

Legally Privileged

Office of the Minister of Conservation
Cabinet

Wildlife (Authorisations) Amendment Bill: Approval for Introduction

Proposal

- 1 This paper seeks approval for introducing the Wildlife (Authorisations) Amendment Bill.

Policy

- 2 On 24 March 2025, Cabinet provided the following policy approvals to amend the Wildlife Act 1953 (**the Wildlife Act**) [CAB-25-Min-0081 refers]:
 - 2.1 to retrospectively validate previously authorised activities under section 53 of the Wildlife Act (including those that should have been considered under section 71) to ensure that it would not be an offence for developers or infrastructure providers to incidentally kill wildlife as part of their activities if the Department of Conservation previously authorised this and they undertake activities in line with the authorisation granted and any conditions set out
 - 2.2 to enable the Director-General of Conservation (**DG of Conservation**) to authorise activities that are prohibited under the Act, particularly killing wildlife, if
 - 2.2.1 this is incidental to the purpose of carrying out otherwise lawful activities;
 - 2.2.2 all reasonable steps are taken to minimise and mitigate impacts on wildlife, consistent with any reasonable and proportionate conditions legally imposed by the Director-General.
- 3 Cabinet also authorised me to make further detailed decisions and issue drafting instructions to the Parliamentary Counsel Office (**PCO**), in line with Cabinet's decisions.
- 4 The Wildlife (Authorisations) Amendment Bill (**the Bill**) was drafted in line with these approvals. Overall, the approach taken in the Bill is to ensure that the DG of Conservation can continue to approve or decline authorisations as prior to the Court's decision – that is, the Bill neither lowers or raises the bar for protections.

This Bill addresses the need to quickly fix a legal problem.

- 5 On 24 March 2025, Cabinet noted that the High Court recently decided it was unlawful for the DG of Conservation to authorise the killing of protected species under section 53 of the Wildlife Act unless there is a direct nexus between that killing and protecting wildlife [CAB-25-Min-0081 refers].
- 6 This related to a case taken by the Environmental Law Initiative to judicially review the Crown's approach to authorise the incidental killing of protected wildlife during construction of a new road at Mt Messenger (*Environmental Law Initiative v The Director-General of the Department of Conservation and others* [2025] NZHC 391).
- 7 The Court's decision means that the DG of Conservation is now unable to continue regulating incidental harm to wildlife (being the unwanted but foreseeable harm, including killing, of wildlife that occurs when doing otherwise lawful activities) under section 53 of the Wildlife Act.
- 8 The Court's decision impacts:
 - 8.1 *Current infrastructure and development projects*, which previously received authorisation under section 53 of the Wildlife Act to incidentally harm wildlife if they met specific conditions to protect wildlife. Developers and infrastructure providers are concerned that they could now be prosecuted if they incidentally kill wildlife in carrying out their projects, despite being previously authorised to do so and complying with all conditions set. This may lead them to delay or stop projects spanning a huge range of activities – including subdivision, construction, solar and wind farms, powerline maintenance, and road infrastructure
 - 8.2 *Other current projects that are important for our environment and economy* that may also incidentally harm wildlife and require authorisation under section 53 of the Wildlife Act. This includes the government-funded TBfree programme that aims to control and eradicate bovine tuberculosis.
 - 8.3 *Future projects* that would require authorisation under section 53 of the Wildlife Act to incidentally harm wildlife. The Department of Conservation (**DOC**) is currently processing over 300 applications for authorisations under section 53 of the Act for a variety of activities and will receive more in the future. Around half of these applications are likely to be for authorising incidental harm to protected wildlife during activities by developers and infrastructure providers. DOC is continuing to process these applications, but the DG of Conservation will not make any decisions involving incidental killing of wildlife until this legal issue is resolved.

Targeted and narrow amendments to the Wildlife Act will fix this problem.

- 9 We need a solution that enables the government to authorise and regulate activities that cause incidental killing of wildlife, while keeping appropriate safeguards in place to protect wildlife.
- 10 The intent of this Bill is to enable the Wildlife Act to be interpreted and applied as it has to date, effectively enabling what was understood to be the status quo, before the Court's decision, to continue.
- 11 The Bill will give businesses, developers, and infrastructure providers the certainty they need to continue activities permitted under existing authorities and enable DOC to process authorities waiting in the pipeline, while still aligning with the Wildlife Act's purpose to protect wildlife.
- 12 Rapid legislative changes introduce risks of unanticipated consequences that could make regulation less effective and more difficult to work with. To mitigate this risk, the Bill makes targeted and narrow changes to the Wildlife Act.

