



## Options for addressing freshwater management in Canterbury

<b>Date:</b>	29 May 2009	<b>MfE Priority:</b>	Non-urgent
<b>Security Level:</b>		<b>Number of Attachments:</b>	
		<b>MfE Ref No:</b>	09-B-01495

### Action Sought

	<b>Action Sought</b>	<b>Deadline</b>
Minister for the Environment  Hon Dr Nick Smith	1) We recommend you initiate a discussion with officials with any issues arise from this briefing.  2) Subject to these discussions, recommend the Ministry for the Environment commission a report exploring issues and options for Environment Canterbury.	No deadline

### Ministry for the Environment Contacts [if required]

<b>Name</b>	<b>Position</b>	<b>Telephone</b>		<b>1st Contact</b>
		<b>(cell)</b>	<b>(work)</b>	
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## Executive Summary

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Environment Canterbury's ability to respond to freshwater management issues has been inadequate. Several triggers, such as Environment Canterbury's consenting statistics, its ability to manage water under the RMA, and the development of the Canterbury Water Management Strategy, suggest that it is an appropriate time for Government to investigate options for addressing its water management issues.

The following options are available and have been briefly analysed in this briefing:

- a. Intervention by the Minister of Local Government under the Local Government Act 2002 – which includes establishing a review authority and/or appointing a Commissioner.
- b. Intervention by the Auditor-General under the Public Audit Act 2001 – which is limited to a performance reporting function.
- c. Intervention by the Minister for the Environment under the RMA – which can go as far as relieving councils of their RMA responsibilities and appointing a person or persons to discharge those;
- d. Ministerial Inquiries;
- e. Select Committee Inquiries;
- f. Commission of Inquiry;
- g. Ministerially hosted and sponsored forum of regional stakeholders;
- h. Advisory panel to Environment Canterbury appointed by Ministers;
- i. Joint Ministerial/Environment Canterbury appointed "review panel";
- j. Moratorium; and
- k. National instruments.

## Recommended Action

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**We recommend that you:** (delete fields not required)

- (a) **Agree** to engage in a discussion with officials on any issues arising from this briefing **Yes / No**
- (b) **Agree** to, subject to the above discussion, have the Ministry for the Environment commission someone to explore the issues and options for Environment Canterbury **Yes / No**

Sue Powell  
General Manager  
**Local Government Group**

**Date**

Referred to Ministry Communications Staff:

No

Hon Dr Nick Smith  
**Minister for the Environment**

**Date**

## **Purpose of Report**

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1. You have requested information on the options for dealing with freshwater and resource management issues in Canterbury. This briefing sets out a range of options which we suggest would provide a good starting point for discussions with relevant officials.

## **Background Issues:**

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2. Environment Canterbury's ability to respond to freshwater management issues has been inadequate. The problems and challenges facing Environment Canterbury are evidenced in the following way:
  - a) There is only patchy coverage in terms of plans in place in Canterbury under the Resource Management Act 1991 (RMA). In particular, allocation of groundwater is not being undertaken through operative statutory planning mechanisms, resulting in possibly unnecessary litigation. There are a number of recent cases of allocation being consented in what have been identified as over-allocated catchments and groundwater systems.
  - b) Councils developing the Canterbury Water Management Strategy (CWMS) are exploring options for a central government-led mechanism to help give effect to the CWMS (a brief introduction and analysis of the CWMS is provided in **Appendix 1**).
  - c) The most recent RMA survey (covering the 2007/2008 year) indicates poor performance at meeting reasonable timeframes for processing consent applications. We suspect that the results may be dominated by stacked up applications to take water from the Waitaki catchment and from groundwater 'red zones'. However, this will need to be further explored. We also have anecdotal advice that Environment Canterbury's more recent (2008/2009) performance has improved but again this must be further explored.
3. Environment Canterbury's primary concern is that it can't manage water under the RMA, claiming that the RMA is designed for managing adverse effects of individual applications rather than managing for cumulative effects. The proposed National Policy Statement (NPS) will not deal with Environment Canterbury's underlying perception that it cannot adequately address water allocation issues within the existing RMA framework. Work undertaken by the Ministry for the Environment concludes that the RMA provides the necessary tools and it is the duty of the councils to determine the capacity and set sustainable limits for their resources, as well as determine those causes that have adverse effects of those resources.

