part condition to monitor the sediment plume

(a) Video of the activity.

(b) Turbidity monitoring.

15. The Applicant's ecological assessment, and that of the ORC peer reviewers conclude that the ecological effects of the sediment plume will be low.<sup>5</sup>

*Effects on spawning habitat*

16. Both Mr Hamer and Ms Barnett agree that the effects of the dredging on spawning habitat will be low. Both agree with Mr Young that there is likely to be some trout spawning in deeper water, but this is not preferred spawning habitat. Once again, the scale of the activity relative to the environment is important. During the spawning season the activity will be localised leaving the vast majority of the spawning habitat untouched. The short-term nature of the activity is also relevant.<sup>6</sup>

17. The Applicant's ecological assessment and the ORC peer review agree that habitat of koaro, trout and bully spawning habitat will be protected by the exclusion from shallower water. There is also agreement that Clutha flathead galaxias spawn in smaller headwater streams and there is little habitat for them in the mainstem Clutha.<sup>7</sup>

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<sup>5</sup> Technical report ecology 2 – suction dredging in the Clutha River – 10 August 2023 at point 5.

<sup>6</sup> Treffery Barnett Response to questions from the panel at 6.

<sup>7</sup> Supplementary Evidence of Mark Hamer at [16].

*Effects on Avifauna*

18. As noted in the Technical Report Ecology the conditions associated with bird nesting are typically seen where an application is affecting braided river habitat. That type of habitat is not present within the area to be dredged due to the exclusion zones proposed. The Babbage review notes that nesting within the balance of the application area is unlikely so further conditions may not be necessary.<sup>8</sup>
19. The Applicant has proposed a condition that identifies the beaches where the specified native birds are most likely to be present and provides a process for identifying whether those areas are being utilised before commencing dredging in their vicinity. It is submitted that this is an appropriate response to the residual potential effects on avifauna, whilst the majority of the effects have been avoided through the conditions creating the various exclusion areas<sup>9</sup>. In all likelihood it will be easier for the Applicant to avoid operating in proximity to these beaches during the breeding season.
20. The Black-billed Gull, Black Fronted Tern, Pied Oyster Catcher, Caspian Tern and Banded Dotterel are identified as specified highly mobile fauna in the National Policy Statement for Indigenous Biodiversity (**NPSIB**). Highly mobile fauna areas are areas outside significant natural areas (**SNAs**) that are used intermittently by specified highly mobile fauna. Regional Councils are required to record areas outside of SNAs that are highly mobile fauna areas.<sup>10</sup> None of the Councils have been through the process of identifying highly mobile fauna areas at this stage and it is unknown whether these identified areas would qualify. It is submitted that the approach proposed by the Applicant is an appropriate response, commensurate with the level of activity and potential effect that is likely to arise, in the residual location outside the exclusion zones.

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<sup>8</sup> Technical Report Ecology – Cold Gold dated 10 October 2022 at 10 c. and d.

<sup>9</sup> Ibid and at 10 a.

<sup>10</sup> Clause 3.20 of the NPSIB.

### Navigational Safety

21. A number of submitters raised concerns about navigational safety effects arising from the operation of the dredge. These concerns are related to the anchoring system and potential for the anchor warps to present a hazard to water users.
22. The supplementary evidence of Mr Hall discusses the further alterations that Cold Gold intend to make to the dredge to address this. Mr Hall also attaches correspondence from the Harbourmasters.
23. There is some uncertainty as to the level of usage on the relevant stretch of the river. The Applicant knows that it will be more than where they are operating at present. Since the hearing the applicant has endeavoured to gather some further information regarding this. That information is set out within Mr Hall's supplementary evidence. It is apparent that there is little data available, so we need to work with the various sources of anecdotal evidence, which together build a reasonably good picture. That is:
  - (a) The river is used by a range of different water user groups including kayakers, fisher people and jetboaters etc.
  - (b) The users will have a range of capabilities – the section of river is a grade 2 river meaning it provides a good training ground for people, particularly multisport kayakers in the lead up to Coast to Coast.
  - (c) The river is busier during the summer months and holiday weekends.<sup>11</sup>

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<sup>11</sup> <https://wanakaapp.nz/news/news/harbourmaster-happy-with-most-behaviour-on-waterways?id=63b646f4531112002cb5b458> This article discusses high summer water use and notes 200 people boated or floated between the Outlet and Albert town bridge on New Years Day 2023.