The Bill will validate previously authorised activities.

- 13 The Bill does this by inserting a new schedule (schedule 1AA) to the Wildlife Act. The validation will generally apply to all authorisations granted under section 53 of the Wildlife Act before 5 March 2025, when the High Court made its decision on the Environmental Law Initiative case. The DG of Conservation has not granted any authorisations under section 53 of the Wildlife Act since this time.
- 14 The Bill will also ensure that authorities granted under section 53 of the Wildlife Act before the date of the judgment in the Environmental Law Initiative case are not unlawful merely because consent is required under section 71 of the Act, rather than an authority under section 53. For example, this will cover authorities previously granted to the NZ Transport Agency for projects under section 53 that should have been given consent under section 71.
- 15 Legislation should generally not interfere with the judicial process of cases before the courts. For this reason, I propose to include a clause that the validation will not affect any legal proceedings that began before I announced Cabinet's intention to amend the Wildlife Act on 28 March 2025.
- 16 There is a very low risk of existing legal proceedings that commenced before 28 March 2025, which would not be covered by the validation. Officials have not been notified of any cases.

The Bill outlines conditions that the DG of Conservation can set when authorising incidental harm to wildlife.

- 17 The Bill establishes that the DG of Conservation needs to consider potential adverse effects of an activity that will cause incidental harm on:

17.1.1 the survival of wildlife populations; and

17.1.2 the persistence of the species to which those wildlife belong.

- 18 The DG of Conservation may then set conditions as part of granting an authorisation.
- 19 The DG of Conservation already has broad powers to set conditions for authorisations to take or kill wildlife under section 53(5) of the Wildlife Act, so the Bill does not limit these existing powers or expand how they are exercised. Instead, the Bill provides clarity on the types of conditions that the DG of Conservation may impose as part of an authority for incidental killing.
- 20 These conditions include:
- 20.1 measures to avoid reducing the survival of species of wildlife (including, for example, measures to offset the potential harm caused by killing individual wildlife belonging to that species); or
- 20.2 measures to avoid, minimise, or mitigate any adverse effects of the lawful activity on individual wildlife.
- 21 These measures are consistent with the types of conditions that the DG of Conservation has previously set for authorisations for incidental killing under section 53 of the Wildlife Act. For example, the DG of Conservation has previously set conditions to protect species such as kiwis and lizards during the development of projects such as housing subdivisions, mines, and quarries to:
- 21.1 follow the approach established in a wildlife management plan (submitted by applicants) to identify the presence of species, take steps to avoid harming them, relocate animals when practical, and to monitor impacts
- 21.2 follow established best practices for capturing, transferring and releasing animals
- 21.3 ensure sites where animals will be transferred are suitable for them, which may be supported by predator control and site enhancement.
- 22 Existing administrative law principles will also apply to decision-making, which means that any conditions that the DG of Conservation imposes will need to be reasonable, rational, for a proper purpose, and proportionate.
- 23 Collectively, this approach will ensure that the DG of Conservation can continue to approve or decline authorisations as they did before the Court's decision. That is, the clarification drafted in the Bill neither lowers or raises the bar for authorisations and/or conditions put on authorisations.

