

PART I: APPROVALS RELATING TO CONCESSIONS THAT WOULD OTHERWISE BE APPLIED FOR UNDER THE CONSERVATION ACT

[1] OGNZL is seeking two concessions, one referred to as the Northern Area Concession and the other as the Willows Area Concession.

[2] OGNZL provided the Schedule 6, Part 1 (clause 3) information for the Northern Area Concession Area and the Willows Concession Area in section 8.8.1 of application document A11.

The statutory setting

The Conservation Act

[3] Concessions are provided for in Part 3B of the Conservation Act.

[4] Section 17O(2) provides:

Except as provided in subsection (3) or subsection (4), no activity shall be carried out in a conservation area unless authorised by a concession.

[5] “Concession” is defined as:

concession or concession document—

(a) means—

- (i) a lease; or
- (ii) a licence; or
- (iii) a permit; or
- (iv) an easement—

granted under Part 3B; and

(b) includes any activity authorised by the concession document.

[6] “Licence” is defined as:

licence—

(a) means—

- (i) a profit à prendre or any other grant that gives a non-exclusive interest in land; or
- (ii) a grant that makes provision for any activity on the land that the licensee is permitted to carry out; and

- (b) includes—
 - (i) any document purporting to be a licence (whether or not the licence gives an interest, or makes any provision, referred to in paragraph (a)) and issued under any former Act; and
 - (ii) any document purporting to be a licence and purporting to grant an exclusive interest in land, and issued under any former Act or issued under this Act before the commencement of section 2(2) of the Conservation Amendment Act 1996; and
 - (iii) any document purporting to be a licence (whether or not the licence gives an interest, or makes any provision, referred to in paragraph (a)) and issued under this Act before the commencement of the said section 2(2);—

and licensee has a corresponding meaning

[7] “Permit” is defined as”:

permit in relation to Part 3B,—

- (a) means a grant of rights to undertake an activity that does not require an interest in land; and
- (b) includes any authorisation or licence granted before the date of commencement of this definition that granted similar rights; and—

permit holder has a corresponding meaning

[8] Outside of the Fast-Track procedure, applications for concessions are dealt with under Part 3B of the Conservation Act (ss 17O – 17ZJ). They are granted by the Minister (s 17Q).

[9] Section 17U(1) relevantly provides:

- (1) In considering any application for a concession, the Minister shall have regard to the following matters:
 - (a) the nature of the activity and the type of structure or facility (if any) proposed to be constructed:
 - (b) the effects of the activity, structure, or facility:
 - (c) any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity:

...

- (3) The Minister shall not grant an application for a concession if the proposed activity is contrary to the provisions of this Act or the purposes for which the land concerned is held.

...

- (4) The Minister shall not grant any application for a concession to build a structure or facility, or to extend or add to an existing structure or facility, where he or she is satisfied that the activity—

- (a) could reasonably be undertaken in another location that—
 - (i) is outside the conservation area to which the application relates; or
 - (ii) is in another conservation area or in another part of the conservation area to which the application relates, where the potential adverse effects would be significantly less; or
- (b) could reasonably use an existing structure or facility or the existing structure or facility without the addition

- (5) The Minister may grant a lease or a licence (other than a profit à prendre) granting an interest in land only if—

- (a) the lease or licence relates to 1 or more fixed structures and facilities

- (which structures and facilities do not include any track or road except where the track or road is an integral part of a larger facility); and
- (b) in any case where the application includes an area or areas around the structure or facility,—
 - (i) either—
 - (A) it is necessary for the purposes of safety or security of the site, structure, or facility to include any area or areas (including any security fence) around the structure or facility; or
 - (B) it is necessary to include any clearly defined area or areas that are an integral part of the activity on the land; and
 - (ii) the grant of a lease or licence granting an interest in land is essential to enable the activity to be carried on.

[10] We will come back shortly to s 17U(3).

[11] Also relevant is s 17W(1):

17W Relationship between concessions and conservation management strategies and plans

- (1) Where a conservation management strategy or conservation management plan has been established for a conservation area and the strategy or plan provides for the issue of a concession, a concession shall not be granted in that case unless the concession and its granting is consistent with the strategy or plan.

Schedule 6 to the FTAA

[12] Clause 7 of Schedule 6 to the FTAA provides:

7 Criteria for assessment of application for concession

- (1) For the purposes of section 81, when considering an application for a concession, including conditions in accordance with clause 8, the panel, giving the greatest weight to paragraph (a)(i),—
 - (a) must take into account—
 - (i) the purpose of this Act; and
 - (ii) Part 3B of the Conservation Act 1987 (except sections 17SB and 17U(3) of that Act) as if the application were an application for a concession under Part 3B; and
 - (iii) any other relevant provisions of Parts 3, 4, 4A, 5, 5B, and 5C of the Conservation Act 1987 that direct decision making in relation to Part 3B of that Act; and
 - ...
 - (vi) the purpose for which the land is held ...; and
 - ...
 - (i) in the case of an approval referred to in paragraph (a) of the definition of concession, any policy statement or management plan of the Crown (other than a strategy or plan referred to in paragraph (a)(vii):
 - ...
 - (b) may consider,—
 - (i) ... any policy statement or management plan of the Crown ...
 - (2) For the purposes of subclause (1), the panel must take into account that the

following provisions would or may normally require a decision maker to decline an application for a concession, but must not treat the provisions as requiring the panel ... to decline the approval the panel is considering:

(a) sections 17U(5) and (6) and 17W(1) and (3) of the Conservation Act 1987:

...

