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Office of the Minister for the Environment

Chair

Cabinet

Response to Review of Environment Canterbury

Proposal

1. I seek decisions in response to the review of Canterbury Regional Council, known as Environment Canterbury (ECan). The key decision is to replace ECan councillors with commissioners. Additional decisions will empower commissioners to address pressing freshwater management issues as part of the wider response.
2. This paper is one of three relating to the Government's response to the review of ECan. Another papers approval of the legislation to give effect to these proposals. A paper noting the Minister of Local Government's and my intention to appoint commissioners to take over the governance functions of ECan will be considered at Cabinet on 12 April 2010. Legislation will be tabled in the House on 30 March and considered through all stages under urgency.

Executive summary

3. Canterbury's nationally significant water resources are under intense and increasing pressure. It is critical to the current and future economic, environment and cultural well-being of the people of Canterbury, and New Zealand, that these resources are well managed.
4. Long standing, systemic issues relating to the performance of Canterbury's regional council, ECan, have reached a critical stage. Evidence of failure has been apparent for well over a decade and concerns surrounding ECan were included in the Ministry for the Environment's briefing to me as the incoming Minister for the Environment.
5. ECan has been unable to deliver a robust, clear and effective framework for the management of natural resources (particularly fresh water) in the region, which has led to an ad hoc approach to resource management and an elevated risk of unsustainable outcomes. Because fresh water management is core to the business of ECan, and is of such economic, cultural and environmental importance, these issues are of serious and pressing concern. Perhaps equally as important as the failure itself has been the inability of successive ECan councils to remedy it.
6. The report and recommendations of the recent investigation into ECan's performance identified endemic organisational and cultural issues that cannot be easily resolved. The clear conclusion was that waiting for yet another election would not be enough, and likewise merely encouraging improved performance will not work. The Review Group found a significant gap, characterised as "enormous and unprecedented", between what needs to be done in Canterbury to appropriately manage water and ECan's ability to do so.

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7. The Canterbury community has lost faith in the ability of ECan to deliver on its statutory responsibilities and the conclusions of the Review Group have highlighted discontent with ECan. ECan's relationships with freshwater-stakeholders and parties such as Ngai Tahu and Canterbury's territorial authorities are compromised to a degree that undermines ECan's efforts to remedy the resource management issues in the region. A sustained and high degree of concern among the region's mayors led them to write to the Minister of Local Government in September 2009 to alert him to their serious concerns with ECan. They were concerned that ECan's performance could harm the future well-being and prosperity of Canterbury.
8. The Minister of Local Government and I held meetings with ECan, Canterbury mayors and chief executives, key stakeholders and Ngai Tahu in Christchurch on 24 February 2010. I have subsequently met with local authorities throughout Canterbury. I left these meetings with the impression that there was broad consensus in support of the Review Group's findings in relation to the institutional governance of ECan and almost unanimous support for strong central government leadership on this issue. There is less consensus on whether the Review Group's recommendation to establish a stand-alone Canterbury Regional Water Authority is appropriate. ECan and Ngai Tahu both expressed that such a move is premature, with further consideration required before such structural arrangements are put in place.
9. On 24 February, the Canterbury Mayoral Forum issued a press release urging Government to take immediate steps to address the serious issues that are raised in the report, and to implement its recommendations. On 3 March Ngai Tahu wrote to me, stating that "Ngai Tahu regretfully supports the recommended transitional arrangements to install commissioners in place of Council."
10. The threshold for intervention in the affairs of local government is very high, whether intervention occurs through the Local Government Act 2002, through the Resource Management Act or through legislation (as is proposed with ECan).
11. Intervention is only considered when there is serious failure, mismanagement or mis-governance. With ECan, the case for intervening includes the following:
 1. the Council has failed to effectively manage Canterbury freshwater (a natural resource of regional and national importance)
 2. it does not have a fully operative regional planning and policy framework for resource management (this has resulted in ad hoc and unsatisfactory arrangements for managing freshwater)
 3. there is an "enormous and unprecedented" gap between what needs to be done to effectively manage Canterbury freshwater, and ECan's ability to do so (as highlighted by the ECan review team's report).
12. These problems straddle the roles and functions of ECan under the Local Government Act 2002 and Resource Management Act 1991 (RMA). Under the Local Government Act 2002 the Minister of Local Government has the power to appoint commissioners but only in limited circumstances – it is not clear that these circumstances apply to ECan at this stage. Under the RMA, options of bringing in one or several commissioners to work with the existing Council (similar to what was proposed to me by ECan on 2 March 2010 in response to the Review Group's findings) do not appear to effectively address the findings of the Review Group that the problems in ECan are deep and systemic.

