



Intervention in Canterbury

Date:	26 June 2009	MfE Priority:	Non-urgent
Security Level:		Number of Attachments:	2
		MfE Ref No:	09-B-01677

Action Sought

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Minister for the Environment Hon Dr Nick Smith	(a) Note that officials have assessed the range of intervention options, and have concluded that an investigation under s.24A of the RMA would be a preferred first step if intervention is to occur (b) Agree that a decision whether to intervene to improve Environment Canterbury's poor administrative performance should not occur until you have considered Environment Canterbury's reply to your recent letter (c) Agree that you will meet with officials to discuss Environment Canterbury's reply	There are no deadlines associated with these actions.

Ministry for the Environment Contacts

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Executive Summary

Environment Canterbury performed poorly in the latest Ministry for the Environment report on the administration of the Resource Management Act 1991 (“the RMA”). In addition, Environment Canterbury also continues to struggle with aspects of its freshwater management functions.

You have powers under the RMA to deal with local authorities who are failing to adequately perform their RMA functions, powers or duties. These options are summarised, and include:

- investigating and making recommendations (under s.24A)
- appointing a person or persons to perform specific functions of that local authority (s.25)
- directing the preparation of a plan, or a change or variation to an existing plan or proposed plan (s.25A).

Possible arguments have been put forward for and against use of each of these powers. We recommend that:

- the preferred option is use of your s.24A powers *if* you are not satisfied with Environment Canterbury’s response to your recent letter (noting this is forthcoming)
- that you meet with officials to discuss Environment Canterbury’s reply if you then wish to pursue intervention options

Recommended Action

We recommend that you:

- (a) **Note** that officials have assessed the range of intervention options, and have concluded that an investigation under s.24A of the RMA would be a preferred first step if intervention is to occur **Yes / No**
- (b) **Agree** that a decision whether to intervene to improve Environment Canterbury’s poor administrative performance should not occur until you have considered Environment Canterbury’s reply to your recent letter **Yes / No**
- (c) **Agree** that you will meet with officials to discuss Environment Canterbury’s reply **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

1. The reason for this briefing note is to provide advice on options to address whether to intervene (and if so, in what manner) to improve administration and water management in Canterbury. This advice includes:
 - background to difficulties currently faced by Environment Canterbury
 - discussion of your options for intervention under the Resource Management Act 1991 ('the RMA'), including your powers under ss.24A, 25 and 25A
 - an analysis of whether difficulties currently faced by Environment Canterbury may justify intervention, and if so, what is the preferred intervention option.
2. The full text of ss.24A, 25 and 25A is set out as **Attachment 1**.
3. This advice is in conjunction with a recent briefing on freshwater management in Canterbury, attached as **Attachment 2**. In response to that briefing, you sought this further briefing and agreed to discuss the issue with officials.

Background to difficulties currently faced by Environment Canterbury

4. Environment Canterbury performed poorly in the latest Ministry for the Environment report on the administration of the RMA. You have written to Environment Canterbury challenging the organisation to provide, within 60 days, a plan as to how it will fix this serious problem.
5. Environment Canterbury also continues to struggle with its freshwater management functions. Canterbury water management is particularly important given:
 - the economic value of Canterbury irrigation and hydropower generation
 - the nationally significant instream values of Canterbury's braided rivers and waters such as Te Waihora/Lake Ellesmere.
6. Unfortunately, water management in Canterbury is largely consent-driven, and consequentially adversarial, rather than plan-driven. For example, Environment Canterbury has failed to manage groundwater within what it considers to be sustainable allocation limits. This is evidenced by successive applicants defeating staff recommendations to decline consent, following expensive and time-consuming hearings.
7. The region still does not have an operative region-wide plan for freshwater management which substantially contributes to these difficulties. The absence of an established plan may also:
 - contribute to ongoing failures to meet statutory timeframes
 - jeopardise the ability of Environment Canterbury to manage cumulative effects caused by further development likely to be promoted by the Canterbury Water Management Strategy (a summary of issues associated with this strategy is included in the previous briefing in Attachment 2)
8. The water quantity and water quality chapters of the proposed regional plan were not notified until 2004. The voluminous nature of these chapters, combined with the highly contested nature of water management in Canterbury, has meant the first stage of plan hearings (ie, at the council level) are only now drawing to a close. Anticipated appeals to the Environment Court are expected to further delay a fully operative plan for several more years.