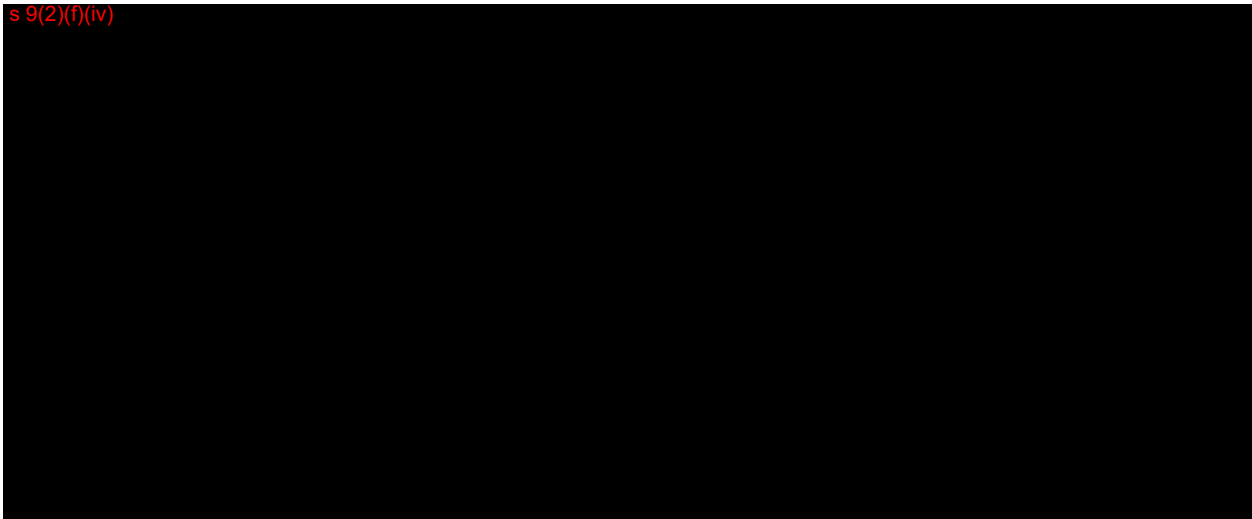
The Bill will resolve a key issue behind the Environmental Law Initiative case.

- 24 Prior to the Court's decision, DOC's interpretation of the Wildlife Act was that this Act does not solely seek to protect wildlife from harm at an individual level. DOC considered that the protective purpose of the Act could also be met by addressing effects on protected wildlife at a population level.
- 25 DOC considered that this meant that wildlife protection could be achieved in situations where there was incidental harm to some individual animals, so long as reasonable steps are taken to minimise and mitigate this harm and wildlife populations are protected. This protection was supported through measures such as enhanced habitat improvements and pest control.
- 26 The Court's decision was based on the view that every individual act of harm or killing needs to be consistent with the purpose of protecting wildlife. This effectively made it unlawful for the DG of Conservation to authorise incidental harm of individual animals even if broader approaches are being taken to protect a wildlife population as a whole.
- 27 The Bill will allow the DG of Conservation to authorise the incidental harm of protected wildlife in cases where some individual animals may be killed by an activity, but the wider population is being protected. For example, an application to authorise the incidental killing of some individuals of a protected bird species during construction of a new wind farm may be approved if the applicant takes action to increase survival rates of this species at nearby nesting sites, so that the overall population is no worse off.
- 28 The Bill will also limit the DG of Conservation from granting an authority to incidentally kill wildlife if this would lead to a species becoming more endangered or extinct. For example, an application to authorise the incidental killing of threatened sea birds in the one location where this species nest is unlikely to be approved unless there are very strict conditions to protect this species.

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- 33 Wider changes are not recommended or possible at this time as required analysis cannot be completed in the timeframe for introducing the Bill and a delay is not tenable.

Impact analysis

- 34 No impact analysis was prepared when Cabinet originally made policy decisions on this proposal [CAB-25-Min-0081 refers], and the Ministry for Regulation had not exempted the proposal from the impact analysis requirements. Therefore, it did not meet Cabinet's requirements for regulatory proposals.
- 35 The Ministry for Regulation and DOC have agreed that a post-implementation review will be developed and provided to Cabinet within two years after implementation.

Compliance

- 36 The Bill complies with each of the following:
- 36.1 the principles of the Treaty of Waitangi;
 - 36.2 the disclosure statement requirements (a disclosure statement is attached to this paper);
 - 36.3 the principles and guidelines set out in the Privacy Act 2020; and
 - 36.4 relevant international standards and obligations;
- 37 DOC's assessment is that the Bill complies with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (**NZBORA**) and the Human Rights Act 1993. The Ministry of Justice is currently undertaking an assessment of whether the Bill is consistent with the NZBORA and will advise the Attorney-General prior to the Bill's introduction.
- 38 The Bill complies with the Legislation Guidelines, except the following principles:

- 38.1 *Public consultation should take place:* this was not possible due to the limited time available to make a rapid legal fix. While some members of the public may raise concerns about this, the Bill is intended to maintain the way the Wildlife Act has been interpreted and applied in the past.
- 38.2 *Legislation should not have retrospective effect:* The Legislation Design and Advisory Committee guidelines anticipate situations in which litigation leads to an outcome that Parliament may wish to countermand. In this case, DOC previously considered applications that needed authorisation under section 53 of the Wildlife Act and set conditions to protect wildlife populations. Developers and infrastructure providers relied on these authorisations to lawfully undertake their activities. Through no fault of their own, their projects are now affected. It is appropriate to validate those authorisations to restore certainty.