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13. There is a compelling case that immediate and direct action by Government is required to address a failure of governance on the part of ECan's elected Council to address immediate and legacy issues, particularly in relation to freshwater management.
14. I propose that Government should intervene by appointing and empowering commissioners to provide the governance and leadership necessary to rapidly bring the region's resource management framework into line, and to solve the immediate problems with ECan. Commissioners will, first and foremost, need to ensure those processes and initiatives that are operating or progressing well at ECan and in Canterbury continue. This intervention will not succeed if it fixes one issue whilst creating others.
15. My proposal will require legislation to replace ECan's elected council with appointed commissioners. The commissioners would step in as a transitional measure and be empowered to rapidly address the institutional and planning problems that are preventing effective resource management governance and decision making in Canterbury. The planned ECan election in October 2010 would be deferred until such time as the commissioners have completed their task. Under any circumstances the next regional council elections in Canterbury will take place no later than the elections scheduled for late 2013. The explicit intent is for the commissioners to withdraw and to be replaced by elected representatives as soon as their task is achieved and the present systemic issues are resolved.
16. Commissioners will be tasked with making institutional adjustments to ensure ECan is able to manage water well. If they determine that this is not possible in the current legislative framework and that new institutions are required, they will be able to make recommendations to Government to this effect. They will additionally be tasked with 'fixing' the water problem. This requires an operative and effective regional fresh water plan. It is only through such a plan that ECan can make strategic decisions about resources and lay the ground rules against which future decisions will be assessed. This will enable ECan to make robust and sustainable resource management decisions in an efficient and timely manner.
17. Commissioners will need to be experienced and capable individuals, collectively holding a wide and deep set of expertise and experience. They will have power to appoint and delegate appropriate people with the necessary status and experience in resource management to advise and/or decide on resource management matters. Commissioners will be required to draw on the wisdom and opinions of the mayors of Canterbury, seeking mayors' guidance regularly and thus ensuring they are aware of the different viewpoints throughout Canterbury on key issues. Central Government support will be available, so that commissioners are informed by the deliberations of the Land and Water Forum and are able to draw upon the wider New Start for Fresh Water work and decisions.
18. Additionally, commissioners will be given unique powers and will operate under an altered decision making framework for the duration of their appointments. They will be able to advance the planning framework (regional policy statement and regional plan) more quickly than normal. They will also be empowered to make recommendations on water conservation orders; an integral part of the freshwater management framework in Canterbury. The commissioners' decisions on the freshwater planning framework in Canterbury will be made after having particular regard to the vision and principles of the Canterbury Water Management Strategy – a strategy that has widespread support throughout the Canterbury region, has been developed following a lengthy collaborative and consultative process, and

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19. I am confident that the above proposal is the minimum required to turn ECan around, and that such intervention is not only in the interest of the well-being of the people of Canterbury, but is indeed in the interest of all New Zealanders.

Background

20. This proposal is in response to the findings and recommendations of the "Investigation of the Performance of ECan under the Resource Management Act & Local Government Act" (the Report).
21. On 15 February 2010, Cabinet invited the Minister for the Environment and the Minister of Local Government, in consultation with the Minister of Economic Development, Minister of Agriculture and Minister of Conservation, to develop the government's response to the report and to submit a paper to Cabinet on 1 March 2010 addressing the Government's response and next steps [CAB Min (10) 5/13 refers]. Cabinet considered the issue again on 8 March 2010 [CAB Min (10) 8/4 refers]. Cabinet deferred decisions on the submission attached to CAB (10) 86 but invited the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office for the preparation of a Bill to give effect to the proposals in the submission attached to CAB (10) 86.
22. Cabinet invited the Minister for the Environment to submit to Cabinet on 22 March 2010, if possible
 1. A final proposal;
 2. A draft Bill to give effect to the proposal; and
 3. A paper on the appointment of the proposed commissioners.
23. The 2007/2008 RMA Survey of Local Authorities found that ECan was only complying with statutory timeframes in 29 percent of cases. On the basis of this finding and advice from the Ministry for the Environment, I decided to investigate the performance of ECan under section 24A of the RMA. The Minister of Local Government and I discussed my intentions and the strong representations in favour of intervention that he had received from Canterbury region Mayors. We decided to expand the scope of the review of ECan to include Local Government Act issues.
24. The review was undertaken by an independent Review Group, chaired by Wyatt Creech and including Doug Martin, Doug Low and Greg Hill.
25. The Review Group has recently completed their review, and the report and recommendations of the review was publicly released on 19 February 2010.

Fresh water in Canterbury

26. Canterbury's rivers and lakes are both a taonga to Ngai Tahu and of cultural importance to all New Zealanders. The ecological and recreational values of the region's many braided rivers and lakes are individually and collectively nationally significant.
27. The current and potential economic benefits of water use in Canterbury, from irrigation and tourism in particular, are nationally significant. The Canterbury region has the largest potential for expanding irrigation development in New Zealand (see

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28. Canterbury has around 34% of New Zealand's hydro-generation capacity and electricity generated in the region accounts for approximately 18% of New Zealand's total generation in an average hydrological year. Most of this generation capacity is in the Waitaki Catchment, which also provides around 70% of New Zealand's generation storage.
29. In recent years Canterbury's water resources have been coming under increasing pressure. Demand for access to water is high and competition between different interests is increasing. The ecological health of lowland streams, high country lakes and groundwater is declining; there has been a loss of cultural and recreational opportunities. The issues are expected to become more acute as climate change impacts on water availability in the future.