- (d) A variety of commercial operators and education providers use the River for groups.
  - (e) It is not as busy as the stretch of river upstream of Albert town Bridge, and fewer people have been observed on 'unorthodox craft' such as unicorns and flamingos, although there have been some.
24. From the Applicants point of view the key focus is on ensuring that safety issues are dealt with appropriately. Then, the question of 'how many people' becomes less important – the operation of the dredge should be safe whether there are 3 or 33 or 333 people passing it on any given day.
25. With the alterations of the dredge the risks associated with the anchor warps can be addressed. The Applicant is also proposing a suite of conditions to ensure that as many water users as possible are aware of the dredge and its location. This is through signage, email notification to frequent water users, public website etc. It must also be noted that other water users are also obliged to behave in accordance with the relevant navigational safety bylaws which include controls on speed within proximity to other vessels etc.<sup>12</sup>

### Landscape Effects

26. There is a reasonable degree of consensus between the landscape architects with respect to landscape values of the Clutha River/Mata Au and the likely scale of effects. Mr Denney, is marginally more conservative and proposes a series of additional restrictions/exclusions. The magnitude of effects range between very low to moderate at most. None are found to be significant. These

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<sup>12</sup> [https://www.orc.govt.nz/media/9185/orc-navigation-safety-bylaw\\_forweb\\_2020-09-23.pdf](https://www.orc.govt.nz/media/9185/orc-navigation-safety-bylaw_forweb_2020-09-23.pdf) The Otago Regional Council Safety Bylaws 2020, clause 6 and 17.  
<https://www.qldc.govt.nz/media/305he24q/navigation-safety-bylaw-2018.pdf> The Queenstown Lakes District Council Navigation Safety Bylaws 2018, clause 7 and 9.

conclusions remain relatively consistent irrespective of whether permitted activities are factored in or not.

27. The applicant is willing to partially accept the conditions proposed by Mr Denney as follows:
- (a) Colours of any structures on land.
  - (b) Controls associated with lighting on the dredge.
  - (c) Restrictions in relation to the River Ridge, Māori Point Road, and Bowman Road lifestyle areas.<sup>13</sup>
  - (d) Avoidance of the Mata-Au Scientific Reserve from 1 October to 31 March each year (other than to pass through the area between other dredging locations). As discussed by Mr Hall the area surrounding the reserve is some of the most viable area and as such Cold Gold do not wish to see this excluded entirely, particularly when they have committed to the exclusion of other extensive areas already. Therefore, it is proposed to avoid the area during the warmer months when there are more people likely to be using the area and be impacted by dredges presence. It is submitted that this is an appropriate balance given the functional needs of the dredging operation and the landscape values that need to be protected.

### Cultural Effects

28. Ms Burrows identified *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 as the base for her assessment of adverse effects on cultural values. Ms Burrows determined that *SKP Incorporated* was at odds with *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75 relied on by the Applicant in opening submissions.<sup>14</sup> We disagree with

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<sup>13</sup> Refer to maps attached to Mr Denney's Response to questions from Panel.

<sup>14</sup> Addendum s 42A Otago Regional Council report writer statement of reply (16 November 2023) at page 2.

Ms Burrow's interpretation of case law surrounding assessment of adverse effects on cultural values.

29. The Court in *SKP Incorporated* found that it is mana whenua's role to determine their own cultural values. The Court was concerned about non-Māori assigning cultural values and held that it was mana whenua's role to determine what holds value and what does not<sup>15</sup>:

We also have a concern about Ms Charters appearing to assign cultural values to archaeological sites, which we consider is for those who hold mana whenua to do, not an archaeological witness, or Ms Charters.

