

## Regulatory Impact Statement

Amending the Conservation Act 1987 to improve concession processing and management

### Agency Disclosure Statement

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

It provides an analysis of options to (a) establish more rigorous timeframes for processing applications for concessions (leases, licences, permits and easements for activities on public conservation land) and (b) enable the holders of expired concessions to continue operating if they have lodged a new concession application six months before the concession expiry date.

Two non-controversial amendments to the Conservation Act are proposed for inclusion in a Regulatory Reform (Omnibus) Bill (ROB), in accordance with the Department's Draft Annual Regulatory Plan for January 2010-June 2011.

This statement is based on a review of concession processing undertaken by the Department between February and December 2009. The review comprised an internal audit of the department's concession processing performance; information gathering and international comparisons, analysis of policy issues and options by a team of senior policy, planning, legal and concessions staff, and internal and external consultation on issues and options.

Available data, feedback from concessionaires and internal consultation have established clearly that undue delays in concession processing occur and that management of activities continuing under expired concessions is unsatisfactory.

Addressing these two matters is part of a suite of actions to improve the Department's concession regime. Successful implementation will require changes to the Department's behaviour, systems, technology and performance measures, supported by staff training. The proposed measure to establish more rigorous timeframes for processing concession applications would enable regulations to be made and further work would be necessary to prepare and promulgate these.

The proposed amendments to the Conservation Act are expected to reduce costs for businesses associated with delays in concession application processing, and improve certainty and security for concessionaires when concessions expire and a further concession is sought. They are not likely to impose additional costs on businesses, impair private property rights, impede market competition, or the incentives on businesses to innovate and invest, or override fundamental common law principles.

The Department of Conservation confirms that the proposal will have the effect of reducing the compliance burden upon business and certifies that the proposal is consistent with the Government Statement on Regulation.



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[Date]

16/4/10

## **1. Status quo and problem definition**

Under the Conservation Act 1987 (the Act) a concession is a permission to use Crown-owned public conservation land for an activity. This includes land that is National Park, reserve, wildlife sanctuary, wildlife refuge and wildlife management reserve. Concessions can be leases, licences, permits or easements. Concessions are also issued for wild animal recovery operations (being the use of aircraft to shoot and recover wild animals) over all public conservation land. Activities requiring concessions are generally commercial in nature, such as tourism businesses and grazing, but can also involve non-commercial private gain, such as the use of land for a bach.

If an activity requires a concession under the Act it is an offence to undertake that activity without a concession. Concessions are issued for fixed terms and there is no statutory right or presumption of renewal when the term expires.

Concessions are granted by the Minister of Conservation. In practice, decisions on concessions are made predominantly by Department of Conservation officials under delegation.

The Act (Part 3B) provides criteria for decisions on concessions and some directions on process such as the mandatory requirement for public notification of leases and licenses. There are very few timeframes. Most of the process specifications for dealing with concession applications are non-statutory, set out in departmental Standard Operating Procedure (SOP).

## **2. Problem 1: Lack of timeliness in processing concession applications**

The Department is not consistently processing applications for concessions in a timely fashion. A review of concession processing in 2009 found that applicants are concerned about the lack of enforceable timeframes associated with the Department's processing of concessions. Applicants are left with uncertainty over how long it will take for an application to be processed, and what parts of the process will occur at what times. This creates business planning difficulties for existing and aspiring concessionaires. The review noted that delays are also caused by applicants not responding to information requests in a timely manner.

It is difficult to quantify the Department's timeliness in processing concession applications as its concessions database is not used consistently and performance reporting measures are interpreted variably. An internal audit used the available data to check compliance with the application processing timeframes set out in the Concessions SOP. Concessions are classified by scale into high and low impact, and "one-off" where permission is required for single events. The audit found that for concession applications received after February 2007, the database indicated that 29% of high impact concessions, 69% of low impact concessions and 86% of one-off permits were not processed within the standard timeframes. A paper-based assessment of randomly selected records in several conservancies found that 27% were not processed within the standard timeframes. Although a key finding of the audit was that the underlying data was not wholly reliable, the findings still indicate unsatisfactory performance. This conclusion was supported by internal and external consultation during the review of the concessions regime.