Problems with ECan

Planning framework

30. Despite the 18 years since the enactment of the RMA, Canterbury still has not developed a clear and robust regional planning and policy framework for resource management. At the introduction of the RMA in 1991, ECan was grappling with existing and proposed river management plans under the Soil and Water Conservation Act 1967. ECan attempted to convert many of these to plans under the RMA but found the narrow scope of the river management plans didn't fit within the broader scope of the RMA. A strategic decision was taken by ECan in the early 1990's to proceed with an omnibus plan as opposed to a number of specific plans (e.g. air, water, discharge). A series of discussion documents were then produced as the Council tried with little success to progress the omnibus plan.
31. The Proposed Natural Resources Regional Plan (NRRP) was initially proposed in mid-2002, with water-related chapters¹ proposed in mid-2004. Over seven years later it is not fully operative. This lack of a RMA planning framework has contributed significantly to an ad-hoc approach to regional resource management in Canterbury, characterized by a 'consent-by-consent' approach to resource management decision-making.
32. It is not compulsory under the RMA for regional councils to develop statutory plans for the management of fresh water. However, it is surprising, given the complexity of Canterbury's ground and surface water resources and the degree of demand for access to these resources, that ECan does not have an operative first-generation plan for managing water in the region. Other councils facing heavy and growing demand for access to fresh water resources, such as the Hawke's Bay Regional Council, are well advanced in developing second-generation plans.
33. The lack of an operative plan plays a significant part in ECan's ongoing failure to meet statutory processing timeframes, make quality decisions and undermines efforts to effectively manage the cumulative effects of water takes or discharges to water.

¹ The complexity of these chapters combined with the highly contested nature of water management in Canterbury has meant the first (council) stage of plan hearings are only now drawing to a close.

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34. Canterbury also has over 8,500 existing consents granted in nine over-allocated 'red zone'² catchments, potentially threatening the sustainability of fresh water resources in these catchments.

Criticism from commissioners and Environment Court

35. Criticisms of the approach taken by ECan to managing fresh water in Canterbury have been repeatedly highlighted in decisions of both its own commissioners and the Environment Court, in particular in relation to ground water management.
36. ECan has, on occasion taken the unusual step of issuing media statements criticising independent commissioners' decisions where they contradict ECan's position and appears to have taken to blaming the RMA for its own inability to adequately manage fresh water resources.

A stance that costs ratepayers

37. There have been a number of legal disputes where the stance of ECan has cost rate payers significantly with cost awards such as Pegasus Bay case³ costing \$450,000 (reduced from an initial \$650,000 on appeal).
38. Other instances of poor judgment on ECan's behalf include the Banks Peninsula case⁴ (\$65,000 in awards to Federated Farmers and the Christchurch City Council), the withdrawal of costly to develop and time consuming plans and initiatives such as the Waimakariri flood plan and the failed coal ban initiative.

Concern from regional mayors

39. In September 2009, ten Mayors⁵ from Canterbury wrote to the Minister of Local Government outlining their and their chief executives' serious concerns with ECan. The letter noted "...the potential for these issues to impact on the future well-being and prosperity of Canterbury." Concerns outlined include:
 1. Businesses frustrated at difficulties operating under ECan compared to the rest of the country, with one potential large employer not locating their business in Canterbury as a result.
 2. ECan engaging on consents on an individual basis where they should have been dealt with at the policy level
 3. Long delays in consents processing, including those due to "extremely minor matters", resulting in financial loss to applicants
 4. Poor communication, including around major policy changes
 5. Lack of consistency on consent decisions and on consent processing

² A 'red zone' is one where more than 100% of the water considered available for abstraction has been allocated.

³ Where the planned 1800-home development near Woodend was opposed by Environment Canterbury on grounds Maori rejected it, despite Ngai Tahu reaching agreement with the developers.

⁴ Where ECan challenged a decision by Christchurch City Council on land development and landscape protection in the Banks Peninsula District Plan. After working for over ten years with a wide range of stakeholders, Christchurch City Council made a decision that protected approximately 25 percent of the Banks Peninsula, while Ecan wanted to increase this to approximately 75 percent. After ECan lost its appeal, the Environment Court released a judgment that ECan should pay \$35,000 to Federated Farmers (who were fighting for their 'right to farm') and another \$30,000 to the Christchurch City Council to help with legal costs.

⁵ Mayors of: Waitaki, Ashburton, Hurunui, Timaru, Christchurch, Waimate, MacKenzie, Selwyn, Kaikoura and Waimakariri.

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6. Delayed or nonexistent responses for information and on decisions
 7. Conflicts of interest
 8. A “stealth” approach to change, not collaborative and conciliatory, with an adversarial tendency to “draft and defend” rather than “draft and consult”
 9. A single focus on the environment, rather than on wider range of community benefits and outcomes.
40. On 24 February 2010, the Canterbury Mayoral Forum issued a press release urging Government to take immediate steps to address the serious issues that are raised in the report, and to implement its recommendations. The Canterbury Mayors made it clear that any intervention by the Government should be consistent with the direction of the Canterbury Water Management Strategy, emphasising that they did not want 10 years of work to be lost.

