Regulatory Impact Statement

Public notification of applications for access to public conservation land to undertake "significant" mining activities

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Department of Conservation.

It provides an analysis of options to provide a public notification process for applications for significant minerals access arrangements on public conservation land.

Cabinet has previously decided in principle that a public notification process should be provided for "significant" applications. Options involving minor or "non-significant" applications for access arrangements on public conservation land, or applications involving Crown land other than public conservation land, were therefore not considered.

All options involve effects that the Government has said will require a strong case before regulation is considered – all options would have the effect of imposing additional costs on business. 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. It is noted that the scale of investment required to undertake significant mining operations is such that the costs of an additional public process alongside existing public processes is not great in relation to other set-up costs.

Jim Nicolson, Policy Manager, Policy and Regulatory Services Group
Department of Conservation

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Status Quo and problem definition

1. Commercial activities undertaken on public conservation land normally need to be authorised by the Minister of Conservation before they can occur. Applications for such activities are considered by the Minister under either the Conservation Act 1987 or the Crown Minerals Act 1991. Approvals granted under the Conservation Act are called concessions and approvals granted under the Crown Minerals Act are called access arrangements.

2. Applications to undertake large-scale commercial activities on public conservation land are usually considered under the Conservation Act 1987 and are generally required to be publicly notified (sections 17O(2), 17T(4) and (5) of the Conservation Act refer). This includes applications for mining-related activities except where the activities are located within the area of a minerals permit. (Minerals permits are issued by the Minister of Energy under the Crown Minerals Act 1991.) The public are therefore able to make submissions on such concession applications.

3. Applications to undertake mining-related activities on public conservation land within the area of a minerals permit are considered under the Crown Minerals Act 1991 (section 17O(3)(a) of the Conservation Act and sections 49, 50 and 61 of the Crown Minerals Act refer.) These applications are not publicly notified as the Crown Minerals Act does not provide for public notification. The public are therefore unable to make submissions on such access arrangement applications.

4. The reason for different processes for mining and other activities on public conservation land is that a different test is applied as to whether or not a proposed activity is acceptable. For concessions, which cover nearly all activities except minerals exploration and mining, the Minister of Conservation is not allowed to grant an application if the proposed activity is contrary to the purposes for which the land is held (section 17U(3) of the Conservation Act refers). Public conservation land is normally held for the purpose of preserving the plants, animals, landforms and "systems of interacting living organisms" of the area concerned (cf sections 6(a), 6(e) and 2(1) of the Conservation Act). Since mining surface activity almost invariably involves the complete removal of all biota from a site and changing the landform, mining activity would consistently fail the acceptability test if it was subject to the same test as concessions. Instead, applications for mineral-related activities involving major disturbance of the land surface (which will lie within the area defined by the relevant minerals permit) are considered under the Crown Minerals Act. The Crown Minerals Act requires that the Minister of Conservation must have regard to various factors (section 61(2) of the Crown Minerals Act refers) but the complete removal of biota over a mining site can be allowed.

5. In feedback on the March 2010 discussion paper *Maximising our Minerals Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond*, a large number of submitters noted that concession applications for public conservation land are publicly notified while access arrangement applications are not. Some submitters viewed this as an unfair advantage to the mining sector and the lack of a public process is considered to have an adverse effect on the transparency of the decision-making process.

6. Cabinet has agreed in principle that a public notification process should be provided for significant access arrangement applications on public conservation land [ECC Min (10) 10/4, para 11]. Cabinet has also agreed that that decisions on access arrangements should be made jointly by the Minister of Conservation and the Minister of Energy and Resources [ECC Min (10) 10/4 para 19].

Objectives

7. The Minister of Energy and Resources and the Minister of Conservation have been invited to report to Cabinet on how a public notification process can be provided for significant access arrangement applications on public conservation land [ECC Min (10) 10/4, para 12]. Officials have been asked to provide advice to Ministers.

8. The objectives are to:

   (a) recognise the high level of public interest in the management of public conservation land generally;

   (b) recognise the particular public interest in applications to undertake significant mining operations on public conservation land;

   (c) give the public certainty that they are able to have meaningful input into decisions made on mining access applications;

   (d) strengthen participation in the decision-making process and improve transparency;

   (e) allow the public to have greater confidence in decisions made in regard to mining on public conservation land; and

   (f) minimise unnecessary processes and costs without compromising the other objectives.

Regulatory impact analysis

9. There are two aspects to this matter:

   - determining whether a mining access arrangement application is significant; and
   - determining what public process should be used to notify significant applications.