The review found a number of key reasons for timeframes not being met, including:

- SOP timeframes could not be realistically met
- drawn-out exchanges between the department and applicants over the extent of the information needed to assess the effects of a proposed activity
- uncertainty amongst applicants about likely timeframes, leading to misunderstandings and poor coordination of effort
- a relaxed approach to delays in the provision of information requested from applicants, and to applicants putting applications 'on the back burner'.

The review found that the lack of statutory or regulatory force behind most timeframes for concession processing contributed to perceptions (both internal and external) that efficient concession processing was not of critical importance to the Department. It helped enable staff to give competing work a higher priority, particularly where such work was driven by legal deadlines (e.g. input to Resource Management Act processes).

### ***3. Problem 2: Inability to enable concessionaire operations to continue with a clear statutory basis when a concession has expired and a new application is in progress***

Under Part 3B of the Conservation Act a concessionaire has no right to continue an activity that requires a concession once the concession has expired. It is not uncommon however for an application for a new concession to be in progress when a current concession expires. This can be due to a late application or to delays in processing. The concessionaire in this situation has no statutory basis to continue operations unless and until the new concession is granted.

In many such cases the Department has no concerns with the concessionaire continuing to operate while an application is processed. It enables this by 'rolling on' concessions. This avoids disruption to a business in circumstances where the Department has no reason to expect that a new concession will be refused, but it has no statutory basis.

Both the concessionaire and the Department are in an uncertain legal position when the concessionaire is operating under a 'rolled on' concession. There is legal risk for both parties, with associated risk of legal costs on both sides and business disruption for the concessionaire.

### ***4. Objectives***

The Department seeks to enable commercial activities on public conservation land that contribute to conservation objectives. This includes processing concession applications in an efficient and timely fashion, and avoiding unnecessary risk and uncertainty for businesses operating with concessions.

### ***5. Regulatory impact analysis***

#### ***6. Alternative policy options: improving timeliness of concession application processing***

Delays in concession application processing have a range of underlying causes requiring a range of corrective actions, including changes to the Department's systems, technology and performance measures, supported by staff training. These are addressed by recommendations from the 2009 concessions review, additional to the measure regarding specification of processing timeframes that is discussed here.

The review considered whether timeliness could be improved while continuing to specify most timeframes in the Department's SOP, or whether timeframes should be set in legislation or regulations.

Concessions SOP timeframes will be amended and re-tested. This will act as a trial for identifying and prioritising what timeframes require regulatory direction.

Specification of timeframes in regulation is the preferred option because:

- it is consistent with Legislation Advisory Committee guidance that matters of principle and policy should be in primary legislation, while matters of detail and implementation belong in regulations;
- the concessions regime has changed in response to changes in the nature and scale of business interests in public conservation land, e.g. with the introduction of a fast-track 'conforming' process for certain low impact activities, and regulation will provide more flexibility than statute for future changes to assist business;
- processing timeframes that predominantly affect the Department's own operations are non-controversial and change can be effected more rapidly through a minor amendment to the regulation-making provisions of the Conservation Act than through more substantial amendment to the Conservation Act.

The proposal is to amend section 48 of the Conservation Act 1987 to enable regulations to be made which impose timeframes on concession processing under Part 3B of the Act. Section 48 provides regulation making powers but these do not include the power to make regulations for concessions timeframes. Associated minor amendments to the National Parks Act 1980, Reserves Act 1977, Wildlife Act 1953 and Wild Animal Control Act 1977 would be required to ensure that any regulations made applied to concessions issued over all classes of public conservation land and to wild animal recovery operations.

The proposed new provision would enable regulations to be made to set timeframes that apply to both the Department and applicants. Regulations would also address related matters including when timeframes may be extended and the circumstances in which the processing 'clock' may be stopped (e.g. if it is agreed that an applicant requires time to gather information).

A power to set timeframes in regulation has a precedent in the Building Act 2004, but is not common. Processing timeframes are more often set in statute (e.g. the RMA, the Official Information Act).

For concessionaires and applicants, the specification of concession processing timeframes in regulation will provide greater assurance of timely decision making, more certainty for business planning and a more transparent process for engaging with the Department.