Failure to effectively implement previous Central Government intervention

41. Central government has previously chosen to step in to assist ECan to effectively perform its fresh water management role in the Waitaki catchment. This decision was taken in recognition of the complexity of the situation in the catchment, the national interest in ensuring that fresh water resources in the Waitaki catchment were effectively managed and ECan’s failure to progress its proposed NRRP in a timely manner.
42. The process for developing the Waitaki Catchment Water Allocation Regional Plan was robust – including the establishment of the Waitaki River Allocation Board of Inquiry – and the plan itself was generally supported by stakeholders. Despite Central Government’s direct assistance in this catchment, ECan has failed to adequately implement the resultant plan and it took nearly two years before ECan begun issuing consents under this framework. Many decisions on applications for consent in this catchment are still outstanding.
43. ECan’s apparent reluctance to ‘own’ and implement the Waitaki Plan was highlighted by the Mayors of the Waitaki and Mackenzie Districts in the joint letter from Canterbury’s mayors to the Minister of Local Government, and was identified as a significant issue in interviews conducted by the Review Group with ECan staff and multiple external stakeholders.

Politics dominate Council

44. While having political balance on regional councils is healthy and normal, political tensions at ECan appear to dominate to an unhealthy degree. The political divide between ECan’s councilors appears to have materially affected ECan’s ability to produce a robust and certain planning framework against which the public can design and lodge applications for resource consent. The uncertainty this has created has specifically led to the development of a litigious and adversarial culture amongst those seeking access to, or the protection of, fresh water resources in Canterbury.
45. Additionally, in December 2009, Auditor-General Lyn Provost found four ECan councilors had broken the law by debating and voting on proposed water charges when they had a financial interest in the vote as water consent holders or partners of water consent holders.

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Findings of the review

46. The report of ECan review identified major failings in the way that ECan is managing water in Canterbury and long running institutional problems. The report notes that the investigators were struck by the gap, characterised as “enormous and unprecedented”, between what needs to be done in Canterbury to appropriately manage water and ECan’s ability to do so. The Review Group concluded that Canterbury’s lack of a fully operative over-arching planning and policy framework for management of the region’s natural resources has resulted in a piecemeal, fragmented, inefficient and ineffective approach to the management of fresh water.
47. The Review Group did note that there have been recent improvements in performance, but concluded that these improvements, even if continued, would not be sufficient to ensure the effective management of fresh water in the region.

Importance of the issue

48. Without Government action to address these issues, the costs of the current situation could run to several hundred million, or potentially billions of dollars per year⁶. These costs include opportunity costs due to lost or significantly delayed investment and development, direct litigation costs to applicants and the community, potential damage to tourism and recreational resources, degradation of cultural and ecological values and damage to New Zealand’s international brand.
49. Having particular regard to the results of the recent joint investigation of ECan, it is evident to me that the natural and physical resource management problems in the Canterbury region span institutional and technical spheres, and are strongly influenced by the capacity and organisational-culture of ECan.

Responding to the issues

50. I am concerned at the findings of the Review Group, particularly with the issues the group identified regarding fresh water management; issues that I consider to be nationally significant. Drawing particularly on the recommendations of the Review Group, and based on the past performance of ECan as discussed above, I consider that the current ECan council is not capable of addressing these issues. I agree with the Review Group’s findings that successive ECan councils have created real policy confusion and inertia in the region. I do not believe it is just simply a matter of waiting for a new election and a new council to provide solutions. I consider that central government intervention is necessary and appropriate to address fresh water and broader resource management issues in the region.
51. If we do not act the economic, social and cultural well-being of Canterbury will continue to suffer. This situation has been exacerbated by the Report, which has prompted a wave of negative coverage and commentary on ECan’s performance. I expect that this obvious discontent with ECan will have undermined the ability of ECan staff to operate effectively and to continue to progress the positive work which is underway in the region.

⁶ These figures should be taken as a broad indication of the scale of potential costs rather than a definitive estimate. Based on a Ministry of Agriculture and Forestry Technical Paper 04/01, with more information in the attached Regulatory Impact Statement

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52. I have powers under section 25⁷ of the RMA to appoint commissioners to take over the RMA functions of ECan. However, there is uncertainty about the extent to which a person appointed under these powers would be able to direct the chief executive and to spend council money on the full range of council functions. There would be significant potential for conflict in terms of overall leadership and priorities between any commissioner appointed by the Minister for the Environment and the ECan councillors. This makes it unlikely that such an intervention on its own would be able to address the systemic and institutional capacity issues that are at the heart of planning dysfunction in Canterbury.
53. It is similarly unlikely that the ability to call-in applications or a proposed plan would be the best mechanism for addressing the ingrained capacity and organisational-culture problems in ECan; using this tool may prompt improvements in specific instances but it is likely that the underlying issues would limit the effectiveness and longevity of outcomes.
54. Within the LGA, the Minister of Local Government's power to appoint a commissioner or person(s) to act on behalf of a local authority is limited to specific circumstances that may not apply in this case. The Minister has power to appoint a commissioner under Section 255 of the LGA if the local authority is unable to perform and exercise its duties and functions because it cannot hold meetings owing to a lack of quorum, or if the authority requests the appointment of a commissioner. The Minister's powers to appoint a commissioner under Section 256 only apply if the local authority is "wilfully refusing or substantially refusing to perform and exercise its duties and powers".
55. ECan has proposed entering into a negotiated agreement between the Minister for the Environment and the councillors regarding what is to be delivered to improve fresh water management in the Canterbury region. Under this approach a commissioner/advisor would be appointed to oversee implementation of the negotiated agreement and a secondary advisory group would provide further oversight of the Government's and ECan's progress. The agreement would require among other things the:
- rapid notification of decisions on the Natural Resources Regional Plan
 - rapid notification of a second generation regional policy statement
 - completion of a 'fit-for-purpose' review of the current organisation structure to fill capacity gaps in response to the findings of the Review Group and focusing on the planning and consenting directorate
 - establishment of zonal committees and the Water Executive proposed in the Canterbury Water Management Strategy (CWMS)⁸ along with statutory recognition of the zonal and regional implementation programmes anticipated by the CWMS
 - complete review of current iwi liaison functions.
56. ECan proposes to request that the Government appoint a commissioner/advisor and invite the commissioner/advisor to exercise water management functions under the RMA. It is, however, unclear what role the secondary advisory group would fulfil,