30. *SKP Incorporated* identified that mana whenua is the appropriate authority to assess their own cultural values. *Wakatu Inc* identifies that when a decision maker is assessing effects on cultural values (as opposed to identifying the values), biophysical effects need to be more than minor before concerns about metaphysical effects are engaged and weighed.
31. It is submitted that the cases are not at odds with one another but are complementary. If Ms Burrows' rationale is adopted, then decision makers who are not mana whenua could not make resource management decisions on issues that engage cultural values, or would simply have to accept, without evaluation, the evidence of mana whenua witnesses. This would result in cultural effects functioning as a veto – an approach that has been rejected by the Courts as discussed in opening submissions. It is submitted that the Panel must evaluate the evidence provided in relation to effects on values identified by mana whenua and in doing so it needs to consider all the evidence provided to it.
32. During the hearing Mr Parata and Mr Edwards crystallised the concerns of mana whenua. In light of that it is useful to work through the range of

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<sup>15</sup> *SKP Incorporated v Auckland Council* [2018] NZEnvC 81 at [154].

evidence available to address the 4 key issues of concern highlighted by mana whenua at the hearing:

- (a) Migration
- (b) Spawning
- (c) Connectivity
- (d) Rehabilitation

*Migration*

33. The migration of Kanakana and Tuna elvers was identified as a concern of Aukaha. As addressed in Mark Hamer's summary reply, Kanakana are not currently present in the Upper Clutha River. Contact Energy's trap and transfer obligations have not yet yielded results. Mr Parata also discussed ka runuka's plans and indicated that as a starting point eels would be transferred into the Manuherekia and the Hawea River, neither of which are affected by the proposal. It is also noted that the Clutha River Kanakana population is currently affected by the dredge operations in the lower river. It is arguable that moving the dredge upstream of the dams, where Kanakana currently do not exist is likely to be an improvement as dredge will no longer be operating in an area where they are known to be.
34. It is submitted that the potential impact on Elvers has been severely overstated. Elvers will hide in sediments during the day, so could be affected by the dredge. But, the dredge only works a small section of the river at any one time. Because Elvers tend not to migrate during daylight (due to risk of predation) they will still be able to undertake their normal nighttime movement when the dredge is not operating. Larger fish also tend to 'hide' during the day under logs, boulders or riverbanks.

35. The migration pathways of taonga species would not be affected by the dredge. The migration of Kanakana should not be considered by the Panel as there is no Kanakana present, it does not form part of the receiving environment.
36. When juveniles, Kanakana prefer to be in slow flowing edge and backwater habitats.<sup>16</sup> These areas are largely protected by the proposal through the avoidance of shallow water.

### *Spawning*

37. Kanakana eggs have been found on the underside of boulders in small streams, this environment is starkly different to the deep and fast flowing Clutha that the dredge will be working in.
38. However, the reality is that with no Kanakana in the Upper Clutha, the proposal cannot affect them during spawning or otherwise.
39. With respect to Trout and Salmon, the dredging activity needs to be contextualised. The Upper Clutha is a large catchment with a lot of spawning habitat available for salmonids. Whilst Mr Young is right that there may be some spawning activity in the areas proposed to be dredged, the most important areas (shallower water) will be avoided. Further spawning habitat in the numerous tributary rivers and streams is unaffected. Given the high fecundity of salmonids it is extremely difficult to conclude that dredging a localised area of the whole upper catchment would have a material effect on the spawning of salmonid species. Evidence for the applicant and ORC's peer reviewers are *ad idem* on this issue.
40. For Tuna, the Dams will continue to be the key issue due to their need to get back out to sea to spawn. This application cannot influence that.

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<sup>16</sup> Mark Hamer's Ecological Evidence at [9].

