

**Office of the Minister of Energy and  
Resources**

**Office of the Minister of Conservation**

**Chair**

**Cabinet Economic Growth and Infrastructure Committee**

**Public notification of applications for access to public conservation land  
to undertake “significant” mining activities**

**Proposal**

1. This paper recommends criteria and a process for publicly notifying applications for access arrangements over public conservation land for “significant” mining activities. These give effect to the in-principle Cabinet decision of 20 July 2010 (ECC Min (10) 10/4 para 11 refers).

**Executive summary**

2. A minerals permit (approved by the Minister of Energy and Resources) provides the holder with an exclusive right to the Crown-owned mineral. Where a minerals permit involves public conservation land, the holder of that permit also needs an access arrangement under the Crown Minerals Act 1991 (CMA) from the Minister of Conservation before undertaking prospecting, exploration or mining activities. Activities outside the minerals permit area but still on conservation land (e.g. roads to allow access to the site), are authorised through a concession under the Conservation Act 1987.
3. The CMA does not currently require any consultation with the public over access arrangements. The lack of an opportunity for public input to access arrangement applications has been a longstanding complaint of community and environmental groups.
4. Cabinet has previously agreed in principle that a public notification process should be provided for significant applications to mine on public conservation land and that decisions on access arrangements be made jointly by the Minister of Conservation and the Minister of Energy and Resources (ECC Min (10) 10/4 refers).
5. A public notification process for significant access arrangements will increase costs to applicants. A public notification process will, however, improve consistency in the way different sectors wishing to use public conservation lands are treated. It would also allow closer alignment of access arrangement and concession processes for a mining activity that requires both.
6. We propose that the CMA be amended to utilise the existing public notification process for concessions, which is already familiar to applicants and the community. This also helps align the concessions and access arrangement processes. To minimise

additional costs, applicants would be permitted to opt into a process that combines the public processes for related access arrangement and concession applications.

7. The decision to publicly notify an access arrangement will be jointly made by the Minister of Conservation and the Minister of Energy and Resources. We propose that the CMA be amended to provide a set of criteria that the Ministers be required to have regard to when making these decisions. This provides flexibility to take account of the wide range of variation in applications while also promoting consistency of decision-making.
8. Greater alignment of these processes with the Resource Management Act is being considered and will be reported back to Cabinet in 2013.

### **Background**

9. A minerals permit (approved by the Minister of Energy and Resources) provides the holder with exclusive rights to the Crown owned mineral. The holder of that permit also needs permission to access any land that they do not own. In the case of conservation lands, permission for activities within the permit area is granted through an access arrangement. Activities outside the minerals permit area (e.g. roads to allow access to the site), are authorised through a concession under the Conservation Act.
10. At present the Crown Minerals Act 1991 (CMA) does not require land holding Ministers or Crown Agencies, including the Minister of Conservation and the Department to Conservation, to consult with the public over access arrangement applications. The statutory framework allows conservation boards to comment on applications if they so choose, and Treaty requirements must be met, but wider public input is not explicitly provided for. In contrast, major activities of other types on public conservation lands are subject to public notification under the Conservation Act 1987.)
11. An in-principle decision to publicly notify applications for access arrangements over public conservation land for “significant” mining activities was made in the context of the consultation on the *Maximising our Minerals Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond* discussion paper (ECC Min (10) 10/4 refers).
12. Cabinet also agreed that (ECC Min (10) 10/4 refers):
  - (a) No conservation areas be removed from Schedule 4;
  - (b) 14 conservation areas be added to Schedule 4;
  - (c) Areas with classifications equivalent to land classes already listed in clauses 1 to 7 in Schedule 4 (for example national parks and Marine Reserves) will in future be automatically added to schedule 4. Such classifications will be agreed by Cabinet;
  - (d) The process approval of mineral related access arrangements over Crown land will in future be made jointly by the land holding Minister and the Minister of Energy and Resources

13. The decision detailed in 12(b) above, was implemented in October 2011 (SR 2011/310). Decisions detailed in 12(c) and (d) are being advanced along with those arising from the Crown Minerals Act review (see companion Cabinet paper by the Minister of Energy and Resources titled Amendments to the Crown Minerals Act 1991 [EGI Min (12) 15/4 refers]).
14. Work is also under way, in the context of the Resource Management reforms, to align concession and resource consent processes.