⁷ Section 25 of the RMA enables the Minister for the Environment to appoint one or more persons to exercise or perform all or any functions, powers, or duties under the RMA in place of the local authority.

⁸ I discuss the CWMS in greater depth in paragraphs 71-76 of this paper.

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and specifically how it would relate to elected members and the Government. The proposal focuses on the specific recommendations relating to water management, and it is not clear whether and how broader organisational issues (such as culture, management, stakeholder relationships) would be addressed. It is also unclear whether such an agreement would be durable following elections scheduled for October 2010, or whether statutory intervention would be required to bind incoming councillors to comply with its terms. It would appear that the same issues of potential conflict and uncertainty apply to this proposal, which may limit its ability to address ingrained system issues.

57. ECan's proposal draws strongly on changes anticipated by the CWMS to the institutional and resource management decision-making frameworks in Canterbury. While the proposals in the CWMS may have merit I believe they need to be considered further. I have reservations at this stage about giving statutory recognition to the zonal and regional implementation programmes, as it is unclear what decisions the zonal and regional committees would be making and what effect these decisions would have on the statutory planning framework.

Proposed response

58. I have focused my consideration on four options for responding to this issue:
- come to an agreement with ECan on a voluntary basis to effect change – that could involve appointing an assistance commissioner acting in an advisory role
 - appoint commissioners to deal with the RMA functions only
 - appoint commissioners to take over the ECan governance roles and functions on a temporary basis
 - implement fully the recommendations of the Review Group, including the creation of a regional water authority.
59. I consider that legislation will be required to enable effective intervention that addresses the systemic issues at the heart of the problems with ECan.
60. I propose legislation to replace ECan's elected council with appointed commissioners, who will become the governing body of ECan until they complete their task or new councillors take office at the next election, which at the latest will be October 2013. It will not be possible for commissioners to resolve deep-seated institutional problems before the elections currently scheduled for October 2010. Accordingly, I propose that this election be deferred until such time as commissioners have satisfactorily addressed the immediate issues facing ECan but no later than the local body elections scheduled for late 2013.

Commissioners

61. As the governing body, the commissioners will have the same statutory duties and powers as the former elected council under the LGA, RMA and other statutes that give regional councils responsibilities. They will be expected to provide leadership and direction for institutional change, and leadership to the Canterbury region on resource management matters, including fresh water. The public consultation and participation requirements of the LGA and RMA remain in place.
62. The composition and attributes of the commission will be crucial to ensuring its eventual success. There will be four to seven commissioners with some full time members.

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63. Commissioners will collectively possess a suitable degree of demonstrated experience and competency in the areas of organisational change, fresh water management, the governance and/or executive management of local government bodies in New Zealand, knowledge of Treaty of Waitangi issues and experience in and knowledge of tikanga Māori (Ngai Tahu customary values and practice).
64. A separate paper will be presented to Cabinet on 12 April, noting the intention of the Minister of Local Government and myself to make the appointments of proposed commissions. Prior to Cabinet consideration I will consult with the Minister of Energy and Resources, Minister of Agriculture, Minister of Māori Affairs and Minister of Conservation.
65. Commissioners will have all the same powers as a Council under the RMA with respect to delegating to employees or hearings commissioners functions, powers and/or duties. These powers include the ability to revoke that delegation at any time by notice to the delegate.

Timeframe for intervention

66. ECan, Ngai Tahu and the region's territorial authorities have requested a rapid response on the grounds that it is important to minimise disruption and uncertainty. If legislation is enacted I expect Commissioners to be running ECan from 1 May 2010.
67. I agree there is a need for haste in this initial intervention to minimise the debilitating effects of uncertainty following the Review. However, the importance of getting the long-term institutional frameworks correct for freshwater management in Canterbury is too critical to rush. There are strategic, integration, political and funding risks associated with the Review Group's proposal to establish the Canterbury Regional Water Authority. These risks require further consideration.
68. Additionally, there are significant implications for the structure, functions and accountabilities of local government associated with setting up a separate authority, and these will need to be carefully considered in the national context. The Minister of Local Government is also considering the scope of possible strategic work on local government structure, which would include the implications arising from the ECan intervention, Auckland governance changes, and several other policy work streams that affect local government. Time is needed to give full consideration to other options which may provide a better institutional framework, and also to capitalise on the outcomes of the findings of the Land and Water Forum and decisions coming out of Government's New Start for Fresh Water and Phase Two Resource Management Reform processes. Such consideration will be undertaken alongside Ngai Tahu as Treaty partner, and be informed by stakeholders in the region.
69. I note that while my proposal is not inconsistent with the recommendations of the Review Group, it does not implement them in full. I do not propose to separate out water functions from ECan and to transfer them to a separate regional water authority at this point in time. I agree with the assessment of Ngai Tahu and ECan that such a structural change requires significant consideration and analysis.
70. I instead propose several other changes in the following sections of this paper which I am confident will help the commissioners to effectively address the current impasses in Canterbury's water management in a reasonable time frame. I believe this proposed response provides the breathing space to find durable solutions to the institutional and governance problems within ECan, whilst also immediately

