



Guidance on land access for permit holders

This guideline summarises key aspects of access-related legislation for permit holders, describes the different types of land access permissions, outlines the processes involved and explains what applicants need to prepare.

KEY POINTS

- › Permits do not confer an automatic right of access to land.
- › Permit holders may enter land to conduct minimum impact activities providing 10 working days notice is given to each owner and occupier.
- › Permit holders require consent (this differs from an access arrangement, which is stricter) from the Department of Conservation (DOC) to conduct minimum impact activities on conservation land.
- › Access arrangements are required for all activities other than minimum impact activities.
- › Access arrangements are not required offshore.
- › Access to Crown land is required from the relevant Minister of the Crown with responsibility for the land.
- › If the minerals permit is Tier 1, applications for access arrangements are considered jointly by the relevant Minister of the Crown and the Minister of Energy and Resources.
- › The Minister of Conservation cannot accept applications for access arrangements (except for certain low impact activities) on land listed in Schedule 4 of the Crown Minerals Act.
- › A land owner or occupier can decline to grant access.
- › Access arrangements are only binding on successive owners of title if the arrangement is lodged with the Registrar-General of Land and registered against the land title.
- › The permit holder may seek arbitration for land access but only with the agreement of the land owner and land occupier or on public interest grounds.

LEGISLATIVE CONTEXT

Sections 47-80 of the Crown Minerals Act 1991 (the “Act”) outline the provisions which apply when permit holders seek access to land for prospecting, exploration and mining activities. The following excerpts cover the most relevant sections.

s49 Entry on land for minimum impact activity

This section provides the Crown with the right to carry out minimum impact activities (explained further below) and for permit holders to access land without consent providing the landowner and occupier is notified of the activity 10 working days prior to entry.

s50 Entry to special classes of land for minimum impact activity (in conjunction with s55)

Under this section the consent of the landowner or occupier is required for minimum impact activities to be undertaken on special classes of land.

s51 Entry on Maori land for minimum impact activity

This section provides for access to Māori land without consent providing the landowner/s is notified of the activity 10 working days prior to entry but also outlines circumstances where this is not the case.

s54 Access to land for minerals other than petroleum

This section requires the permit holder to hold an access arrangement (except for specified minimum impact activities) with the land owner and occupier and undertake prospecting, exploration and mining activities in accordance with such an Access Arrangement.

s57 Meaning of entry on land

This section outlines when activities under the surface do not constitute prospecting, exploration or mining (meaning the permit holder can undertake such activities effectively as of right).

s59 Notice of request for grant of right of access & s60 Grant of right of access by Access Arrangement

These sections relate to the application for an access arrangement and the matters that may be included in access arrangements (provided those matters are not inconsistent with the matters set out in section 61(2)).

s61, s61A and s61B Access Arrangements in respect of Crown land

This is the section under which access arrangement applications for Crown land are considered and granted.

Schedule 4

The places for which the Minister of Conservation cannot grant an access arrangement are listed in Schedule 4 of the Act.

GUIDANCE

Mineral permits generally do not confer rights to access

Permits issued under the Act do not give the permit holder automatic right of access to any land except for minimum impact activities. The permit holder is required to negotiate an access arrangement with each landowner and occupier. Access arrangements and rights to access land for minimum impact activities are not conferred until a minerals permit is granted.

Circumstances where a land access arrangement is not ordinarily required

The Act provides for a number of circumstances where an access arrangement is not required, which include:

- › minimum impact activities (except where s51 states otherwise in relation to Māori land) - Sections 49 and 50 (in conjunction with section 55)
- › mining activities for offshore minerals - Section 53
- › activities carried out below the surface of the land which, essentially, are not likely to have adverse effects on the surface of the land - Section 57
- › the use of hand-held equipment in designated gold fossicking areas - Section 98.

Crown research activities

The Act provides the Crown and its agents with the right to enter land during the daytime to undertake minimum impact activities.

