

Interpretation and Application of Statutory Planning Documents

Context

In December 2014, the Office of the Ombudsman published a report assessing a decision made by the Minister of Conservation's delegated Decision Maker which allowed a guiding concession to exceed prescribed limits in the relevant National Park Management Plan. The Ombudsman determined the decision made was unreasonable.

The Ombudsman recommended the Department 'review its processes for handling applications for concessions in national parks in light of [the] opinion'.

The Department has now undertaken a review of how concession applications are to be assessed against statutory planning documents. This document sets out guidance for Permissions Advisors, Community Rangers, Decision Makers, and Statutory Managers as to how concession applications should be assessed against these planning documents.

Purpose

To provide users of statutory planning documents with guidance to interpret and apply these documents when assessing concession applications.

For everyone

Sections 17T(2) and 17W(1) of the Conservation Act 1987 require the granting of a concession to be 'consistent with' all relevant statutory planning documents – that is, Conservation Management Strategies (CMSs), Conservation Management Plans (CMPs), and National Park Management Plans (NPMPs).

That being said, the Minister of Conservation's discretion cannot be fettered by the statutory planning documents. This means the Minister's right to make the decision they wish to make cannot be restricted by these documents. The only way the Minister can be absolutely directed to do or not do something is via the law, bylaws, or regulations.

Statutory planning documents are developed in consultation with the Department's Treaty partners, the community, and other stakeholders. They are seen as a handshake with the community, and are the Department's commitment to the public about how an area will be managed.

Will / Should / May

Policies in CMSs, CMPs, and NPMPs are phrased as a 'will', a 'should', or a 'may' (note that older documents may use the phrase 'must' – in this situation, read a 'must' as a 'should'). Definitions for will, should, and may are included in the [Conservation General Policy](#).

So as not to fetter the Minister's discretion, 'will' policies are only used where the policy is mandatory – that is, where the policy is reiterating a legal requirement. A legal requirement can be set by a law, a bylaw, or a regulation.

‘May’ is used to provide guidance to the Minister. ‘May’ allows the Minister flexibility in whether or not to adopt the policy.

Both ‘will’ and ‘may’ are easy to interpret when assessing statutory planning documents. ‘Should’ is the one which can create difficulties.

Where ‘should’ is used, a strong expectation of the outcome of the planning documents is created. A decision that is inconsistent with a ‘should’ policy is not to be made lightly.

The use of the phrase ‘should’ does not fetter the Minister’s discretion, as the Minister is able to make a decision contrary to this. However, the Minister is only to exercise this ability where there is evidence of a special case or exceptional circumstances.

Quick Definitions

Will: Mandatory, only to be used to reiterate legislative requirements

Should: Strong expectation of the outcome, to be followed unless ‘exceptional circumstances’ exist

May: Allows flexibility, provides guidance to the Decision Maker

Exceptional Circumstances

‘Exceptional circumstances’ are just that – exceptional. This is because the Department has made a commitment to the community and it’s Treaty Partners through the statutory planning documents and the processes to develop these documents that there is a strong expectation of the outcome of the ‘should’ policies in the statutory planning documents.

The Supreme Court has defined exceptional circumstances as ‘well outside the normal range of circumstances’ – that is, truly an exception rather than the rule, although they do not have to be unique.

The test of ‘exceptional circumstances’ before there can be a departure from a ‘should’ policy is to be applied to all the Department’s statutory planning documents. In the Department’s view, there is no real or meaningful difference between the ‘strong expectation of outcome’ provided for in the Conservation General Policy and the ‘exceptional circumstances’ provided for in some national park management plans.

If you consider exceptional circumstances exist, you must follow the processes set out in this guidance before a decision is made that is inconsistent with a ‘should’ policy.

Examples

Examples of circumstances which might be considered to be exceptional:

Context and Activity	May be an exceptional circumstance?	Explanation
The Canterbury CMS expired six months ago, but is still operative as the new CMS has not been completed. Aircraft landings are limited in St James Conservation Area to manage the noise effects for recreation users. No aircraft policies have been drafted for the new CMS yet.	Yes	The aircraft policies were developed to manage noise effects. The noise of the drone is not comparable to that of a helicopter. Drones are a new activity