*Connectivity*

41. This issue encapsulates the potential entrainment of fish and the possibility that fish will not want to swim past the dredge, either due to noise or the sediment plume.
42. The NPSFM notes that it is necessary to rely on the best available information when making planning decisions with respect to water. That includes resource consents. Mr Hamer has identified a small number of studies that indicate that fish entrained in dredges pass through and appear unharmed. Even if that were not the case, it is apparent that the frequency of entrainment is low. This information is supported by the anecdotal evidence.
43. With respect to the potential of the dredging to prevent fish moving up or downstream the following needs to be borne in mind:
  - (a) Observations are that fish continue to swim around the dredge and sediment plume.
  - (b) The activity does not span the entire river, so fish do have space to pass by the dredge.
  - (c) Even if that were not the case there is ample habitat available for them to 'wait' until the dredging activity stops each day.
  - (d) The level of sedimentation within the water is very localised, less than would be experienced by fish during a flood event and not at a level that is likely to affect their health.
  - (e) Key indigenous species prefer to move at night, so elvers are likely to avoid encountering trout that may be feeding within the sediment plume, and would also avoid entrainment.

### *Rehabilitation*

44. This topic related to the overarching goal of rehabilitating taonga species within the Clutha River / Mata Au. The potential for this application to compromise that long term goal is very slim. As is noted in the e3 assessments and the ORC peer reviews there are numerous other factors at play are significantly more influential.
45. The localised disturbance of the river bed and associated macroinvertebrates highlighted by Mr Edwards is not ecologically significant. As discussed by My Hamer, these areas will quickly recolonise.<sup>17</sup> This will barely be a change above baseline given the transitory nature of the macroinvertebrates involved.<sup>18</sup> The ecological evidence is clear that the health and wellbeing of the River will not be materially affected by this, as such it cannot be said to compromise the ability for the Mata Au to 'recover'. This needs to be contextualised against the good water quality that exists (All attribute band A).
46. The term of the consent also needs to be borne in mind. The rehabilitation aspirations of mana whenua are a long-term project, heavily influenced by other decisions such as re consenting of the hydroschemes. Given the ecological conclusions in relation to the proposed dredging activity it is difficult to see how it will affect the ability to achieve the longer-term cultural aspirations of mana whenua. We do not find ourselves in an 'either or' scenario.

### Cumulative Effects

47. The applicant is proposing a condition that will:
- (a) Result in the surrender of the existing downstream dredging permit prior to the commencing dredging under this consent if granted.

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<sup>17</sup> Supplementary Evidence of Mark Hamer at [17].

<sup>18</sup> Response to questions from panel Trefferly Barnett 16.11.23 at page 5.

- (b) Prevent permitted activity dredging occurring within the permit area while the consented dredging takes place.
48. It is submitted that with these proposed conditions there are no cumulative effects that arise from the application.
49. It is worth noting that the assessment of the permitted baseline provides a point at which adverse effects can be disregarded. It is not about cumulative effects. The only context within which cumulative effects would arise is where on a 'real world' assessment of the receiving environment the Commission concluded that there would be exercise of permitted activity rights. Due to the nature of the mining permit regime, and the conditions proposed above that is not a possibility in this case. However, as I set out earlier, in the event that this consent is declined the applicant will exercise permitted activity rights, so those provide a point of comparison.

Noise Effects

50. Filed with these submissions is an outline prepared by Marshall Day setting out how the noise testing of the dredge will be undertaken. The proposed activity will comply with the noise standards within the respective districts. When combined with the other conditions including exclusion and restriction areas it is submitted that noise effects will be acceptable.
51. For most people on the river or alongside it their interaction with the dredge will be fleeting. Once again, the effects of the dredge will be localised and transitory. For those people who live on the land the noise levels will be within that contemplated by the plan. The most proximate dwellings will also be protected by the condition proposed by Mr Denney ensuring that noise from the dredge is not experienced for extended periods of time.