## **Options**

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### ***Investigative/governance options***

4. Officials have previously considered the various statutory powers / administrative review options available to try to resolve what actions may be required. These options include:
  - a. Intervention by the Minister of Local Government under the Local Government Act 2002 – which includes establishing a review authority and/or appointing a Commissioner.
  - b. Intervention by the Auditor-General under the Public Audit Act 2001 – which is limited to a performance reporting function.

- c. Intervention by the Minister for the Environment under the RMA – which can go as far as relieving councils of their RMA responsibilities and appointing a person or persons to discharge those.
- 5. The main limitation of these powers is that none of the respective review functions have terms of reference beyond their respective statutes. That is, the reviews are benchmarked against the functions and powers given under the respective Acts.
- 6. The option of relieving Environment Canterbury of some or all RMA functions would enable high level governance and direction to be addressed. It is, however, not a trivial measure, and careful consideration would need to be given to an exit strategy.
- 7. Options with the ability to investigate more broadly include :
  - a. Ministerial Inquiries;
  - b. Select Committee Inquiries; and
  - c. Commissions of Inquiry.
- 8. The first two options (i.e. Ministerial or Select Committee inquiries) are not considered appropriate in this instance as they have typically been used to investigate specific matters relating to central government departments / administration. As the considerations would be beyond the scope of RMA matters, multiple Ministers would be required to initiate a Ministerial Inquiry. Additionally, there is significant benefit to selecting an option that provides for a 'partnership' approach with Environment Canterbury. A Select Committee Inquiry would be less suitable in this regard.
- 9. If a solution is to be sought that goes beyond current institutional arrangements and individual ministerial portfolios it may be more appropriate to give consideration to establishing a broader Commission of Inquiry to examine the issues and make appropriate recommendations.
- 10. The Ministry of Agriculture and Forestry have previously suggested additional options:
  - a. A ministerially hosted and sponsored forum of regional stakeholders;
  - b. An advisory panel to Environment Canterbury appointed by Ministers; and
  - c. A joint Ministerial/Environment Canterbury appointed "review panel" (when last discussed, MAF's preferred option)
- 11. The Commission of Inquiry option includes proactive engagement with key stakeholders, while ensuring the independence of the Commission. It includes early consultation with Environment Canterbury (including shared development of the scope of the Commission), and a non-blaming approach to a solution.
- 12. A Commission of Inquiry is the option which is most likely to advance an effective solution due to its status, independence, and potential scope of considerations (which may extend beyond current institutional arrangements).

***Moratorium option***

- 13. A further option for consideration is whether all resource consent applications for water within the Canterbury Region that have not yet been determined by Environment Canterbury should be put on hold, and no further applications be accepted. This would remain until any relevant national policy statements and/or national environmental standards are in effect, or until a relevant body has undertaken a review.

14. New or amended legislation would take time and would be required for a moratorium, which would divert attention from delivering the outcomes which are being sought through the proposed NPS. Once enacted, a moratorium would be a fairly blunt instrument which in effect can lead to the virtual cessation of development involving water in Canterbury. Issues are likely to be raised about:
  - a. Constraints on either low impact or high priority uses, including applications in replacement of consents as they expire, small water uses/takes, high priority water uses (e.g. community supply, those associated with significant existing investment).
  - b. How and when is a moratorium lifted.