(3) The panel must decline the approval if,—

...

(b) giving effect to the approval would result in the conferral of an interest in land that is incompatible with an existing interest in land ...

...

[13] What this means is that:

(a) Section 17U(3) is not required to be taken into account under cl 7(1)(a)(ii) and is not within the provisions of cl 7(1)(a)(iii). However, the purpose for which the land is held is material under cl 7(1)(a)(vi). And

(b) Section 17W(1) is a “must take into account” factor under cl 7(1)(a)(ii) and (2) but is not controlling.

The Northern Area Concession

[14] The Northern Area Concession consists of land that lies generally around the northern sides of the area to which the Wharekirauponga Access Arrangement relates.

[15] The activities for which OGNZL seeks approval are:

(a) All pest control and monitoring on public conservation land.

(b) The installation and maintenance of a telemetry system to transmit environmental data, including the continued use of the existing telemetry system authorised under concession 101993-OTH.

(c) The installation and maintenance of three river flow monitoring stations, and the continued use of the existing surface water monitoring site (originally permitted under concession 70763-OTH and subsequently 87585-OTH).

(d) The installation and maintenance of three near stream piezometers.

- (e) The continued use of a flow tracker for flow gauging (authorised under concession 87585-OTH).
- (f) Low impact monitoring activities. And
- (g) The hovering of helicopters delivering equipment associated with the placement, maintenance, use monitoring and subsequent removal of piezometers, river flow monitoring stations.

[16] The proposed activities are discussed in more detail in Sections 2.6, 4.4 and 8.8.1 of the Application and Appendix C to DOC's s 51 Report.

Issues

[17] As already referred to, Ngāti Porou ki Hauraki maintained that the Wharekirauponga Access Arrangement would create an interest in land that was incompatible with their present interest in land adjoining the Coromandel Forest Park and expected future interests in the Forest Park itself. We have already discussed that contention in relation to clause 7(2)(b) of Schedule 6. In relation to the Northern Area Concession, the corresponding provision is cl 7(3)(b). For reasons given in relation to Wharekirauponga Access Arrangement, we do not see cl 7(3)(b) as engaged.

[18] The Panel is required to consider whether the concessions sought are consistent with the relevant conservation management strategy and conservation management plan, together with any conservation management strategies or conservation management plans that have been co-authored, authored, or approved by a Treaty settlement entity.¹ As discussed earlier, we are satisfied that is the case.

[19] This means that the principal issues in terms of actual and potential effects involve:

- (a) Native herpetofauna (including the Archey's frog, the Hochstetter's frog's and Threatened and At Risk lizard species) associated with piezometer installation,

¹ Clause 3 (1)(d)(i) of Schedule 6 (concession) and Clause 3 (1)(d)(iv) of Schedule 11 (access arrangement) of the Act.

increased human use and tramping and noise and vibration associated with helicopters;

- (b) Heritage;
- (c) Kauri dieback disease; and
- (d) The effects on Wharekirauponga track users and hunters of helicopter noise, visual nuisance associated with piezometer sites and loss of solitude from increased presence of OGNZL personnel.

We will also discuss the operation of the relevant cl 7, Schedule 6 criteria.

Effects on herpetofauna

[20] These are generally reviewed in sections E7 and E8 of this Decision.

[21] The activities that will be carried on in the Northern Area Concession are less intense than those for which authorisation is sought under the Wharekirauponga Access Arrangement. It follows that the conclusions in sections E7 and E8 apply with greater force.

Effects on heritage

[22] These are addressed in section E18 of this Decision.

Effects on Kauri dieback disease

[23] These are addressed in E8 of this Decision.

Effects on Wharekirauponga track users and hunters

[24] These effects are assessed in sections E14 and E15 of this Decision. They will be no more than minor.

The application of cl.7, Schedule 6 criteria: cl.7(1)(a)(1): purpose of the FTAA

[25] This favours OGNZL given our conclusion that the WNP as a whole will provide significant regional and national benefits.

The application cl.7, Schedule 6 criteria: clause 7(1)(a)(ii), Part 3B of the Conservation Act

[26] The material provisions of Part 3B have already been set out.

[27] The decision-making criteria are in s 17U. Of these, subs (3) is disappplied.

[28] Also relevant is s 17W which deals with the relationship between concessions and conservation management strategies and plans, to which we will revert shortly.