With more rigorous processing timeframes, applicants who are not well prepared might be unable to provide optimal information in support of their proposal in time for the Department to consider it before a decision is due. The Department will encourage applicants to manage this risk by discussing proposed applications before they are lodged.

For the Department, meeting regulatory timeframes for concession processing is expected to require organisational change, technological improvements and staff training. The Department will be able to meet these needs through reprioritisation and the reallocation of existing resources.

*7. Alternative policy options: enabling concessionaire operations to continue with a clear statutory basis when a concession has expired and a new application is in progress*

Alternatives to amending the Conservation Act to enable concessionaires to continue operations after a concession expires (providing a new concession application is in progress) are to continue the current practice of 'rolling on', or to enforce the current law.

The Department does not consider that it can responsibly continue 'rolling on' concessions when the practice has no statutory basis. This does not fulfill the Department's obligation to administer and enforce the law, exposes both the Department and concessionaires to unnecessary risk of legal costs, and risks disruption of concessionaires' business.

More rigorous enforcement of the existing law require concessionaires to cease activities for which concessions have expired, regardless of whether a new application is in progress, and prosecuting at least some concessionaires who continued to operate without a concession. This would result in unproductive compliance actions, unnecessary disruption to desirable business activities on public conservation land and a deterioration in the Department's relationships with concessionaires.

The Department often alerts concessionaires to the forthcoming expiry of concessions and encourages timely applications for new concessions. This does not always result in applications being received in time to process them to a conclusion before existing concessions expire. While this is not prudent behaviour for concessionaires, requiring an immediate halt to their activities would generally be a disproportionate response and in some cases (e.g. where concessions are required for structures on public conservation land) an impracticable one.

In some cases a timely application for a new concession to succeed an expiring one can take longer to process than can reasonably be anticipated by the concessionaire or the Department (e.g. due to a surge in applications for similar activities in the area, or associated Resource Management Act processes). Requiring a concessionaire in these circumstances to halt activities when the existing concession expires, when the concessionaire has acted prudently and in good faith, would be unfair as well as unproductive.

'Rolling on' concessions is in many cases due to undue delays in the Department's concession decision making. Improving the timeliness of concession application processing would reduce the number of cases in which concessions expire while a new application is in progress. It would not however eliminate all such cases.

The preferred option is to amend Part 3B of the Conservation Act to provide a statutory basis for 'rolling on' concessions when a new application is in progress. The proposed amendment would provide that where a concession is due to expire and the concessionaire applies for a new concession to continue an activity, the concessionaire may continue operating under the existing concession (after the expiry date) until the new

concession application has been determined. This would apply if the new application is made six months or more before the expiry of the existing concession, or three months or more with the consent of the Minister of Conservation. A concessionaire applying for a new concession less than three months before the expiry of an existing concession would have no right to continue operating if the concession expired before the new application was determined.

The proposal parallels a provision of the Resource Management Act 1991 that deals with the same issue regarding expiring resource consents. Section 124 of the RMA provides that where a resource consent is due to expire and the consent holder applies for a new consent for the same activity, the holder may continue operating under its existing consent (after the expiry date) until the new consent application has been determined. This applies if the new application is made to the council six months or more before the expiry of the existing consent, or three months or more with the consent of the council. If these timeframes are not met, there is no right to operate once the existing consent expires.

For concessionaires the proposed amendment would provide more certainty and security for business operations through the transition from an expired concession to a new concession.

Under the proposal, concessionaires applying late for new concessions that are required for legal continuation of their operations would be at increased risk of compliance action by the Department.

Clear statutory provisions covering this matter would provide a strong signal to concessionaires of the need for timely application for new concessions. This would be reinforced by communications from the Department and should reduce the incidence of late applications. With changes to its processes resulting from the 2009 concessions review, the Department expects to be able to process most concessions to a conclusion within 6 months.

### **8. Consultation**

The Department's 2009 concessions review included consultation with key stakeholders who have a direct relationship and interest in concessions, including concessionaires, focused on problem identification and options for improvement. No external stakeholders have been consulted on the recommendations from the review, including the specific proposals addressed in this RIS.