### ***National environmental standard option***

15. Environment Canterbury has previously requested a national environmental standard to enable the classification of “at-risk catchments or water resources” and address issues such as contaminants, water quality, levels or flows. It is unclear how such a standard would be able to address the issues in Environment Canterbury. They will still be required to determine how the standard would fit into its planning framework.
16. For example, it has been suggested that a National Environmental Standard or other national instrument could give formal status and weight to the groundwater ‘red-zone’ constraints, thus limiting perpetual re-litigation of those ‘rules’.
17. A national environmental standard tailored for Environment Canterbury would avoid the consultation requirements for regional plans or plan changes as set out under Schedule 1 of the RMA and make for quicker implementation relative to a plan or plan change. Such an approach may be seen as a perversion of RMA processes and an abrogation of the Regional Council’s responsibilities. A national environmental standard would still take time to develop and also would not have the same effect as a regional plan or the effect a regional plan should have. A national environmental standard would still be required to go through statutory consultation process, but is not subject to Environment Court process.
18. To use national instruments to substitute for effective regional management has legal limitations, as well moving away from the central premise of freshwater management of the RMA: that freshwater management be the function and responsibility of regional councils. A further risk is that the national environmental standard would move accountability to the Minister for the Environment rather than with Environment Canterbury, who would be in a position to shift any future blame. This occurred with the Waitaki Allocation Plan (developed by a Board of Inquiry under special legislation).
19. In the opinion of officials, and as successfully demonstrated by several other councils, the RMA already provides an adequate framework, as such there is nothing stopping Environment Canterbury from accomplishing now, within existing regulatory frameworks, what they are requesting a national environmental standard to achieve.

## Appendix 1

### Canterbury Water Management Strategy

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20. The Canterbury Water Management Strategy (CWMS) is a non-statutory process led by the Mayoral Forum, which is a committee made up of the mayors of all of Canterbury's councils. The purpose of the CWMS is to provide a long-term direction for the management of all water in the region.
21. The CWMS, which is currently going through public consultation, includes four different but related options including:
  - a. Option A – Business-as-Usual
  - b. Option B – Advance environmental protection then infrastructure development
  - c. Option C – Reconfigure consents and infrastructure for protection and repair of the environment, improved reliability and supply and development
  - d. Option D – Advance infrastructure development alongside environmental repair and protection.
22. Indicative feedback from officials associated with the CWMS is that:
  - a. Option A is not favoured by anyone
  - b. A combined option (“Option E”), featuring various elements of B-D for specific catchments, is the likely outcome
23. The final option will need to be given statutory effect, with the intention that applications for resource consents that were consistent with the agreed plans would be fast tracked through the approval process, while applications that were inconsistent with the plans would not be processed. How statutory effect will be given to the CWMS has yet to be decided. However, CWMS officials have tabled for consideration by government officials a range of implementation options including:
  - a. Use the normal RMA process, ie incorporate the CWMS by change/variation to the existing regional policy statement, regional plans and district plans
  - b. Give the CWMS the status of a NPS
  - c. Create a new statutory mechanism akin to a Water Conservation Order following a formal process set out in special legislation
24. Each of these options has strengths and weaknesses.
25. Use of the normal RMA process will avoid creating a difficult precedent, for example if other regions wish to see similar effect given to their strategies (of which several are now in development). It will also allow in depth public consultation and scrutiny of the preferred option, which is arguably not provided by the current truncated public consultation process.
26. However, there may be risk that following the usual process will result in long delays as a result of time taken to introduce and resolve changes/variations to the existing regional policy statement and Proposed Natural Resources Regional Plan. Environment Canterbury do not have a good track record of progressing plan initiatives in a timely manner. Most notably, major chapters of its Proposed Natural Resources Regional Plan were publicly notified in 2004, and are still being heard at the council level.
27. The other options being put forward by CWMS officials could short-track the implementation of the CWMS whilst also providing some opportunities for public consultation. They do present additional difficulties in terms of drafting and precedent, although these are not insurmountable. One additional concern is whether Environment Canterbury would necessarily ‘buy-in’ to any special central government initiative. This concern arises from previous resistance (and indeed

active opposition) by Environment Canterbury to central government initiatives in the Waitaki catchment.