Context and Activity	May be an exceptional circumstance?	Explanation
You have received a concession application to use a drone within St James Conservation Area to film for a documentary. The aircraft landings allocation is already fully exhausted.		since the CMS was approved over ten years ago.
<p>The Auckland CMS states grazing should be phased out on Great Barrier Island.</p> <p>You receive a concession application for a grazing licence for 50 hectares of land on Great Barrier Island. The application is to replace the Applicant's current grazing licence when it expires. The grazed area is prone to fires during summer months. There have been two fires in the last two years.</p> <p>The District Office does not have a finalised plan in place to immediately manage the land once grazing is phased out, but has started to form a plan of how this might be managed in the future.</p> <p>The concession application is for one year.</p>	Yes	<p>If the land being grazed is left unmanaged before the District Office has a plan to restore the natural vegetation, there is a concern of fire during summer months due to the long dry grass that may result.</p> <p>A one year term is not a long term commitment for the Department.</p> <p>The plan to manage the land could then be developed during the term of the concession.</p>
<p>The Tongariro NPMP limits the number of guided walking concessions for the Tongariro Crossing to manage the effects on other visitors.</p> <p>You receive a one off concession application for guided walking on one day only.</p>	No	Even though the application is for one day only, this does not mean the adverse effects of additional guided walkers may not affect walkers on that day.
<p>The Nelson-Marlborough CMS restricts helicopter landings to specified locations in order to protect the natural quiet outside of these areas.</p> <p>A beehive operator wants to place beehives by helicopter at different locations in North West Nelson Forest Park. Instead of landing, they want to hover at least 100 metres above the ground to place the beehives.</p>	No	<p>Under s17ZF of the Conservation Act, hovering an aircraft is classified as landing.</p> <p>The noise from hovering the helicopter will be similar to landing on the ground.</p>

For Permissions Advisors

If you are processing a concession application where you intend to make a recommendation that is inconsistent with a 'should' policy in a statutory planning document and you consider an exceptional circumstance exists, you need to:

1. Speak to a National Permissions Advisor to discuss the circumstances;
2. Request legal advice on the exceptional circumstance.

If its determined exceptional circumstances may exist, you should then:

1. Hold a critical issues discussion with the Decision Maker to raise the issue, if appropriate;
2. Advise the District Office as early as possible, as this may influence the advice they provide and will allow them to consult on the potential exceptional circumstance with whānau/hapū/iwi and any iwi post-settlement governance entities with an approving role in the planning document;
3. Advise the relevant Statutory Manager;
4. Highlight the circumstances to your manager to ensure they are aware of the risk.

Before recommending a decision that is inconsistent with a 'should' policy, you must get legal advice. However, you cannot quote this advice or make reference to it in your report, as it is subject to legal privilege. The Decision Maker may ask to view the legal advice received to support them in making their decision. If the Decision Maker asks for this information, provide it to them outside of the report. This will ensure the information retains legal privilege.

Clearly analyse the concession application against the planning document in your report to the Decision Maker, considering the legal advice, District Office and Science and Policy comments, the views of whānau/hapū/iwi and the Conservation Board, and any other advice received. Note that there may be views from both whānau/hapū/iwi in their role as a Treaty Partner, and from iwi post-settlement governance entities that have a role in approving the statutory planning document. These views should be clearly differentiated between when they are analysed in the report.

It must be absolutely clear to the Decision Maker in your report where a decision will be inconsistent with a statutory planning document.

For Community Rangers

Processing a one off concession

If you are processing a one off concession application where you intend to make a recommendation that is inconsistent with a 'should' policy in a statutory document, the application does not fit the criteria for a one off.

The Applicant should be advised the application does not fit the one off concession criteria due to its lack of consistency with the relevant statutory planning documents. The application is to be forwarded to the appropriate Service Centre to process through either the notified or non-notified concession process.

Providing comments on a concession application

If you are providing comments on a concession application being processed by a Permissions Advisor, the Permissions Advisor will advise you there is the potential for exceptional circumstances to exist as early as possible. As well as commenting on this in the comments you provide, advise whānau/hapū/iwi at the earliest opportunity a decision may be recommended that is inconsistent with a 'should' policy. Either you or your Statutory Manager should also seek comment from the relevant Conservation Board on the application.

You must consult with whānau/hapū/iwi specifically about how the activity is inconsistent with a statutory planning document.

Where iwi post-settlement governance entities have an approving role for a statutory planning document

Some Treaty Settlements give iwi post-settlement governance entities roles in approving conservation management strategies or plans.