### **Effects of adding a public process**

15. The lack of an opportunity for public input for access arrangement applications has been a longstanding complaint of community and environmental groups. Providing for input for significant applications may benefit the mining industry, by increasing public acceptance of the outcomes of decisions. Providing a well managed focus for public debate may reduce the risk of protest activities, and reduce the risk of judicial review (which would have a higher cost and delay effect).
16. Notifying access arrangements will improve consistency in treatment of different industries wishing to use public conservation lands, and ensure that the decision-maker has access to all relevant information about the effects of the proposal. It will also allow closer alignment of access arrangement and concession processes for a mining activity that requires both.
17. Adding a public process for land access arrangements for significant mining proposals will increase the costs and time required for applicants to obtain an access arrangement. Improving the alignment of access arrangements with concessions and other regulatory approvals is discussed further in paragraphs 29 to 34 below.
18. The proposals in this paper seek to minimise additional costs and delays, for example by using an existing (and familiar) public notification process and by the way in which “significant” is defined. Additional time requirements might be reduced by undertaking notification for access arrangements at the same time as for related concessions.
19. Consistent with the earlier Cabinet decision, only access arrangements for significant mining (under a mining permit) will be publicly notified. Access arrangements for significant mineral exploration (under an exploration permit) will not be publicly notified. While exploration activities might reach the threshold for significance only occasionally, there may be dissatisfaction among some of the wider public who may expect that all significant minerals-related access arrangements will be notified.

### **Public notification procedure**

20. Section 49 of the Conservation Act 1987 provides a process for the public notification of concession applications, including details on where and for how long an application should be notified, who the submission should be directed to, in what form the submission should be submitted, the process for seeking and hearing of written submissions, and the rights of objection. This process (which is integrated within the Department’s standard operating procedure for processing concessions) has

been found to work well, and developers, the public and the Department are already familiar with using it.

21. We recommended that public notification of mining access applications use the same Section 49 process that is used for concessions. The Department's standard operating procedure for processing access arrangement applications would need to be revised at the appropriate time to incorporate this public process.
22. Cabinet is likely to consider proposals to streamline the Conservation Act public process or more closely align it with the RMA or other statutory approvals in the near future. Any amendments to the Conservation Act to facilitate this would then also apply to the CMA process.

### **Significance test for public notification**

23. Mining activities that require access arrangements under the CMA cover a continuum from very low impact and short duration (days) prospecting or exploration activities to high impact and long duration activities (e.g. open-cast mining operations). Approval for large scale mining activity on conservation land is sought only infrequently (for example, only 4 applications in the last 12 years involved surface disturbance of 25 hectares or more<sup>1</sup>).
24. We recommend that the CMA set out a range of matters that the Minister of Conservation and Minister of Energy and Resources must have regard to when making any decision to publicly notify. These matters are set out below. The list of matters is designed to capture the magnitude of the proposed operation and its impacts.
25. Department of Conservation officials propose that matters Ministers would consider when making a decision whether to notify or not would be:
  - (a) the effects of the proposed activity on conservation values on the land or on adjacent land;
  - (b) the effects of the proposed activity on other activities being undertaken on the land or adjacent land;
  - (c) any purpose for which the land is held by the Crown and any policy statement, strategy or management plan relating to the land;
  - (d) whether or not the mining access application is likely to have significant public interest (e.g. due to its size, location or type of mining amongst other things); and
  - (e) a "catch-all" provision which would allow the Ministers to consider other issues and/or risks which might be solely location specific and outside the standard assessment criteria.

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<sup>1</sup> These were for expansions of Echo and Globe Progress mines at Reefton, and the proposed new Escarpment mine at Denniston

26. The Minister of Energy and Resources has concerns that the criteria outlined above are too broad proposes that matters Ministers would consider when making a decision whether to notify or not would be:
- (a) the effects of the proposed activity on conservation values on the land;
  - (b) the effects of the proposed activity on other activities being undertaken on the land;
  - (c) Whether the net impact [over time] on conservation land of the mining proposal is significant
  - (d) a “catch-all” provision which would allow the Ministers to consider other issues and/or risks which might be solely location specific and outside the standard assessment criteria.
27. Officials consider that having a set of criteria specified in the CMA that the Ministers needed to have regard to when deciding whether or not an application is “significant” would achieve the best balance of certainty and flexibility in notification decisions. This could then be strengthened if required by officials undertaking further work to develop decision support guidelines as a means of ensuring consistency across the country (both in process and the balancing of criteria). This approach is likely to build public confidence while minimising the risk of “unanticipated” notification decisions.
28. The use of tightly defined criteria would be unlikely to take into account the wide range of variation in applications. Whilst this would drive high certainty in decisions, it could lead to unexpected outcomes – for example, a proposal widely considered to be significant by the general public could end up not being notified because it failed to pass the statutory threshold for notified applications.
29. Another approach would be to enable the Ministers to publicly notify mining access applications at their discretion and to remain silent as to how this discretion was applied. This option would provide the greatest flexibility but would also lead to a greater potential for inconsistent application and would expose the Ministers to the greatest risk of legal challenge.

