

Update Report
Making difficult decisions:
Mining the conservation estate

June 2014



Parliamentary Commissioner
for the **Environment**
Te Kaitiaki Taiao a Te Whare Pāremata

Contents

1	Introduction	1
2	Reaction to the report	3
3	Response to the Commissioner's recommendations	5
4	Conclusion	9
	Notes	10



Introduction

In September 2010 the Parliamentary Commissioner for the Environment released a report titled *Making difficult decisions: Mining the conservation estate*.

Earlier that year the Government had released a discussion paper proposing that some conservation land be removed from Schedule 4 of the Crown Minerals Act to allow it to be considered for mining. The Commissioner made a submission on the discussion document. During the preparation of that submission, a number of issues about mining on conservation land were identified, and the Commissioner decided to investigate them further.

The investigation was focused on the 60% of the land managed by the Department of Conservation where mining can currently occur, that is, the land that is not listed on Schedule 4 of the Crown Minerals Act.¹ Not all of that land has high conservation value and applications to mine should be considered on their merits. However, decisions to mine should be made transparently and ensure there are overall gains to conservation.

The Commissioner's investigation found a number of deficiencies in the process for allowing mining on conservation land. In particular, it is easier to gain access to conservation land for mining than it is for other commercial activities including tourism.

The report concluded with seven recommendations from the Commissioner.

Update report on Making difficult decisions: Mining the conservation estate



2

Reaction to the report

The issue of mining on conservation land generates strong public interest and the report resulted in significant media attention and commentary.

When the report was released the Minister of Conservation, Hon. Kate Wilkinson, said that she would be getting some advice on the report, and that: *“Some things are happening, some things we might decide to take up, some things we might not.”*²

The Acting Conservation spokesperson for Labour welcomed the report commenting that: *“Conservation should be the priority for the Minister of Conservation not kowtowing to the wants of the Minister for Economic Development”.*³

The Conservation spokesperson for the Green Party called the report an *“authoritative and independent assessment”*. He added: *“The Commissioner recommended sensible alternative improvements to the regulatory framework around granting mining access to the conservation estate.”*⁴

The Chief Executive of Straterra, an organisation representing the mining industry, welcomed the report saying: *“The Parliamentary Commissioner for the Environment’s report brings a welcome dose of sanity to the mining debate”.*⁵ However, he did not agree with all the recommendations.

The Royal Forest & Bird Protection Society described the report’s recommendations as *“a reasoned and rational way of ensuring mining does not compromise conservation.”*⁶

Update report on Making difficult decisions: Mining the conservation estate



3

Response to the Commissioner's recommendations

Recommendation 1:

Parliament does not support legislation that requires decisions on access to public conservation land for mining to be made jointly by the Minister of Conservation and the Minister of Energy and Resources.

In its 2010 discussion paper, the Government had proposed that decisions on access arrangements for mining on conservation land be made jointly by the Minister of Energy and Resources and the Minister of Conservation, rather than just by the Minister of Conservation.⁷

The Minister of Conservation is accountable to the public for safeguarding the conservation estate. So this joint decision making is at odds with a basic principle of good governance, namely that the power to make a decision should be aligned with the accountability for that decision.

The Commissioner's recommendation was not adopted by the Government, and the Crown Minerals Act was amended in 2013 to establish joint decision making on access arrangements.^{8,9}

The joint decision making proposal generated strong views as it passed through Parliament. Both the Labour Party and the Green Party expressed their views in select committee minority reports, stating respectively:

"It cuts right across the deliberate separation of powers between the Minister of Energy and Resources who, under this bill, is responsible for 'promoting' mining activities and the Minister of Conservation, who grants access to the conservation estate."

and

*"Ministerial joint decision-making is a major political shift away from the power of the Minister of Conservation over conservation land to a privileging of the economic imperative. As the Parliamentary Commissioner for the Environment has said, 'It cuts across the fundamental separation of functions and powers'."*¹⁰

Recommendation 2:

The Minister of Energy and Resources and the Minister of Conservation introduce legislation to ensure that all proposals for access to the conservation estate for commercial uses can only be granted if consistent with the purpose for which the land is managed.

Applications for access to mine on conservation land face a lower legal hurdle than other commercial activities.

In law, the difference is that the Minister of Conservation must only “have regard” to conservation laws and the reasons the land is protected in deciding whether or not to grant access to mining operations. By contrast the Conservation Minister “shall not grant” access to other businesses if doing so is contrary to the conservation laws and reasons for protection.¹¹ As a result, relatively benign activities such as guided tours and adventure tourism face a tougher legal test for access to the conservation estate than mining operations.

The Commissioner’s recommendation has not been adopted by the Government. Indeed when the Crown Minerals Act was amended in 2013, a requirement for considering “*the direct net economic benefit and other benefits*” of the proposed mine has been added.¹²

This placing of the economic benefits of the mine alongside the protection of conservation is consistent with access decisions being made jointly by the Minister of Energy and Resources and the Minister of Conservation. Both changes mean that mining is now even more ‘favoured’ than other commercial activities on areas of conservation land that are *not* listed on Schedule 4 of the Crown Minerals Act.

Recommendation 3:

The Minister of Conservation ensures that mining operations on public conservation land provide a net conservation benefit as well as compensating for damage they cause.