**SECTION 104(1)(b)**

52. There are a range of statutory documents relevant to the assessment of the application. There is consistency between the planning witnesses about which documents are relevant, albeit some inconsistencies in relation to the assessment of the application against the provisions. This largely arises from the difference of opinion on whether there is adequate information to assess effects on cultural values.
53. In opening submissions Counsel traversed the question of weight to be given to the two Regional Policy Statements. Those submissions stand and are not repeated. Counsel notes that Mr Vial indicated he did not agree with that assessment because the proposed RPS is intended to give effect to the NPSFM. With respect, it is not necessary to 'upweight' the proposed policy statement in order to have regard to the NPSFM or Te Mana o Te Wai. Those matters can be given direct regard by having regard to the NPSFM itself, which is required by section 104(1)(b)(ii).
54. With respect to landscape matters, the evidence of the landscape architects indicates that the policy direction with respect to ONL/ONF's is satisfied. In relation to CODC the Applicant has no quibble with the ONL provisions being considered, despite the fact that the Clutha River / Mata Au is not identified as an ONL in CODC plan. It is apparent that the River within CODC possesses the same characteristics as the upper section and qualifies as outstanding.
55. These submissions focus on the provisions relating to commercial activities and functional need as they are particularly relevant and important given the nature of the proposed activity.
56. Within the Regional Policy Statement 2019 mining for gold is recognised as a major source of revenue for Otago<sup>19</sup>. The PORPS

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<sup>19</sup> Partially Operative Regional Policy Statement 2019 At Part A, pg 1.

contains provisions that seek to manage activities in rural areas to support communities and the economy. Mineral extraction is recognised as one of the activities that needs to be provided for.<sup>20</sup> Policy 5.3.4 requires the functional need of mineral extraction to locate where the resource exists. Gold mining can only occur in environments where Gold exists – In this case there is a functional need to locate within the proposed application area.

57. The PORPS provides a clear effects cascade to manage the effects of mineral extraction. As you would expect there is a preference to avoiding location in special areas, but where avoidance is not practicable because of the functional needs of the activity it provides for an effects management hierarchy to be followed. That has been done in the current case by:
- (a) In the case of effects on the outstanding landscape – the dredge and associated structures has been coloured to minimise visibility, operational hours have been reduced, lighting is managed and particularly valued areas are either avoided entirely (e.g. Delta section) or the activity is managed to reduce its impact (Mata Au Scientific Reserve).
  - (b) With respect to indigenous biodiversity the activity has responded by applying the exclusion areas for areas of key importance to indigenous species being the Delta, the Nook, close to tributary confluences, shallow water and potential native bird nesting habitat beyond that already excluded. These measures, along with the localised and temporary nature of the activity itself means the effects are assessed as very low to low by the ecologists.
  - (c) With respect to health and safety Mr Hall's supplementary sets out the further measures that will be taken to address potential navigational safety risks. This along with the updates to the

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<sup>20</sup> PORPS Policy 5.3.1

Standard Operating Procedures in the MTOP will address these matters.

58. It is submitted that through the suite of mitigation measures, secured by proposed conditions granting consent will be consistent with the policy direction in the PORPS.
59. It is submitted that the Proposed RPS takes a similar approach. It recognises the importance of mineral mining to the Otago Economy.<sup>21</sup> There is also similar recognition that a management approach will be necessary where an activity has a functional need to locate in a particular environment. E.g. LF-FW-P13 and ECO-P6.
60. The recognition of functional needs flows through into Policy District Plans as well. For example, Policy 3.3.24 of the QLDC PDP. 6.3.5.4 provides for appropriate commercial activities on the surface of water. This is implemented by the suite of policies that support Objective 21.2.12.
61. For CODC, the plan recognises the presence of alluvial gold mining within the district and that by its nature it tends to occur over a wide area, but for a short time.<sup>22</sup> It also recognises the likelihood of further mining due to the advances in technology.<sup>23</sup> The Cold Gold dredge which is a bespoke build for the Clutha River is an example of this. The CODP takes a maintenance approach to values of the surface of water bodies and seeks to manage activities.<sup>24</sup> It must be noted that the CODP plan has not been reviewed in light of the Regional Policy Statement or any of the National Policy Statements so reference needs to be had back to these higher order documents.

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<sup>21</sup> Proposed RPS 2021 at Description of the Region pg 6 and SRMR pg 64 and 75

<sup>22</sup> CODP at Page 2:11-12

<sup>23</sup> CODP at Page 2:19

<sup>24</sup> Ref Policy 5.4.1

62. It is submitted that the proposal implements the provisions within the respective plans through:
- (a) Exclusion areas to respond to areas of important nesting and spawning habitat (Delta, Nook, tributary confluences and shallow water).
  - (b) Exclusions areas to address areas of higher usage (Delta, Nook, Mata Au Scientific reserve and extended stays in areas visible to residents. Otherwise, the localised and transient nature of the activity mitigates potential effects.
  - (c) Proposed changes to the vessel to reduce noise emanating from the barge and responding to navigational safety matters.