9. While these difficulties continue, officials consider there is some cause for optimism about Environment Canterbury's water management performance. An intake of new senior officials, and some new councillors with a stronger understanding of water management issues, have in recent years helped to progress initiatives such as:
- the Restorative Programme for Lowland Streams (reviewing resource consents to deal with over-allocation of groundwater)
 - an accelerated programme of water metering (supported by proposed national regulations for the measuring of water takes)
 - the introduction by variation, of further, more sophisticated environmental flow regimes into the proposed regional plan

Options for intervention under the RMA

10. These difficulties relate to Environment Canterbury's functions under the RMA. The RMA provides you with powers in the event that you believe any local authority is performing those functions poorly.

Under s.24A (Power of Minister for the Environment to investigate and make recommendations):

- this empowers you to investigate the performance of Environment Canterbury of any of its functions, powers and duties, and to make recommendations to Environment Canterbury based on that investigation
- no preconditions are set for use of this power
- because these powers are quite limited (only enabling investigation and making recommendations), it would be relatively easy to justify their use
- use of these powers would also be a logical first step if other, more extreme powers were seriously being considered.

Under s.25 (Residual powers of Minister for the Environment):

- these powers extend beyond investigation
- this empowers you to appoint 1 or more persons (on such terms and conditions as you see fit) to exercise or perform all or any of those functions, powers, or duties in place of Environment Canterbury
- this section sets three pre-conditions that must all be satisfied before you can exercise this power:
 1. You must give written notice to Environment Canterbury specifying the reasons why you propose to make the appointment
 2. You must give Environment Canterbury a reasonable opportunity to satisfy you that it has **not** failed to exercise or perform any of its functions, powers, or duties to the extent necessary to achieve the purpose of this Act
 3. Having not succeeded in satisfying you, Environment Canterbury must also fail to take proper steps within a time specified in the notice (being not less than 20 working days after the date of the notice) to remedy the defaults complained of.
- It is important that these pre-conditions be properly satisfied, as the decision to use this power could be open to judicial review
- acting in this way would be a very serious indictment on Environment Canterbury, and accordingly, very strong justification would be needed

Under s.25A (Minister may direct preparation of plan, change, or variation):

- enables you to direct Environment Canterbury to prepare a regional plan (or to prepare a variation or change to an existing proposed or operative plan respectively) to address a resource management issue relating to one or more of their functions
- the only constraint in exercising this power is that you must, in giving a direction, specify a reasonable period within which the plan, change, or variation must be notified

Analysis of whether intervention is justified

11. No criteria exist to help guide your decision-making on whether or not to intervene using any or all of your ss.24A, 25 or 25A powers. There is no precedent for use of these powers, as these powers have never been exercised.

12. The arguments for and against using ss24A, 25 or 25A are laid out in Table 1 below.

Table 1: Pros and cons of various intervention options

Powers	Arguments	
	For	Against
S.24A (investigate and make recommendations)	<ol style="list-style-type: none"> 1. Relatively easy to justify investigation, and no risk of judicial review 2. A positive result from the investigation could actually improve public confidence in Environment Canterbury's abilities 3. Could be used to inform decision about whether other, more severe action is warranted 	<ol style="list-style-type: none"> 1. Perception that this is a limited power 2. In terms of its freshwater management difficulties, compelling arguments that "we are already onto this" include: <ol style="list-style-type: none"> a) Considerable (if slow) progress has been made towards making the regional plan operative b) Its ongoing support of the Canterbury Water Management Strategy shows it is aware of the need to take a strategic approach to water management 3. In terms of its consent processing difficulties, we expect Environment Canterbury will say "we are onto this" by pointing to recent improvements.
S.25 (residual powers)	Sufficiently strong power to make changes	<ol style="list-style-type: none"> 1. "We are already onto this" arguments 2. May appear at odds with public statements you have made that in terms of water management, central government is at least partly responsible by failing to provide sufficient direction 3. Risk of judicial review? 4. Would require an exit strategy that left behind a fully effective regional council
S.25A (direct preparation of plan, change or variation)	None apparent	<ol style="list-style-type: none"> 1. "We are already onto this" arguments 2. Use of this power could be counter-productive as it could further slow regional planning processes.