Under the Crown Minerals Act, the Department of Conservation can negotiate compensation with a mining company as part of the access agreement process. But ‘compensation’ in this context can include more than just recompense for damage – it can include additional benefit for the landowner.¹³ Thus, the seeking of a net conservation benefit is allowed, though not required, by the law.

The Department of Conservation is developing a guideline for assessing compensation for access arrangements for mining. The current draft of this guideline states that “*compensation should aim for ‘no net loss’ at a minimum*”.¹⁴ This is not in line with the Commissioner’s recommendation.

However, the recent negotiation of a \$22 million compensation package for the Escarpment Mine Project on the Denniston Plateau by the Minister of Conservation does signal a stronger intent to seek a net conservation benefit in practice.¹⁵

Recommendation 4:

The Minister of Conservation directs officials to develop a nationally consistent framework and guidelines for evaluating applications for mining on public conservation land and setting access conditions.

Progress has been made on this recommendation.

A shared service centre in Hokitika now processes all applications for mining on conservation land.

*"This will ensure that all access arrangements and minimum impact applications are processed under a single line of managerial supervision, and will greatly reduce the likelihood of inconsistencies between decisions."*¹⁶

As noted above, the Department of Conservation is developing a guideline for assessing compensation for mining. This is a step in the right direction towards providing national consistency.

Recommendation 5:

The Minister for Conservation improves public access to information about mining on public conservation land by making relevant information readily available on the internet.

Information included on the website should cover existing permits and access agreements with attached conditions, as well as lodged applications and proposed conditions including offsetting agreements.

Little progress has been made on this recommendation.

The Department of Conservation's website contains only a few mining access agreements, and they are not easy to find.

Recommendation 6:

The Minister of Conservation ensures that all significant applications for access to conservation land be publicly notified and that 'significant' be defined so it applies consistently to all conservancies.

The 2013 amendments to the Crown Minerals Act included a requirement to publicly notify 'significant' mining applications on conservation land.¹⁷ The Act states what the Minister "*must have regard to*" in determining whether an application is 'significant' or not, but detailed policy guidance is yet to be developed.¹⁸

Recommendation 7:

The Minister of Conservation adds all ecological areas to Schedule 4 unless there is a good reason for excluding some.

The ecological areas in the conservation estate were created as representative examples of the full range of ecosystems. Only one is listed on Schedule 4 of the Crown Minerals Act.

The ecological areas on the West Coast of the South Island are listed on Schedule 4 of the Conservation Act, which, under current law, means they cannot be added to Schedule 4 of the Crown Minerals Act.¹⁹

The remaining ecological areas could be added to Schedule 4 of the Crown Minerals Act without amending legislation, but the Government has not made any moves to do so.²⁰



Conclusion

The Government has responded positively to some of the recommendations in the Commissioner's report, but not to the most important recommendations. The joint decision-making by the two Ministers about access for mining on conservation land undermines the role of the Minister of Conservation as guardian of the conservation estate. It is important that the law and policy be designed to ensure a net conservation benefit when mining does take place on conservation land.

In the end it is important to remember that, while commercial activities such as mining may at times have a major impact on the conservation estate, the impact is localised. Introduced pests are by far the biggest threat to conservation land and protected plants and animals.

Notes

- 1 All national parks form the bulk of Schedule 4.
- 2 NZPA, 2010, *PCE warns as Govt eyes rest of DoC estate for miners*, NZPA, 21 September 2010.
- 3 New Zealand Labour Party, 2010, *Diluted Minister of Conservation powers worrying*, press release, 21 September 2010.
- 4 Green Party, 2010, *Greens welcome PCE's findings on mining*, press release, 21 September 2010.
- 5 Straterra, 2010, *Straterra welcomes PCE report on mining on conservation land*, press release, 21 September 2010.
- 6 Forest and Bird, 2010, *Commissioner is right: conservation should come first*, press release, 21 September 2010.
- 7 Ministry of Economic Development and Department of Conservation, 2010, *Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and beyond – Discussion paper*, p18.
- 8 Crown Minerals Act 1991, s 61(1AA).
- 9 The joint decision making applies only to the applications for 'Tier One' permits (major mining operations). See Crown Minerals Act 1991, s2B and Schedule 5.
- 10 Commerce Committee report, "Crown Minerals (Permitting and Crown Land) Bill", 18 March 2013, p.14 and p.17.
- 11 Crown Minerals Act 1991, s 61(2), and Conservation Act 1987, s 17U(3).
- 12 Crown Minerals Act 1991, s 61(2)(da).
- 13 Letter from Hon Kate Wilkinson, Minister of Conservation to PCE, 21 August, 2012. See Crown Minerals Act 1991, ss 60(1)(f), 76(1).
- 14 Department of Conservation, "Assessing Mining Compensation – Guideline, Draft", May 2014, p.11.
- 15 Letter from Hon Dr Nick Smith, Minister of Conservation to PCE, September 2013.
- 16 Letter from Hon Dr Nick Smith, Minister of Conservation to PCE, September 2013.
- 17 Crown Minerals Act 1991, s 61C.
- 18 Letter from Hon Dr Nick Smith, Minister of Conservation to PCE, September 2013.
- 19 Crown Minerals Act 1991, s 61(7). This is a hangover from the now cancelled West Coast Accord.
- 20 Under s 61(4) of the Crown Minerals Act, the approval of both the Minister of Energy and Resources and Minister of Conservation is required to add an ecological area to Schedule 4 of the Crown Minerals Act.