Accessing land for minimum impact activities

Minimum impact activities generally do not require landowner and occupier consent for access (except on Crown land) but the permit holder is required to give 10 working days notice to the landowner and occupier. This notice must specify the date of intended entry, the type and duration of work to be carried out and a telephone number of the person who intends to enter the land.

The meaning of minimum impact activities is defined in section 2 of the Act and generally includes sampling and surveying by handheld means and aerial surveying (see **Appendix 1** for the full definition).

Accessing special classes of land

Land that is defined as a special class of land in section 55(2) requires the consent of the landowner and occupier before access is permitted to carry out minimum impact activities.

These special classes include:

- any land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 of the Conservation Act 1987
- land subject to an open space covenant in terms of the Queen Elizabeth the Second National Trust Act 1977
- land subject to a covenant in terms of the Conservation Act 1987 or the Reserves Act 1977
- land for the time being under crop
- land used as or situated within 30 metres of a yard, stockyard, garden, orchard, vineyard, plant nursery, farm plantation, shelterbelt, airstrip, or indigenous forest
- land which is the site of or situated within 30 metres of any building, cemetery, burial ground, waterworks, race, or dam
- land having an area of 4.05 hectares or less.

To access Crown land (as mentioned in a, b, and c above) the permit holder must gain consent from DOC. The process or criteria for acquiring consent are not prescribed in any legislation. DOC has documented standard procedures. The applicant's guide entitled Mining Activities on Conservation Land outlines these procedures, processing times and fees and can be found at <http://www.doc.govt.nz/Documents/about-doc/concessions-and-permits/mineral-exploration/applicant-guide-mining-activities-conservation-land.pdf>. Pages 10-11 are most relevant.

To summarise DOC's process, the application assessment involves DOC consultation with iwi and the Conservation Board if the land applied for has high conservation values, and a discussion with the applicant regarding potential impacts and any required conditions.

A permit holder may access other Crown lands not held or managed under the Conservation Act or in other Acts specified in Schedule 1 of the Conservation Act by going through the regular process. Consent is not required if notification is made 10 working days prior to entry.

Māori land

For minimum impact activities on Māori land, reasonable efforts should be made to consult with the landowner/s (as identified by the Registrar of the Māori Land Court). In addition, 10 working days notice is required to be given to the iwi authority of that area. Areas regarded as waahi tapu¹ by the tangata whenua² also require the consent of the landowners before access is permitted.

¹ A place which is particularly sacred or spiritually meaningful to tangata whenua.

² The Māori tribe or subtribe that holds the customary authority over a particular area.

Access arrangements

Access arrangements are ordinarily required for all activities other than minimum impact activities. The first step in obtaining an Access Arrangement is for the permit holder to serve notice on each landowner and occupier. As per section 59, this notice should specify:

- › the land affected
- › the purpose for which the access is required
- › the proposed work programme and likely adverse effects
- › the compensation and safeguards against any like adverse effects
- › the type of permit held or applied for
- › if the permit relates to Crown land or land in the common marine and coastal area (i.e. from 0 to 12 nautical miles offshore), the direct net economic and other benefits of the proposed activity
- › any other matters specified in regulations (at the time of writing, no relevant regulations apply).

Where an Access Arrangement is obtained by way of agreement, and the requirements of section 59 were not complied with in a material way, then such agreement shall be of no force or effect unless the non-compliance is waived in writing by the landowner or occupier affected.

If the landowner and occupier or Minister(s) grant an access arrangement, the following provisions may be included as conditions:

- › the periods during which the permit holder is to be permitted access to the land
- › the parts of the land on or in which the permit holder may explore, prospect, or mine and the means by which the permit holder may gain access to those parts of the land;
- › the kinds of prospecting, exploration, or mining operations that may be carried out on or in the land
- › the conditions to be observed by the permit holder in prospecting, exploring, or mining on or in the land
- › what the permit holder needs to do in order to protect the environment while having access to the land and prospecting, exploring, or mining on or in the land
- › the compensation to be paid to any owner or occupier of the land as a consequence of the permit holder prospecting, exploring, or mining on or in the land
- › the manner of resolving any dispute arising in connection with the arrangement
- › the manner of varying the arrangement
- › such other matters as the parties to the arrangement may agree to include in the arrangement.