#### **Permitted baseline**

63. Section 104(2) identifies that a consent authority may disregard an adverse effect of an activity if a rule permits an activity with that effect. The decision about whether to disregard adverse effects within the permitted baseline is a discretionary matter for the decision maker and a distinct assessment from the receiving environment analysis.
64. It is submitted that the permitted baseline does provide something of a benchmark, particularly with respect to the length of the plume and potential ecological effects. As noted above permitted dredging activities whilst smaller, are subject to fewer controls in terms of location so would result in dredging of more sensitive ecological areas along the waters edge etc.

#### **Section 104(1)(c) - Other matters**

65. Ms Royce was asked whether the potential extension of the Upper Clutha River trail could be considered as an 'other matter' under section 104(1)(c), in the event it is not part of the receiving environment for the purpose of section 104(1)(a).

66. It is submitted that this would not be lawful. To do this would be to consider potential future effects that are tangential and uncertain. Future effects may be relevant to the assessment of an application, but only where they arise as a consequence of permitted activities or pursuant to lawful consents that have been granted. Under section 104(1)(c) other matters must be 'relevant' and caution should be taken not to use it as a catch all when the same considerations must be disregarded under other provisions of section 104.

#### **Section 104(5)**

67. Further to the submissions made in opening with respect to activity status, it is worth noting that an application can be granted for an activity, irrespective of what activity status was applied for. Therefore, the change of activity status from non-complying to discretionary does not affect the ability for consent to be granted.

#### **Section 104(6) and (7)**

68. Counsel addressed section 104(6) in opening submissions. During the course of the hearing there were questions raised about whether there was enough evidence available regarding the extent of water use in the application area. Ms Royce confirmed that no request for further information was made with respect to this issue. As set out earlier in these submissions there is a fair degree of information available from a variety of sources about river use. It is submitted that when aggregated together this information is sufficient to enable potential effects to be assessed. Particularly, when the transient and localised nature of the activity itself.
69. It is also considered adequate given the proposed amendments to the barge to address potential navigational safety matters. The supplementary evidence of Mr Hall and correspondence with the two Harbourmasters who hold jurisdiction demonstrate that this matter can be appropriately managed.

70. Opening submissions regarding adequacy of information to assess potential effects on cultural values stand.

### **Section 105**

71. The consent authority must also have regard to the nature of the discharge and the sensitivity of the receiving environment to adverse effects.<sup>25</sup>
72. The discharge is for sediment laden water where the sediment is derived from the bed of the water body itself and discharged immediately. The assessment from the ecological witnesses indicates that the Clutha River / Mata Au is likely to be resilient to this activity, with the ecological systems disturbed recolonising quickly, and the area affected by the activity being small and localised when the wider catchment context is considered. As Ms Barnett noted, while the Clutha River / Mata Au is renowned for its water clarity, the stretch below the Luggate Bridge is highly variable (over time) due to inputs from tributary rivers and streams. This is reflected in the water quality standards set in the Otago Regional Plan: Water
73. The method of dredging has been developed by the applicant to enable access to the alluvial gold deposits within the Clutha River / Mata Au. Other options, such as diverting the watercourse are simply not practical (or desirable) in this environment.

### **Section 107**

74. Section 107 creates certain baseline limitations on the type of discharges that can be approved by Council. In effect consent cannot be granted where after reasonable mixing there is a conspicuous change in colour or visual clarity.

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<sup>25</sup> Section 105(1)(a) of the Resource Management Act 1991.

75. Opening submissions traversed what is 'reasonable' and 'conspicuous'. Those submissions stand and are not repeated. It is submitted that the proposed conditions will ensure that the criteria in section 107 are not offended.