<u>Determining significance</u>

10. Three options can be identified for determining whether or not an access arrangement application is significant:

    - having a definition of "significant" set down in the Crown Minerals Act;
    - having "significance" determined by the Minister of Conservation and Minister of Energy and Resources according to criteria specified in the Crown Minerals Act that they must have regard to;
    - having "significance" determined by the Ministers according to policies developed by officials and/or by the Ministers from time to time.

11. Identifying a specific significance threshold to be set in legislation would be difficult and the use of tightly defined criteria would be unlikely to take into account the wide range of variation in applications. This option would be likely to result in some applications being publicly notified when they are not significant from a broad public perspective (which could place unnecessary costs on applicants), and some other applications not being notified when there is major public interest (which could lead to negative public reactions). Whilst this would give a good level of 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. Under this

option, the Ministers would not have the statutory discretion to prevent unanticipated decisions. This option is not preferred.

12. A second option would be to specify in the Crown Minerals Act a set of criteria that the Minister of Conservation and Minister of Energy and Resources had to have regard to when deciding whether or not an application is "significant". Officials consider that this would achieve the best balance of certainty and flexibility in notification decisions. This option could then be strengthened if required by having officials develop support guidelines as a means of ensuring consistency across the country, and the balancing of criteria. This approach is likely to produce good public confidence while minimising the risk of "unanticipated" notification decisions. This is the preferred option.

13. A third approach would be to enable the Minister of Conservation and Minister of Energy and Resources to decide which applications were significant at their complete 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, could create uncertainty for potential applicants, and would expose the Ministers to the greatest risk of legal challenge. Risks could be reduced by the preparation of non-statutory guidelines to assist the Ministers in making a decision on whether an application was significant but the public may question the transparency and consistency of decisions if the significance criteria are able to be easily changed. This option is considered not as good as the preferred option.

<u>Criteria for preferred option for determining significance</u>

14. The preferred option for determining significance would require the Minister of Conservation and the Minister of Energy and Resources to have regard to specified criteria when deciding whether or not an application for an access arrangement was significant.

15. Matters that the Ministers would need to consider are:

    (a) The effects of the proposed activity on conservation values on the land or on adjacent land.

        This is a key criterion. If an area has particularly important conservation values (e.g. providing habitat for iconic highly threatened species) that could be affected by the proposed mining activity then the application is likely to be significant enough to warrant public consultation. Adjacent land is also covered as the wildlife or biodiversity potentially affected by a proposed mine may well be on adjacent land rather than beneath the footprint of the proposed mine.

    (b) The effects of the proposed activity on other activities being undertaken on the land or adjacent land.

        This criterion makes it clear that recreational values of an area also need to be examined when considering whether an application is sufficiently significant to warrant public consultation. While the term "conservation values" as used in the first criterion includes recreational activities, it would also be appropriate to consider whether commercial enterprises operating tourism or other activities on nearby public conservation land would be affected by a proposed activity.

    (c) Any purpose for which the land is held by the Crown and any policy statement, strategy or management plan relating to the land.

Public conservation land is managed under legislation, general policy statements, conservation management strategies and management plans which guide the Department of Conservation on how the "wider community" expect the land to be managed. These documents are all developed through public consultation processes and will often provide indications on what activities are considered acceptable or otherwise. The intent of legislation and the outcomes of previous public processes should not be disregarded when considering whether something is of interest to the general public.

(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).

While some people will oppose (or support) the idea of mining on public conservation land regardless of the nature of the proposed activity, many applications for minerals access will not be considered significant by many of the wider public. Some applications, though, will be regarded as significant by the wider public as a consequence of their size or location or some other attribute. This criterion aims to provide adequate flexibility for the Ministers so that unnecessary notifications (which would place unnecessary costs on an applicant) and "unanticipated" non-notifications (which could create anxiety among many of the wider public) are avoided.

(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.

This general criterion is a safeguard to avoid unnecessary notifications and "unanticipated" non-notifications that might not be captured by the other criteria.

Determining which public process

16. Three options can be identified for a public process for applications needing to be notified:

- use the existing process in the Conservation Act for publicly notifying concessions;
- create a new process for publicly notifying applications and specifying it in the Crown Minerals Act;
- have the process determined by the Minister of Conservation according to policies developed by officials and/or by the Minister from time to time.