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The Canterbury Water Management Strategy

71. The collaborative Canterbury Strategic Water Management Study has recently led to the development of the CWMS. The CWMS has gained the broad support of many stakeholders across the region (including the territorial authorities) and has generated a good deal of momentum behind the development of a robust and durable framework for managing fresh water in Canterbury.
72. The CWMS proposes significant changes to the institutional and resource management frameworks in Canterbury; the implementation detail of some of these changes is still being worked through. I consider it would be premature to implement the more wide reaching changes anticipated by the CWMS for largely the same reasons I have chosen not to recommend establishing a Regional Water Authority (as per the Review Group's recommendation).
73. However, I firmly believe that Government's response to the recommendations of the Review Group should capitalise on the momentum provided by the CWMS. I propose to achieve this by requiring commissioners to have particular regard to the vision and principles of the CWMS, which will be included as a schedule in the Act, when making decisions and recommendations on the framework for managing fresh water in Canterbury.
74. The vision of the CWMS is:

To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.
75. The principles of the CWMS are attached to this paper as Appendix 2.
76. The vision and principles of the CWMS are subtly different from, but consistent with, the sustainable management purpose of the RMA. Requiring commissioners to have particular regard to the vision and principles of the CWMS when making decisions on fresh water management is unlikely to significantly tilt the playing field in favour of any particular outcome. However, it will ensure that any decisions the commissioners make on the planning framework are taken in the context of this recent and well-supported expression of community aspirations.

The Proposed Regional Plan and Regional Policy Statement

77. The Natural Resources Regional Plan (the NRRP) is ECan's planning response to the regional management of air quality, water quality, water quantity use of the beds and margins of lakes and rivers, wetlands and soil conservation. An effective and operative NRRP would provide an overarching natural resource planning framework for Canterbury. Subsequent decisions, including on resource consents, would be considered within this framework rather than the current ad-hoc, untimely, disjointed and high transaction cost approach. A majority of the proposed NRRP is not operative, with Changes and Variations to the proposed NRRP at various stages⁹ in the RMA plan preparation process (as prescribed by Schedule 1 of the RMA). Within these processes, hearing panels have been appointed by the Council, with

⁹ The NRRP consists of 8 chapters which address sustainable management of natural resources in the Canterbury Region. Chapter 1 and Chapter 3 are each partly-operative from 27 October 2009, Chapter 2 is operative from 27 October 2009. Chapters 4-8 were added by Variation 1 and are at various stages in the plan development process.

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hearing panels including currently elected councillors as well as independent commissioners.

78. The proposed NRRP has been in development for over seven years. The complex and technically driven approach ECan has adopted for developing this plan has prompted a significant degree of opposition. This opposition will take time to resolve and the NRRP is unlikely to be fully operative for some years. An unspecified period of delay, likely to be measured in years rather than months, is unacceptable. Decisions on the NRRP need to be finalised within a reasonable timeframe.
79. The commissioners need to be empowered to progress the proposed NRRP to conclusion so that ECan has the ability to make decisions within an operative planning framework. This will decrease both the length of time required to process consents and litigation costs, while increasing the cohesion and quality of decisions. These decisions will act to test the various parts of the NRRP and will inform the future development of the planning framework. Future changes to the NRRP are to be expected, and will eventually strengthen the NRRP. The sooner the NRRP becomes operative the sooner momentum will be built in support of a strategic vision for the management of fresh water resources in the region. I consider that the appointment of Commissioners to act as an effective governance body of ECan will speed progress on planning processes currently underway.
80. In order to empower commissioners to expedite decisions on the NRRP, I propose that there only be appeals to the High Court on points of law with no appeals on the merit of the commissioners' (or their delegates') decisions. This differs from the current situation where appeals on merit are available to the Environment Court. Appeals to the superior Courts on the decisions of the High Court would follow normal processes.
81. I also propose that any further changes to the RMA planning framework that are promoted by the commissioners during their time in office would be subject to the same truncated appeals process (no appeals to the Environment Court on merit). This would include changes to the NRRP, changes to other operative regional (water) plans and changes to the regional policy statement. Extending this to changes to the regional policy statement will maintain strategic consistency between objectives, policies and rules for resource management in the Canterbury region as expressed in both regional and district council documents. As discussed in the above section on the CWMS, I propose that the commissioner's decisions under the RMA on the planning framework must be made after having particular regard to the vision and principles of the CWMS, in addition to existing statutory criteria.