Arbitrator for Landowners

If the landowner agrees to allow access to the permit holder they can either arrive at an access arrangement themselves or agree that access will be determined by an arbitrator. A registered arbitrator can be found through the Arbitrators' and Mediators' Institute of New Zealand Inc. at <http://www.aminz.org.nz>. Arbitration may be useful for people who may not have the confidence in dealing with mining companies and may wish for a professional arbitrator to determine an access

arrangement for them. The cost of arbitration falls entirely on the person desiring access. The access arrangement may contain any condition as agreed between the applicant and the landowner (see section 60 the Act for details).

Considerations of the Crown when assessing applications for access arrangements

If an access arrangement is sought for Crown-owned land, the appropriate Minister charged with the administration of the land makes the decision on the basis of legislative criteria.

The appropriate Minister may enter into an access arrangement for Tier 2 permits. For Tier 1 permits the appropriate Minister must jointly grant access with the Minister of Energy and Resources. The appropriate Minister may solely vary (i.e. without joint signoff with the Minister of Energy and Resources) an established access arrangement for a Tier 1 permit only if the variation is not "for the purpose of significant exploration or mining activities".

Conservation Land

If an access arrangement is sought for conservation land, the Minister of Conservation must determine whether the proposed mining activities are 'significant', and in doing so must have regard to:

- › the effects the activities are likely to have on conservation values for the land concerned
- › the effects the activities are likely to have on other activities on the land
- › the activities' net impact on the land, either while the activities are taking place or after their completion
- › any other matters that the Minister considers relevant to achieving the purpose of the Crown Minerals Act.

If the activity is considered to be a 'significant mining activity' the application for land access must be publicly notified with a submission period, after which a report shall be sent to the Minister of Conservation to inform the decision on the application for access. Submitters may request a hearing be held.

Ministers must not accept applications for access arrangements in relation to land listed in Schedule 4 of the Crown Minerals Act apart from in certain specified circumstances (see **Appendix 2**).

Under section 61, in considering whether to grant an access arrangement the appropriate Minister(s) shall have regard to:

- (a) the objectives of any Act under which the land is administered
- (b) any purpose for which the land is held by the Crown
- (c) any policy statement or management plan of the Crown in relation to the land
- (d) the safeguards against any potential adverse effects of carrying out the proposed programme of work
- (e) such other matters as the appropriate Minister(s) consider relevant
- (f) if the proposal is for a significant mining activity, the Minister(s) shall have regard to the report to the Minister of Conservation which summarises submissions made on the application

(g) if the mineral on Crown land is Crown-owned³ the Minister(s) shall have regard to the direct net economic [See Appendix 3 for explanation of this term] and other benefits of the proposed activity in relation to which the access arrangement is sought

(h) if the mineral on Crown land is privately owned the Minister(s) shall also have regard to the interests of the owner of the mineral in obtaining access to that mineral.

Applications for an access arrangement over Crown land must adequately cover these points.

Public interest arbitration for minerals

If the landowner refuses access, the permit holder may apply to the Chief Executive of the Ministry of Business, Innovation and Employment for a declaration by the Governor-General that an arbitrator determine an access arrangement for reasons of public interest. The public interest arbitration is not available for Māori land and land of the special classes described in section 55(2).

Successive Owners

Access arrangements are binding on all successive owners of the title. Under s83 of the Act, all access arrangements for periods longer than six months are required to be lodged with the Registrar-General of Land for registration on the relevant land title. If this is not done the access arrangement is not binding on successors, as provided for in s56.