Intervention to improve performance?

13. We understand that Environment Canterbury does intend replying to your letter asking for a plan of action, and that the letter will explain a recent restructuring which has led to improvements in consent processing timeframes. Should these improvements elevate their performance to a level comparable with other regional councils, it would be difficult to justify intervention.

14. If you remain dissatisfied with Environment Canterbury's response and wish to pursue the option of intervention, our advice would be to meet with officials to discuss further the option of using your s.24A powers under the RMA in the first instance. Specific actions to be discussed could include:
 - commissioning an independent investigation which would lead to a report making recommendations to you on how to improve the performance of Environment Canterbury

 - after considering the independent report, writing to Environment Canterbury making recommendations on its exercise of problematic functions

15. Should you remain dissatisfied with Environment Canterbury's response after use of your s.24A powers, you would then be in a sound position to exercise your s.25 powers.

ATTACHMENT 1: INTERVENTION POWERS UNDER THE RMA

24A Power of Minister for the Environment to investigate and make recommendations

The Minister for the Environment may—

- (a) investigate the exercise or performance by a local authority of any of its functions, powers, or duties under this Act; and
- (b) make recommendations to the local authority on its exercise or performance of those functions, powers, or duties; and
- (c) investigate the failure or omission by a local authority to exercise or perform any of its functions, powers, or duties under this Act; and
- (d) make recommendations to the local authority on its failure or omission to exercise or perform those functions, powers, or duties; and
- (e) take action under section 25 or section 25A if the local authority's failure or omission to act on a recommendation gives the Minister grounds to take action under 1 or both of those sections.

25 Residual powers of Minister for the Environment

(1) Where any local authority is not exercising or performing any of its functions, powers, or duties under this Act to the extent that the Minister for the Environment considers necessary to achieve the purpose of this Act, the Minister may appoint, on such terms and conditions as the Minister thinks fit, 1 or more persons (including any officer of the public service) to exercise or perform all or any of those functions, powers, or duties in place of the local authority.

(2) The Minister shall not make an appointment under subsection (1) until—

(a) the local authority has been given written notice specifying the reasons why the Minister proposes to make the appointment; and

(b) the local authority has a reasonable opportunity to satisfy the Minister that it has not failed to exercise or perform any of its functions, powers, or duties to the extent necessary to achieve the purpose of this Act, and having not succeeded in so satisfying the Minister, has failed to take proper steps within a time specified in the notice (being not less than 20 working days after the date of the notice) to remedy the defaults complained of.

(3) Any person appointed under subsection (1) to exercise or perform the functions, powers, or duties of a local authority under this Act may do so as if the person were the local authority, and the provisions of this Act shall apply accordingly.

(4) All costs, charges, and expenses incurred by the Minister for the purposes of this section, or by a person appointed by the Minister under this section in exercising or performing functions, powers, or duties of a local authority, shall be recoverable from the local authority as a debt due to the Crown or may be deducted from any money payable to the local authority by the Crown.

25A Minister may direct preparation of plan, change, or variation

(1) The Minister for the Environment—

(a) may direct a regional council—

(i) to prepare a regional plan that addresses a resource management issue relating to a function in section 30; or

(ii) to prepare a change to its regional plan that addresses the issue; or

(iii) to prepare a variation to its proposed regional plan that addresses the issue; and

(b) may direct the council, in preparing the plan, change, or variation, to deal with the whole or a specified part of the council's region; and

(c) must, in giving a direction, specify a reasonable period within which the plan, change, or variation must be notified.

(2) The Minister—

(a) may direct a territorial authority—

(i) to prepare a change to its district plan that addresses a resource management issue relating to a function in section 31; or

(ii) to prepare a variation to its proposed district plan that addresses the issue; and

(b) must, in giving a direction, specify a reasonable period within which the change or variation must be notified.

ATTACHMENT TWO: PREVIOUS BRIEFING