### **Alignment issues**

30. We have considered the potential to align access arrangement processes with other processes.
31. Combining parts of the concession and access arrangement processes does not require legislative change, and already occurs where it is appropriate. To help minimise notification overlaps, this paper proposes that an applicant can opt into an approach whereby the public process for an access arrangement and a related concessions application are run concurrently.<sup>2</sup>
32. The Department of Conservation and Ministry for the Environment are working on ways to align concession and resource consent processes. It is not currently envisaged

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<sup>2</sup> It is noted that, in the recent Denniston situation, the applicant may have preferred to keep the two processes separate even if a combined access arrangement/concession public process had been an option.

that the CMA process would be incorporated into any aligned processes for “nationally significant” Resource Management Act 1991 (RMA) and concession applications because it is unlikely to be frequently used and its inclusion at this stage of the process may create unnecessary complexity. However, any changes to the public notification aspects of the concessions process will also benefit access arrangements.

33. The Minister for the Environment and Minister of Conservation are doing further work to develop options and will report back to Cabinet in 2013.
34. Flexibility needs to be retained in any changes to the law to ensure that the processes can be adjusted to suit each circumstance. A key feature in most mining approvals is that work is staged over many years, and what will be required in out-years is not known before the earlier work is done. Detailed design is therefore generally approved through annual work plans, rather than the access arrangement itself (which sets the broad conditions which design must meet). Annual work plan processes will not involve public notification.
35. Another key difference between mining access and resource management processes is that long delays before work is commenced is easily granted for access arrangements, while un-exercised resource consents must lapse. This allows industry the ability to adjust their investments to fit with market conditions. Major changes in proposals are also readily accommodated. That is a feature of the system that officials consider needs to be retained in any alignment work.

### **Cost Implications**

36. Implementation of the notification requirement would not impose significant processing costs on the Department of Conservation. The Department has a policy of full cost recovery for processing permits and any additional costs associated with this proposal applies (public notification, summarising submissions, holding hearings) and costs would be passed on to the applicant.
37. Since the CMA does not currently require public notification, the inclusion of a public process will increase the time taken and costs of processing access arrangements under the CMA for significant applications.
38. The Department of Conservation has no direct data on the cost or effort involved in publicly notifying and processing submissions for mining access applications. However, based on the time required publicly notify concession applications, it is estimated that at least 95 working days (4 months) additional time would be required to process publicly notified mining access applications. This would include collating submissions, holding a hearing (if required), and drafting a final recommendation report. In the case of larger and potentially contentious mining access applications, this could be a minimum timeframe. Public notification is likely to result in an increase in processing costs of between 50-100%, with more contentious applications costing the applicant upwards of \$50,000 for the notification process. Applicants will also incur additional costs as part of preparing for and attending the hearing.

39. For applications for access arrangements considered not significant, no changes are proposed and the current non-notified process and existing timeframes will continue.
40. Allowing applicants to opt into a process that combines public notification of related access arrangement and concessions applications could mitigate to a large extent these additional costs. Nevertheless, the additional work for such a combined process is likely to result in some increase in costs compared to the current situation.

### **Regulatory Impact Statement**

41. The regulatory impact statement for this proposal is attached. The proposed approach involves a minor amendment of the legislation, the policy outcome of which has already been agreed to in principle by Cabinet.
42. The Policy Manager of the Department of Conservation has reviewed the regulatory impact statement prepared by the Department of Conservation and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.
43. All options involve effects that require a strong case before regulation is considered since all options would impose additional costs on some mining businesses. However, the Government has indicated that the issue of mining on public conservation land is of such public interest and importance that public notification is warranted for significant applications.

### **Consistency with Government Statement on Regulation**

44. We have considered the analysis and advice of officials, as summarised in the attached Regulatory Impact Statement. We are satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
  - (a) are required in the public interest;
  - (b) will deliver the highest net benefits of the practical options available; and
  - (c) are consistent with our commitments in the Government statement “Better Regulation, Less Regulation.