## **MISCELLANEOUS MATTERS**

### ***Jurisdiction of the harbourmasters***

76. It is useful to understand the jurisdictional limits of the harbour masters. By default jurisdictional responsibility sits with the Regional Council. However, for the Queenstown Lakes District this function has been delegated to the District Council. The District Council has in turn engaged Cougar Security Group to perform its harbourmaster function. Therefore, the QLDC Harbourmaster exercises jurisdiction to the CODC boundary (approximately 1/3 of the river proposed to be dredged), whilst the ORC Harbourmaster holds jurisdiction within CODC (covering approximately 2/3 of the river).

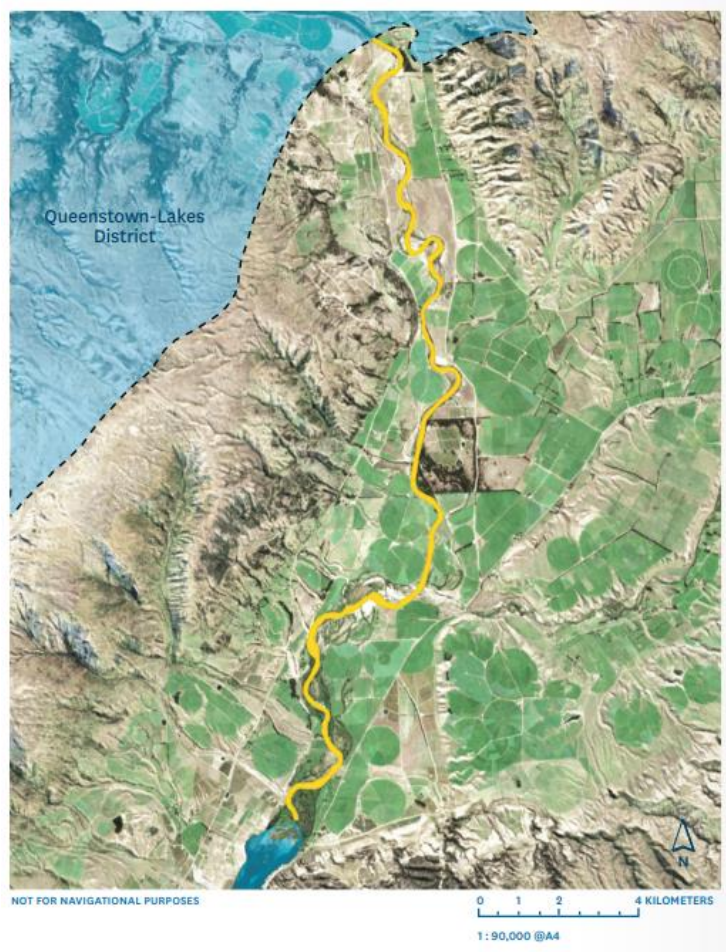


Figure 1 – Image from Otago Regional Council Navigational Safety Bylaw 2020 indicating boundary between QLDC and CODC.

*Comments from the QLDC Harbourmaster*

77. The Commission sought comment from QLDC Harbourmaster in light of information provided during the hearing. Counsel has reflected and apologises for not raising the need for the ORC harbourmaster to be involved in this process.
78. The QLDC harbourmaster's response indicated some confusion about the operation of the dredge and the location of the warps and anchors relative to the barge. This is understandable and likely a consequence of not being familiar with the activity and not having been able to attend a site visit. Because the dredge has not been operational in QLDC



before the QLDC Harbourmaster does not have the benefit of the prior experience that the ORC harbourmaster has.

79. Regardless, the issue of concern to everyone is clear – that of the anchor warps being surface bearing.
80. In order to improve understanding and help resolve these concerns the Applicant invited the Harbourmasters to undertake a site visit and discuss potential alternations to the dredge to address the navigational safety issues that had been raised during the hearing. Following that invitation, the ORC Harbourmaster attended the dredge on 24 November. The QLDC Harbour master declined.
81. Mr Hall attaches the correspondence from the ORC Harbourmaster with his supplementary evidence. It is submitted that this confirms that the issue of the anchor warps can be addressed with some alterations to the anchor system on the dredge. The Applicant volunteers conditions to secure the dredge alterations. Effectively the purpose of these changes is to have the anchor lines below the water surface immediately so that they can only get lower as they extend from the dredge. This removes the potential for them to create a hazard for boaties and floaties.
82. The applicant is also grateful for the further written feedback from the QLDC Harbourmaster. This indicates that the proposed changes address the concerns previously raised, and flags the need to update the MTOP to reflect the new anchor arrangement. That would occur in any event pursuant to Maritime Transport legislation, but the Applicant has proposed a condition that secures that and provides an opportunity for the harbourmasters to provide input prior to commencing operations.
83. Further, the QLDC harbourmaster's concerns about navigational safety and visibility are in part addressed with the exclusion areas that apply within the QLDC section. The exclusion areas (particularly Devil's