³ A separate guideline on Land and Mineral Status reports covers the ownership of minerals.

Offences and penalties

It is an offence under the Act:

- › for a permit holder to prospect, explore or mine (except to undertake minimum impact activities) in or on land to which a permit relates other than in accordance with an access arrangement
- › for a person entering land under the minimum impact activity provisions of the Act to carry out any activity other than minimum impact activity
- › for a person entitled to exercise a right of access by virtue of an access arrangement to contravene the conditions of the arrangement.

A person who commits any of the above is liable on summary conviction to a fine not exceeding \$20,000, and, if the offence is a continuing one, to a further fine not exceeding \$2,000 for every day or part of a day during which the offence continues.

Where a person is convicted of contravening the conditions of an access arrangement, the court may, instead of or in addition to imposing a fine, cancel or revoke the right of access or impose additional conditions on the right where it considers it is appropriate to do so.

Appendix 1: Definition of minimum impact activities (s 2) of the Crown Minerals Act

Minimum impact activity means any of the following:

- (a) geological, geochemical, and geophysical surveying
- (b) taking samples by hand or hand held methods
- (ba) taking small samples offshore by low-impact mechanical methods
- (c) aerial surveying
- (d) land surveying
- (e) any activity prescribed as a minimum impact activity
- (f) any lawful act incidental to any activity to which paragraphs (a) to (e) relate—
to the extent that it does not involve any activity that results in impacts of greater than minimum scale and in no circumstances shall include activities involving—
- (g) the cutting, destroying, removing, or injury of any vegetation on greater than a minimum scale; or
- (h) the use of explosives; or
- (i) damage to improvements, stock, or chattels on any land; or
- (j) any breach of the provisions of this or any other Act, including provisions in relation to protected native plants, water, noise, and historic sites; or
- (k) the use of more persons for any particular activity than is reasonably necessary; or
- (l) any impacts prescribed as prohibited impacts; or
- (m) entry on land prescribed as prohibited land.

Appendix 2: Mining activities allowed on land listed in Schedule 4 of the Crown Minerals Act (s 61)

The Minister of Conservation, or the Minister and the Minister of Conservation, as the case may be, must not accept any application for an access arrangement, or variation to an access arrangement, or enter into any access arrangement, or variation to an access arrangement, relating to any Crown owned mineral in any Crown owned land or internal waters or land of the common marine and coastal area described in **Schedule 4**, except in relation to any activities as follows:

- (a) that are necessary for the construction, use, maintenance, or rehabilitation, of an emergency exit or service shaft for an underground mining operation, where these cannot safely be located elsewhere, provided that it does not result in—
 - (i) any complete stripping of vegetation over an area exceeding 100 square metres; or
 - (ii) any permanent adverse impact on the profile or surface of the land which is not a necessary part of any such activity;

- (b) that do not result in—
 - (i) any complete stripping of vegetation over an area exceeding 16 square metres; or
 - (ii) any permanent adverse impact on the profile or surface of the land that is not a necessary part of any activity specified in paragraph (a);
- (c) a minimum impact activity;
- (d) gold fossicking carried out in an area designated as a gold fossicking area under section 98 or 98A;
- (e) any special purpose mining activity carried out in accordance with a mining permit.

Appendix 3: Interpreting net direct economic benefits⁴

How should 'net' and 'direct' be interpreted?

'Net'

It is clearly necessary to take account of the costs of an activity in estimating its economic value. The net economic benefit to a minerals permit holder is the realised value of sales minus the capital and operating costs incurred in extraction of the resource.

To the extent that there are external effects of the activity which do not occur through market transactions involving the permit-holder, these should be assessed and included in a comprehensive estimate of the overall effect of the activity on economic value. So if the activity requiring an access arrangement would have a negative effect on the profits of existing businesses (for example, in the tourism sector), or reduce the amenity value of the area to visitors, these costs should also be offset against the permit-holder's net benefit to allow an overall estimate of the net value of the activity. If there are any external benefits, these should also be included.