### **Human rights**

45. The proposal contained in this paper is consistent with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993.

### **Consultation**

46. This paper has been prepared by the Department of Conservation (DOC) and the Ministry of Business, Innovation and Employment (MBIE). The Ministry for the Environment, Treasury, Te Puni Kōkiri, the Office of Treaty Settlements, Department of Internal Affairs, and the Ministry of Foreign Affairs and Trade have been consulted and their comments incorporated. The Department of Prime Minister and Cabinet has been informed.

47. Other “land holding” agencies were not consulted as this process is only proposed for public conservation land.

#### **Section 4 Conservation Act 1987**

48. The proposed changes would not adversely affect the interests of iwi, as they would continue to have the same level of input into decisions as already occurs through the existing processes used by the Department of Conservation when considering applications for significant activities on public conservation land.

#### **Risk Assessment**

49. The addition of a public process to the consultation provisions of the CMA (anticipated by the public as it was announced by the Government two years ago) will be welcomed by environmental groups and by some business interests, although they may be disappointed that exploration activities are not included. Not proceeding with a public notification process for mining access applications would lead to a negative reaction from these groups. The proposed changes will not be supported by the minerals sector and some pro-mining interests.

#### **Legislative Implications**

50. To implement the proposed public notification of significant access arrangement applications, the Crown Minerals Act 1991 will need to be amended to provide :
- (a) that access arrangement applications for significant mining activities on public conservation land be publicly notified;
  - (b) that the Minister of Conservation and Minister of Energy and Resources decide on whether or not in their opinion a mining access arrangement application is significant;
  - (c) that the Minister of Conservation and Minister of Energy and Resources must have regard to following matters when making a decision on whether a mining access arrangement application is significant:
    - (i) the effects on conservation values on the land or adjacent land;
    - (ii) the effects on other activities on the land or adjacent land;
    - (iii) any purpose for which the land is held by the Crown and any policy statement, strategy or management plan relating to the land;
    - (iv) the level of public interest (e.g. due to the size, location or type of mining);
    - (v) such other matters as the Ministers consider relevant.
  - (d) that the public notification procedure in Section 49 of the Conservation Act 1987 be used for notified access arrangement applications.

## Publicity

The in-principle decision to provide for a public process for significant mining access arrangement applications was publicly announced in July 2010. Should Cabinet agree to the specific proposals in this paper, we will announce this at the appropriate time.

## Recommendations

51. We recommend that the Committee:

1. Note that as a result of the discussion document “*Maximising our Minerals Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond*” the Government agreed in principle that “significant” applications to mine on public conservation land would be publicly notified and invited Ministers to report back to Cabinet on how this should be implemented (ECC Min (10) 10/4 refers).
2. Note that the existing Crown Minerals Act 1991 does not currently provide for public notification of mining access applications and that the Act will need to be amended to provide for this.
3. Agree that the Crown Minerals Act 1991 should be amended to provide:
  - (a) that access arrangement applications for significant mining activities on public conservation land be publicly notified;
  - (b) that the Minister of Conservation and Minister of Energy and Resources decide on whether or not in their opinion a mining access arrangement application is significant;

### **Either: Option One**

- (c) that the Minister of Conservation and Minister of Energy and Resources must have regard to following matters when making a decision on whether a mining access arrangement application is significant:
  - (i) the effects on conservation values on the land or adjacent land;
  - (ii) the effects on other activities on the land or adjacent land;
  - (iii) any purpose for which the land is held by the Crown and any policy statement, strategy or management plan relating to the land;
  - (iv) the level of public interest (e.g. due to the size, location or type of mining);
  - (v) such other matters as the Ministers consider relevant.

### **(Or) Option Two**

that the Minister of Conservation and Minister of Energy and Resources must have regard to following matters when making a decision on whether a mining access arrangement application is significant:

- (i) the effects on conservation values on the land;
- (ii) the effects on other activities on the land;

- (iii) whether the net impact [over time] on conservation land of the mining proposal is significant;
- (iv) such other matters as the Ministers consider relevant.

(d) that the public notification procedure in Section 49 of the Conservation Act be used for notified access arrangement applications.

4. Agree that applicants for access arrangements on public conservation land may also opt into a process providing for combined public notification for related access arrangement and concession applications.
5. Note that the Department of Conservation will amend its standard operating procedures at the appropriate time to provide for the combined public notification process described in recommendation 4.
6. Invite the Minister of Conservation and the Minister of Energy and Resources to issue drafting instructions to the Parliamentary Council Office to give effect to the proposals in recommendations 3 and 4.

**Kate Wilkinson**  
Minister of Conservation

**Phil Heatley**  
Minister of Energy and Resources

30 August 2012