The Department considers that consultation with concessionaires on the proposals assessed here is unnecessary. The proposals are in large part to regulate the Department's own processes and reduce legal risk for both the Department and concessionaires. They would improve certainty, security and transparency for businesses engaging with the Department over concessions. The Department is confident that further consultation with concessionaires would only confirm the desirability of proceeding with the proposals, while delaying their implementation.

### **9. Conclusions and recommendations**

The timeliness of the Department's processing of concession applications is unsatisfactory and improving it requires a suite of actions including more rigorous specification and implementation of processing timeframes. These timeframes would

apply to both the Department and to applicants for concessions. Specification of timeframes in statute or regulation would promote the necessary behaviour and performance change within the Department and encourage timeliness on the part of applicants also. Regulation is recommended as more appropriate in principle, more flexible for future adaptation of the concessions regime and quicker to implement. A minor change to the regulation making provisions of the Conservation Act is recommended to enable regulations to be made for concession processing timeframes. Associated minor amendments are required to the National Parks, Reserves, Wildlife and Wild Animal Control Acts.

The current provisions of the Conservation Act make it an offence to carry on an activity on public conservation land that requires a concession, if a concession is not in effect. A problem arises when concessions expire while applications for new concessions to continue activities are in progress. Rather than initiate unnecessarily punitive compliance action, disrupting desirable business and private activities undertaken with concessions, the Department 'rolls on' concessions, allowing concessionaires to continue operating while applications are processed to a conclusion. Such 'rolling on' has no statutory basis, however, leaving the Department and concessionaires exposed to risk of legal expense and disruption to business. More timely processing of applications by the Department and encouragement of early applications by concessionaires cannot eliminate the need for some concessions to 'roll on', but it is not desirable for the Department to continue the practice. The recommended solution is to amend the Act to enable concessionaires to continue operating under an expired concession where they have applied for a new one a reasonable time (three to six months) in advance of the expiry date.

### **10. Implementation**

Regulation of the Department's concession processing timeframes would be achieved by amending the regulation making power in the Conservation Act to enable regulations to be made, and preparing and promulgating regulations. Concession processing staff would be trained in the new requirements. The Department would reallocate and reprioritise resources as necessary to effect necessary changes to internal systems, technology, capacity and performance measures. Changes would be communicated to concessionaires and the public.

The Department proposes to enforce regulated concession processing timeframes by monitoring compliance through an improved concessions database and referring to this data where appropriate when assessing the performance of processing staff. The Department also proposes to develop a processing fee rebate policy that returns a proportion of processing fees to concession applicants if the Department fails to meet regulatory timeframes. This policy would be implemented through revisions to Standard Operating Procedures covering processing fees and cost recovery.

Communication with external stakeholders has raised expectations of significant improvement in the Department's concessions processes and there is some risk of harm to the Department's reputation and relationships if change is not implemented effectively and expectations are not met. The Department proposes to manage this risk by giving responsibility for implementation to a General Manager reporting directly to the Director-General of Conservation and by communicating the scope and timing of change clearly to stakeholders and staff.

Establishing a statutory mechanism for allowing concessionaires to continue operating under expired concessions while new applications are in progress would be achieved by introducing new provisions to the Conservation Act. The Department would establish more consistent procedures for alerting concessionaires to forthcoming concession expiry dates and encouraging timely applications. Information on the change would be provided to concessionaires. Enforcement action would be taken and publicised in at least some cases where concessionaires filed late or no applications for new concessions and continued operating under expired concessions.

Transitional arrangements would be necessary for concessionaire operations that are currently being 'rolled on' pending determination of a new concession application, and for applications currently in progress that will not be determined before an existing concession expires. It is proposed that a transitional provision be introduced to the Conservation Act stating that applications made before the expiry of a concession for continuation of an activity, and before the enactment of the proposed amendment, are deemed to have been made at least 6 months before the expiry of the concession. Relevant concessionaires would then be covered by the proposed new section of the Act, enabling them to continue operating while their new application was processed.

#### ***Monitoring, evaluation and review***

Timeliness in the Department's processing of concession applications would be monitored through an improved concessions database and performance measures, supplemented by auditing as necessary and by feedback from concessionaires.

The incidence of 'rolling on' expired concessions would be recorded and tracked through the concessions database.

Monitoring data will be assessed as part of a broader project to implement the recommendations of the Department's 2009 Concessions Review.