External effects such as these are a direct consequence of the activity itself that do not result from market purchases by the permit-holder. If a mining operation affects access to an area or makes an adjacent area no longer pleasant to visit and leads a tour company to have to reduce the length of a guided tramp, reducing demand and profits, this reduction in visitor numbers is a cost of the activity as much as the cost of machinery purchased to mine the site.

'Direct'

Direct impact is sales minus the capital and operating costs, i.e. net profit. This applies to the mining operation and the impact on profits of existing businesses as a direct consequence of the mining operation, but not as a result of market purchases by the permit-holder.

By including 'direct' impacts only it is intended that no weight should be attached to second-round effects of subsequent expenditures arising because of the activity taking place. That is, 'indirect' and 'induced' impacts should not be included. This is because 'indirect' and 'induced' impacts, such as increased

⁴ This guidance was prepared by MBIE as part of the Crown Minerals Act review in 2013. The Amendment Act of that year introduced 'net direct economic benefits' as a relevant matter when considering land access applications.

employment in the supply chain, are likely to be offset by a corresponding decrease in other industries. Such impacts are also uncertain and difficult to calculate.

'Indirect'

Indirect impact is the effect of additional (or reduced) expenditure on other businesses' levels of production. For example, mining machinery purchased by a permit-holder leads to purchases of components from the supply chain of the machinery producer. Component suppliers require more inputs from other companies, and so on. A tourism operator may purchase transportation services, which would involve fuel purchases from a local supplier.

Each of these subsequent transactions represent indirect effects through inter- and intra-industry purchases and should not be included.

'Induced'

Induced impact refers to the effect of additional (or reduced) consumer spending that happens as employees, business owners and others spend their income. This includes, for example, workers' spending on essential services.

The induced effects of spending by those who receive income because of the costs incurred by the permit-holder should not be included.

QUANTIFICATION AND RISK

For significant proposals where joint decision-making will take place, the approach described above will need to take into account impacts where quantification and valuation of costs and benefits are not straightforward, and where a range of risks and uncertainties need to be taken into account. These issues are the same as for decisions necessary in many areas where government intervenes, whether or not through regulation, and it is important that consistent and transparent approaches to assessment are taken. Clear guidance is provided in the New Zealand Treasury's Cost Benefit Analysis Primer (December 2005

edition).⁵ In particular:

- › Section 2.4.3 sets out approaches that can be taken to place values on costs or benefits where there are no market prices. These include Revealed Preference techniques where market values or costs can throw light on non-market values (the value associated with a lakefront could be estimated by comparison between prices of similar houses on the lakefront and elsewhere) and Stated Preference approaches (where individuals identify strength of preference by trading off costs and benefits in hypothetical circumstances).
- › Chapter 4 discusses the need to identify key risks and uncertainties in both costs and benefits, and to test the conclusions of any assessment to changes in key assumptions, particularly those relating to non-market valuations. Methods include sensitivity analysis (involving a systematic test of robustness through changes in individual variables and assumptions), scenario analysis where combinations of variables are tested (for example, base, pessimistic and optimistic scenarios), and Monte Carlo analysis (which uses assumed probability distributions to simulate the effect of uncertainties on conclusions).

STANDARD OPERATING PROCEDURE

The Department of Conservation maintains a Standard Operating Procedure which describes the procedures to evaluate applications for access arrangements for mining on public conservation land.

The Standard Operating Procedure will be updated to incorporate guidance for departmental staff in relation to the economic assessment, in line with the above, as well as any other changes to the Department's or Ministers' roles under the Crown Minerals Act.

The Department will require applicants to include their own assessment of the expected net direct economic benefits when applying for an access arrangement. Where appropriate, an applicant's assessment of net direct economic benefits would be independently peer-reviewed.

⁵ <http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/primer>

Disclaimer

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