Existing and proposed water conservation orders

82. In the absence of an operative planning framework for managing water in Canterbury, the region's water conservation orders (WCOs) have set the benchmark around which the NRRP has begun to develop and consents have been granted. While the RMA explicitly provides for this by prohibiting plans from being inconsistent with the provisions of WCOs, there is such a stark contrast in Canterbury between the way resources subject to WCOs are managed versus those that are not subject to WCOs that I'm concerned at the sustainability of the overall resource management outcomes. I consider that the attributes of the Canterbury region justify a move to ensure that the region's water resources are managed in a way that ensures sustainable outcomes. I am also mindful that the Canterbury community has, following a lengthy collaborative process, developed a strategy for water management - the CWMS - that has gained widespread support

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83. Accordingly in Canterbury, during the period of intervention, as the Minister for the Environment, I would be required to direct applications for new WCOs and applications to vary or revoke existing WCOs to the commissioners rather than a Special Tribunal. The commissioners would follow normal statutory procedures for inviting submissions and conducting hearings, although there would be no provision for submissions (appeals) to the Environment Court on the merit of their recommendations. In addition, commissioners' recommendations on WCOs would be made against an amended decision-making framework that provides for sustainable management as the primary consideration in determining whether to recommend that an order be made and ensures that appropriate regard is given to the most recently expressed aspirations of the local community, as reflected in the vision and principles of the CWMS. The commissioners' recommendations on WCOs would be appealable to the High Court on points of law only. As Minister for the Environment I would have the final decision making role on WCOs in accordance with existing RMA provisions.
84. An application for a WCO over the Hurunui River is currently subject to submissions (appeals) to the Environment Court. The threshold for Government intervening in matters before the judiciary is rightfully very high. In this case I consider that it is necessary to promote consistent planning outcomes and avoid the potential need for subsequent revision of the recommendations of the Environment Court (and the time, cost and uncertainty associated with this). Accordingly I propose that the application for a WCO over the Hurunui River be referred to the commissioners. The Environment Court process would cease and the commissioners would consider the application, and submissions on it, against the amended criteria set out in paragraph 83 above. The original applicant would have an opportunity to revise its application in light of the new decision-making criteria. In order to ensure that the process is equitable but also efficient, I propose to allow persons who made submissions to the special tribunal on the application for a WCO over the Hurunui (this would include the parties to the Environment Court proceedings) to make submissions to the commissioners and to participate in hearings.

Need for a targeted moratorium mechanism to prevent further allocations in over allocated and at-risk catchments

85. Currently, there are certain ground water zones and other fresh water resources in Canterbury that are nearing or beyond full allocation. In many of these over-allocated catchments, consents for new water takes are still being granted, further jeopardising the economic, environmental and social well-being of communities. To stop this, I propose that commissioners be given the power to impose targeted moratoria, subject to the approval of the Minister for the Environment. These moratoria would enable commissioners to refuse to accept new applications and to put existing applications on hold for a defined area(s) for a defined time period(s). These moratoria would not affect applications that have either been decided or are subject to appeals to the Environment Court – those applications would proceed in accordance with existing statutory processes and criteria. Both the commissioners

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86. At the end of any moratorium, applications will be processed by reference to any new planning framework that has been put in place. Applicants whose applications were put on hold will be given a suitable period to revise their applications in light of the new planning framework without prejudice to their position in the processing queue. The revised application must be similar in scope to the original application. Resource consents that are due to expire during the intervention period will be deemed to continue until a suitable period after the end of the moratorium; with that additional period of time giving applicants an opportunity to apply for replacement consents at the end of the moratorium.
87. This will give commissioners a targeted tool to prevent the current situation getting any worse while they work to put in place an operative NRRP and consider any changes to WCOs.

Consistency with the findings of the Land and Water Forum and wider New Start for Freshwater

88. It is important that institutional changes and planning related to fresh water in Canterbury are closely linked to national developments. The commissioners will need to maintain consistency with the broader national level policy work underway in the New Start for Freshwater policy programme and keep abreast of the deliberations and recommendations of the Land and Water Forum.
89. It will also be necessary for the commissioners to feed back to Government lessons learnt from this targeted policy intervention in Canterbury. We will be able to establish an effective 'feedback-loop' between this policy work and the work of commissioners through the terms of reference for the commissioners. To further enable this, it is appropriate that relevant departments (namely the Ministry for the Environment, Department of Internal Affairs and the Ministry of Agriculture and Forestry) make support available for the commissioners so that they remain informed of, and are able to draw on, additional information and experience emerging from the New Start for Fresh Water.

Summary of policy proposal

90. The key aspects of the policy proposal are discussed below, with those that are more appropriately not advanced directly through the legislation to be advanced as is most appropriate. The key aspects of the policy proposal are:

Commissioners

1. Replace the current elected ECan councillors with a panel of four to seven commissioners to act as the governing body for the regional council.
2. Election for Council deferred until commissioners have carried out their task, but no later than October 2013.
3. The Minister for the Environment and Minister of Local Government in consultation with the Minister of Energy and Resources, Minister of Agriculture, Minister of Māori Affairs and Minister of Conservation will appoint the commissioners, including a Chair and Deputy Chair.
4. Commissioners' appointments will expire following the election of Councillors.