Nook) remove the worst of the sharp corners with low visibility from the mining area. The river from Devils Nook to the boundary with CODC is relatively straight and unobstructed.

84. It is submitted that the proposed changes address the concerns raised about navigational safety, such that the potential effects are low.

***Does the dredge become a structure at any point?***

85. It is submitted that the dredge does not become a structure at any point. The dredge is anchored as opposed to moored. A mooring is a permanent structure to which a waterborne vessel may be secured. That is not the nature of the anchors that are used to hold the dredge in place while it is working. The anchors are not permanent and therefore do not fall within the term 'mooring' that is included in the definition of structure.

***Large-scale Mineral Extraction***

86. Counsel concurs with Ms Royce's assessment of whether the proposal constitutes large-scale mineral extraction. It is apparent from reading around the provisions that there is more of a focus on land-based activities. However, it is still relevant to evaluate the proposal. The following are noted:
- (a) The vessel is larger than those permitted, but consideration of the level of permitted dredging that could occur within the application area is also required.
  - (b) The assessment of effects on bio-physical matters such as landscape, ecology etc confirm the effects of the proposal are very low-moderately low.
  - (c) The activity is transient and localised. The consent is proposed to expire in 2031 and once the dredge has been removed from the river there will no evidence of the activity occurring at all.

Contrast this with other land-based mining which often leaves an obvious legacy (tailings for example) or irreversibly changes (and sometimes destroys) entire landscape features.

87. It is submitted that this is not a large-scale mineral extraction activity.

***Te Mana o Te Wai***

88. It is important to remember that Te Mana o Te Wai and the NPSFM is a creature of the RMA. It is a method by which sustainable management is achieved, that includes both environmental imperatives and human use values.
89. As set out by Mr Hall, mining activities are necessary in order to produce the many products, facilities and infrastructure that are required by the community and support its well-being, now and into the future.
90. Section 104 of the RMA requires a consent authority to have regard to any relevant provision of a national policy statement (and any other statutory document set out in section 104(1)(b)).
91. In *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 the High Court found that the phrase 'must have regard to' means that the matters must be given genuine attention and thought.<sup>26</sup> This is different from the obligation to 'give effect to' the NPS as required by the plan making process.
92. As highlighted by Mr Parata, Te Mana o Te Wai is not a Ngai Tahu concept, it is not an assessment of cultural values. Te Mana o te Wai is about protecting the health of the water so that it may contribute to the health and wellbeing of the wider environment (which includes people). It is submitted that it is clear based on the ecological evidence of Mr Hamer and the ORC Peer reviewers that this

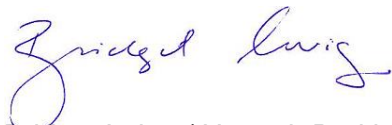
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<sup>26</sup> *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 at [69].

application does not imperil the health of the Clutha River / Mata Au. As Ms Barnett put it the Applicant has made considered effort to respond to the potential areas of concern through the suite of conditions proposed, including exclusion areas and a limited mixing zone consistent with that required by much smaller operations.

93. On this basis it is submitted that the Mauri of the wai cannot be genuinely imperilled either and that consent can be granted enabling the applicant, their employees and contractors to provide for their social, economic and cultural wellbeing.

Dated 19 December 2023

A handwritten signature in blue ink, appearing to read "Bridget Irving". The signature is fluid and cursive, with the first letter of each name being significantly larger and more stylized.

Bridget Irving / Hannah Perkin

Counsel for the Applicant