If you are advised by a Permissions Advisor a decision may be made that is inconsistent with a 'should' policy in a statutory planning document, you need to check whether any iwi post-settlement governance entities have an approving role for that planning document. If any iwi post-settlement governance entities do have an approving role, consult with these post-settlement governance entities about how the proposed activity is inconsistent with the statutory planning document as early as possible. The feedback provided by the post-settlement governance entities should then be provided to the Permissions Advisor to be incorporated into the report.

A list of iwi post-settlement governance entities with a role in approving a statutory planning document, and the statutory planning document they have a role in approving, is attached as Appendix One.

This consultation is additional to the general consultation with whānau/hapū/iwi about the activity described above.

If there is an iwi post-settlement governance entity with an approving role for a statutory planning document as a result of a Treaty Settlement, you must consult with them specifically about how the proposed activity is inconsistent with the statutory planning document.

For Statutory Managers

The relevant Conservation Board is to be advised if a recommendation is to be made for a decision on a concession application that is inconsistent with a 'should' policy in a statutory planning document. Either you or a Community Ranger should advise the Conservation Board of such a circumstance and seek their comments.

The Permissions Advisor will advise you if they intend to make a recommendation that is inconsistent with a 'should' policy in a statutory planning document.

For Decision Makers

The report to the Decision Maker may make a clear recommendation to make a decision that is inconsistent with a 'should' policy in a statutory planning document, or it may set out options for the decision, some or all of which may be inconsistent with a 'should' policy. In all situations, where you are being asked to treat a concession application as an exceptional circumstance and make a decision that is inconsistent with a statutory planning document, it will be clear to you in the report from the Permissions Advisor that this is being asked in your decision. It is part of the Permissions Advisor's role to ensure you are equipped with the necessary information to make this decision.

In their report, the Permissions Advisor will have sought and analysed:

- Legal advice;
- District Office comments;
- Science and Policy comments;
- The views of whānau/hapū/iwi (consultation undertaken by the Community Ranger);

- The views of any iwi post-settlement governance entities with an approving role for the statutory planning document (consultation undertaken by the Community Ranger);
- Conservation Board comments (consultation undertaken by the Community Ranger and/or Statutory Manager).

If the report sets out this information, you should have the necessary information to make such a decision. The [Making Good Decisions](#) resource is available to support you in making these decisions.

Note that as legal advice is subject to legal privilege, the Permissions Advisor cannot discuss legal advice directly in the report. As per the guidance in this document, the Permissions Advisor will have sought legal advice before recommending a concession application be treated as an exceptional circumstance. If the report is clear an exceptional circumstance exists, you can make the decision being comfortable legal advice has been received on this issue.

To view the legal advice provided, contact the Permissions Advisor. They will provide the advice to you separate from the report, in a form that retains legal privilege.

Further Resources

Making Good Decisions: A Resource for Permissions Advisors, Hearing Chairs, and Decision Makers – available at [DOCDM-1411341](#).

Approved by: Mike Slater, DDG Operations



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Appendix One

Iwi post-settlement governance entities that have an approving role in a statutory document, current as of July 2016:

Post-Settlement Governance Entities	Statutory Planning Document
Te Aupouri Claims Settlement Act 2015 Te Rarawa Claims Settlement Act 2015 Ngāti Kuri Claims Settlement Act 2015 Ngāi Takoto Claims Settlement Act 2015	Te Hiku Conservation Management Strategy
Ngāti Manuhiri Claims Settlement Act 2012	Te Hauturu-o-Toi/Little Barrier Island Conservation Management Plan
Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 1914	Hauraki Gulf/Tīkapa Moana Inner Motu Conservation Management Plan
Ngāti Whare Claims Settlement Act 2012	Whirinaki Te Pua-a-Tāne Conservation Park Conservation Management Plan
Ngāti Awa Claims Settlement Act 2015	Te Tāpui Tokotoru Conservation Management Plan for Moutohorā (Whale Island) Wildlife Management Reserve, Ōhope Scenic Reserve, and Tauwhare Pā Scenic Reserve
Te Urewera Act 2014	Te Urewera Management Plan
Ngāti Porou Claims Settlement Act 2012	Ngā Whakahaere Takirua (chapter of the Conservation Management Strategy)
Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009	Harbour Islands Reserves
Ngāti Toa Rangatira Claims Settlement Act 2014	Kapiti Island Reserves
Ngāi Tahu Claims Settlement Act	Te Waihora (Lake Ellesmere) Joint Management Plan