Application of cl.7(1)(a)(iii) of Schedule 6: other provision of Conservation Act

[29] Section 19 requires Conservation Parks to be managed so as to preserve and protect natural and historic resources.

[30] Looked at in isolation, the activities for which the concession is sought (pest control; and water monitoring) are consistent with conservation purposes. There is, however, the broader context in which the water-monitoring is ancillary to, and thus part and parcel of mining activities. In this sense it sits at least uneasily with the purpose for which the land is held.

Application of cl.7(1)(a)(vi) of Schedule 6: purpose for which land is held

[31] As already noted, under section 7(1) the land is held for conservation purposes, which means:

... the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

Any policy statement, conservation management policy statement or management plan of the Crown

[32] These are relevant by reason of s 17W(1) (which is in Part 3B and thus referred to in clause 7(1)(a)(ii)) but no controlling (see cl 7(2)).

[33] The relevant provisions of the General Conservation Policy (GCP) (which require compliance with conservation management strategies (see policy 11.1(a)) the Waikato Conservation Management Strategy (WCMS) and the Coromandel Peninsula Conservation

Land Management Plan (CPCLMP) have been already set out in Part H of this Decision on access arrangements.

[34] The issues as to consistency that arise in relation to the Northern Area Concession overlap with those already discussed in respect of the Wharekirauponga Access Arrangement. The overlap, however, is not complete. This is because:

- (a) the intensity of the primarily relevant activity in the concession area is far less than the access arrangement activity;
- (b) the provision of the WCMS with which the access arrangement activities are most tangibly inconsistent (policy 9.2.2.14 – avoidance of “habitats important for persistence of nature frogs”) applies to access arrangements, not concessions; and
- (c) helicopter landings (relevant to policy 16.3.5.3 of the WCMS) are not proposed).

[35] The DOC s 51 Report concluded that the concession sought was inconsistent with:

- (a) the GCP in respect of sections: 4.5(b) (intrinsic values of landscape, landform and geological features), 4.6(a) (activities on public conservation land to avoid or minimise adverse effects), and 11.1(a)-(b) (consistency with the Conservation Act and purpose for which land is held);
- (b) the WCMS in respect of policies 5.1.1.1 (preserving diversity of New Zealand’s natural heritage), 5.2.1.3 (prioritising and protecting actively conserved historic places) and 16.1.1.2 and 16.1.1.3 (management of conservation land to be consistent with purposes for which they are held and the outcomes, and policies of the WCMS); and
- (c) the CPCLMP in relation to objectives 3.1 (protecting biodiversity) and 3.9.1 (aircraft).

[36] The provisions invoked by DOC are all in general terms. DOC's conclusions are in part based on assessments of effects (including mitigation) and in part evaluative. DOC's conclusions as to effects (and mitigation) are not consistent with our own. As for the more evaluative aspects of DOC's approach, there is obviously scope for debate and different views as to whether activities associated with mining should occur on conservation land. It is, however, of note that OGNZL holds an existing concession for similar activities in the same area (including the installation of near-stream piezometers and the installation of a telemetry system). The granting of the existing concessions must have been predicated on a conclusion that these activities were consistent with the GCP, WCMS and CPCLMP.

[37] Our primary view is that there is no relevant inconsistency in relation to the concession. This is because we see the very limited intensity of the activities proposed as not inconsistent with the relevant statutory instruments. As well, and if that is not right, such inconsistency that arises under clause 7(1)(a) criteria is outweighed by the purpose of the FTAA and, in relation to cl 7(1)(b), is not determinative given cl 7(2) and s 85(3).

Should a concession be approved?

[38] For the reasons just given, and in light of our approach to s 85(3), we are of the view that the concession sought should be approved, but on appropriate terms.

The terms of the concession

[39] The terms of the concession are as set out in Appendix E of this Decision.

The Willows Area Concession

The concession that OGNZL seeks

[40] The concession sought is to conduct rehabilitation planting and pest control and associated monitoring.

[41] The proposed activities are discussed in more detail in Section 8.8.1 of the Application and in Appendix C to DOC's s 51 Report.

[42] The land is marginal strip and is therefore held under s 24 of the Conservation Act. Under s 24C of that Act:

... subject to this Act and any other Act, all marginal strips shall be held under this Act—

- (a) for conservation purposes, in particular—
 - (i) the maintenance of adjacent watercourses or bodies of water; and
 - (ii) the maintenance of water quality; and
 - (iii) the maintenance of aquatic life and the control of harmful species of aquatic life; and
 - (iv) the protection of the marginal strips and their natural values; and
- (b) to enable public access to any adjacent watercourses or bodies of water; and
- (c) for public recreational use of the marginal strips and adjacent watercourses or bodies of water.

Should the concession be granted?

[43] Having regard to the statutory criteria which we have already discussed and is consistency with s 24C, we grant the concession sought.

Terms of the concession

[44] The terms of the concession are as set out in Appendix F of this Decision.