Consultation

- 39 The following agencies were consulted on proposed amendments to the Wildlife Act prior to Cabinet agreeing to policy approvals on 24 March 2025, and provided feedback: Crown Law, the Ministry of Business, Innovation and Employment, the Ministry of Transport, and Te Waihangā New Zealand Infrastructure Commission.
- 40 The following agencies were informed of this paper and the proposed Bill: Crown Law, the Department of Prime Minister and Cabinet, the Ministry of Business, Innovation and Employment, the Ministry for the Environment, the Ministry of Housing and Urban Development, the Ministry of Primary Industries, the Ministry of Regulation, the Ministry of Transport, Te Puni Kōkiri, Te Waihangā New Zealand Infrastructure Commission, and the Treasury.

Binding on the Crown

- 41 This Bill will not alter the extent to which the Wildlife Act, or any specific provisions in it, binds the Crown.

Creating new agencies or amending law relating to existing agencies

- 42 This Bill will not create new agencies or the coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision-making powers

- 43 The Bill does not allocate decision-making powers between the executive, the courts, and tribunals.

Associated regulations

- 44 No regulations are needed to bring the Bill into operation.

Other instruments

- 45 The Bill does not include any provision to empower the making of other legislative instruments.

Definition of Minister/department

- 46 The Bill does not amend the existing definitions for Ministers and departments in the Wildlife Act.

Commencement of legislation

- 47 The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

- 48 I propose for this Bill to be introduced under urgency and passed through all its stages without going to a select committee. This is necessary to quickly fix the legal problems that have arisen because of the recent Court decision.
- 49 The Bill should be introduced in the week beginning 5 May 2025 and be passed by 9 May 2025.

Proactive Release

- 50 I intend to proactively release this Cabinet paper, subject to any redactions that need to be made, within 30 days of being confirmed by Cabinet.

Recommendations

I recommend that Cabinet:

- 1 **note** that the Wildlife (Authorisations) Amendment Bill holds a category 3 priority in the 2025 Legislation Programme
- 2 **note** that the Bill will:
 - 2.1 validate certain previously authorised activities under section 53 of the Wildlife Act
 - 2.2 ensure that authorities granted under section 53 of the Wildlife Act before the date of the judgment in the Environmental Law Initiative case are not unlawful merely because consent is required under section 71, rather than an authority under section 53
 - 2.3 enable the Director-General of Conservation to authorise the incidental killing of wildlife if this is incidental to the purpose of carrying out otherwise lawful activities, if the overall effect of granting the authority is consistent with protecting wildlife
 - 2.4 ensure that, in making decisions to authorise incidental killing, the Director-General is not required to be satisfied that the lawful activity is itself consistent with protecting wildlife, or that each individual act of killing, viewed in isolation, would be consistent with protecting wildlife

- 2.5 ensure that, when determining whether the overall effect of an authority to incidentally kill wildlife would be consistent with protecting wildlife, the Director-General must regard the effects of an activity on the survival of wildlife populations and the persistence of the species to which that wildlife belongs, as well as any conditions and other matters that the Director-General considers relevant
- 2.6 require the Director-General to be satisfied that the holder of the authority will take all reasonable steps to protect wildlife, including steps to avoid, minimise and mitigate impacts on individual animals.
- 3 **approve** a provision in the Bill that the validation of authorisations previously made under section 53 of the Wildlife Act will not affect any legal proceedings commenced or in progress before 28 March 2025 (when Cabinet's decision to undertake amendments to the Wildlife Act was announced).

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- 5 **approve** the Wildlife (Authorisations) Amendment Bill for introduction, subject to sufficient support in the House of Representatives.
- 6 **agree** that Parliamentary Counsel Office can continue to make minor changes to the Bill to settle technical matters in line with Cabinet's previous policy decisions and incorporate feedback from PCO proofreading and quality control processes up until the Bill is printed for introduction.
- 7 **agree** that the Bill be introduced in the week beginning 5 May 2025.
- 8 **agree** that the Government propose that the Bill be passed by 9 May 2025.

Authorised for lodgement

Hon Tama Potaka
Minister of Conservation