17. The preferred option is to use the same process for access arrangement applications as is used to publicly notify applications for concessions. Section 49 of the Conservation Act (CA) provides a procedure 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 procedure has been found to work well, and mining companies, the general public and Department of Conservation officials are familiar with using this procedure. Having public notification of mining access applications use the same procedure would ensure consistency and be seen to be so.

18. Furthermore, if in future the Conservation Act process for concessions is streamlined and more closely aligned with the Resource Management Act, any amendments to

the Conservation Act to facilitate this could then also apply to access arrangement applications under the Crown Minerals Act.

19. A second option would be for a new public notification procedure for access arrangement applications to be defined and set out in the CMA. Officials can identify no benefits for doing this in preference to using the process set out in section 49 of the Conservation Act.

20. A third option would be for the public process for to be determined by officials and/or by the Minister from time to time. This would provide the greatest flexibility but would not provide certainty for potential applicants, and would present a greater risk of legal challenge. There could be ongoing concerns for applicants about the costs they would incur by having to fund a public consultation process of undefined scope. This would be exacerbated if slightly different processes were used for different applicants – exposing the Minister to a risk of legal challenge. This option is considered inferior to the preferred option.

Implications for applicants

21. Under any of the options, applications for access arrangements within the area of a minerals permit would be publicly notified (if the proposed activity was deemed to be significant) just as applications for mining-related concessions outside the area of a minerals permit currently are. Cabinet has yet to decide on the exact form of the notification and how "significant" is to be defined.

22. If the preferred option is chosen, based on the time required to process 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, compared to the current non-notified process. This additional work would include collating submissions, holding a hearing (if required), and drafting a final recommendation report. In the case of particularly large 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.

23. To help minimise costs to applicants, officials are recommending that applicants be able to opt into a process that would combine the public notification of related access arrangement and concession applications, if the applicant so desired. This could mitigate to a large extent the additional costs of notification of access arrangement applications.

24. For applications for access arrangements considered not significant, no changes are proposed and the current non-notified process and existing timeframes will continue.

Consultation

25. This regulatory impact analysis has been prepared by the Department of Conservation, in consultation with the Ministry for Business, Innovation and Employment. 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 also been consulted. The Department of Prime Minister and Cabinet has been informed.

26. Other “land holding” agencies were not consulted as this proposed public process, already agreed to in principle by Ministers, is proposed for public conservation land only.

Conclusions and recommendations

27. DOC and MBIE conclude that the best option for determining whether or not an access arrangement application is significant is to have criteria specified in the Crown Minerals Act that the Minister of Conservation and Minister of Energy and Resources must have regard to. This option gives the greatest transparency and certainty for applicants and the general public, while giving the Ministers sufficient discretion to ensure that applications are public notified wherever appropriate and that applicants are not faced with unnecessary costs when public notification is not needed.

28. Officials therefore recommend that the Crown Minerals Act 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 an 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 applications.

Implementation

29. Any of the options chosen would be implemented via amendment to the Crown Minerals Act as part of the amendment bill currently being developed. At the appropriate time, the Department of Conservation would amend its standard operating procedures for processing applications for access arrangements to align with any new legislation.

30. The transition to any new regime would be managed by the Department of Conservation preparing a revised standard operating procedure, in consultation with the Ministry of Business, Innovation and Employment, once the form of the new legislative requirement was known.

31. To help minimise costs to applicants, officials recommend that applicants for access arrangements be able to opt into a process that combines the public notification of their access arrangement application with public notification of a related concession application. The one public process would then feed into the processing of the separate applications – access arrangements considered under the Crown Minerals Act 1991 and concessions under the Conservation Act 1987. This combining of the public processes should not be compulsory as applicants may have reason to want to keep consideration of their access arrangement and concession applications separate.

Monitoring, evaluation and review

32. The decision to publicly notify significant applications for access arrangements on public conservation land has already been made in principle by the Government. The effectiveness of the option chosen by Ministers will be revealed by how often the wider public disagree with a decision not to notify an access arrangement application and how often applicants consider that their notified applications were notified unnecessarily. Mining in public conservation areas can be contentious and the public appear to have no hesitation in clearly expressing their dissatisfaction if and when they disagree with policy decisions regarding mining in protected areas.

33. The Department of Conservation will need to modify its standard operating procedures to provide for whatever option is adopted. The Department regularly reviews its standard operating procedures and if cost efficiencies or other benefits (for the department or for applicants) are identified as a result of a review, these will be brought to the attention of Ministers. Aside from these periodic general reviews, no other review of the adopted option is planned as the changes will essentially be making the process for considering access arrangement applications more consistent with the existing process for concession applications.