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5. Commissioners will collectively have a suitable degree of demonstrated experience and competency in the areas of organisational change, fresh water management, the governance and/or executive management of local government bodies in New Zealand, knowledge of Treaty of Waitangi issues and knowledge and experience of tikanga Māori (Ngai Tahu customary values and practice).
6. Commissioners will be required to comply with protocols established under existing local government triennial agreements setting out processes governing communication, co-ordination and consultation on new regional council activities with Canterbury's territorial authorities. The commissioners will be required to enter into new protocols with incoming territorial authority councils following the 2010 local body elections.

Water

7. When making decisions on the RMA planning framework (proposed regional plan and policy statement), commissioners will have particular regard to the vision and principles of the CWMS in addition to existing statutory criteria.
8. For the time of the intervention, as Minister for the Environment I will direct applications for new Canterbury WCOs or applications to alter or revoke existing WCOs in Canterbury to the commissioners rather than a Special Tribunal.
9. Appeal rights on commissioners' decisions on the RMA planning framework (proposed regional plan and policy statement) and on the commissioners' recommendations on WCOs will be limited to appeals on points of law to the High Court. Appeals beyond the High Court will follow standard processes.
10. When making recommendations on Canterbury WCOs, commissioners will be required to:
 - i. Accord primacy to the purpose and principles of Part 2 of the RMA in deciding whether to recommend that an order be made
 - ii. have particular regard to the vision and principles of the CWMS in addition to existing statutory criteria
 - iii. provide for public submissions and hearings in accordance with normal statutory processes, but there will be no provision for submissions (appeals) to the Environment Court on merit.
11. Commissioners will be empowered to establish targeted moratoria, subject to the approval of the Minister for the Environment, allowing commissioners to refuse to accept new resource consent applications and/or to put existing applications on hold in defined areas for a defined time period.
12. All matters will revert to the status quo following local government elections.

Commissioners' Terms of Reference

91. The Minister of Local Government and I will be responsible for issuing the commissioners with Terms of Reference. These Terms of Reference will be in addition to, and will not override, provisions within the LGA and RMA (as amended by legislation). They provide an opportunity to advise and guide commissioners on priorities for commissioners. I propose that the Terms of References be developed after consultation with relevant Ministers (including the Minister of Agriculture), in

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1. assess the scope of matters to be dealt with and determine the priority of the tasks and decisions they are required to make
2. use opportunities provided in the statute to deal with matters in an integrated and expeditious manner
3. seek advice from Canterbury territorial mayors on issues that impact on their roles, functions and powers;
4. ensure that any delegations in place or to be put in place are made to appropriately skilled and experienced persons and, in particular, when delegating any decision making powers in relation to the Resource Management Act 1991, have regard to the need for experience in conducting hearings and making decisions under the Resource Management Act 1991 and knowledge of tikanga Maori, including Ngai Tahu customary values and practices.
5. consider issuing draft decisions on the Natural Resources Regional Plan and Regional Policy Statement giving interested parties an opportunity to comment on the draft decision before a final decision is made
6. report quarterly to the Minister for the Environment on progress towards resolving the issues raised in the report of the ECan Review Group – particularly relating to freshwater management
7. review and provide advice to Government on the long term governance and institutional arrangements in Canterbury necessary to promote durable resolution of the issues raised in the report of the Review Group – particularly relating to freshwater management
8. regularly communicate lessons learnt during this temporary period of intervention to government officials – particularly relating to freshwater management.

Risks and transitional/implementation issues

Risks with proposed response

92. The proposal is striking new ground in New Zealand and it is difficult to know with any certainty how significant the risks associated with it will be. However, there are a range of potential risks including:
 1. This legislation needs to be enacted quickly under Urgency. Such speedy passage raises both perception risks (normal parliamentary processes of review such as consideration by a Select Committee are not followed) and technical risks (there is a risk of legislative error in this statute). I propose to minimise this risk as far as possible by minimising the effect of this statute on the primary legislation and by including an explicit expiry of the institutional arrangements in the legislation.
 2. There are significant risks associated with removing existing rights that guarantee community participation in decision-making both via the election of decision-makers and via rights to appeal those decisions. The proposal to progress this legislation under urgency enhances these risks by reducing opportunities for public comment. In particular, the proposed intervention has

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3. There are also risks stemming from the proposal to replace the elected council in its entirety, when the Review Group found that ECan's functions and general governance outside of resource management matters, including fresh water, are adequate. The Review Group considered this issue and found that separating functions would create real issues in terms of effective governance and accountability. Such an option would be destabilising and cut across local government elections in 2010.
4. There is the potential that the commissioners will be overworked, the broad scope of their task may lead to lower priority functions being set aside to allow them to focus on the key resource management issues identified by the Review Group. Commissioners will be given the power and flexibility to deal expeditiously with key resource management issues.
5. The proposal transfers responsibility for ECan's challenges to Government appointed commissioners and in doing so places a great deal of faith and responsibility on a small number of individuals to resolve the problems in Canterbury. The task is complex and challenging, and success will not be easy. Government will need to appoint the right people as commissioners. Securing commitment from people with the correct range of skills and knowledge is critical, and is likely to rely in part on the ability to provide assurance that they will be appropriately and effectively supported.
6. While preventing appeals to the Environment Court on merit will speed development of the planning framework in the Canterbury region, the decision to minimise the 'footprint' of the intervention on the primary statute (or to limit the process differences between the legislation and the RMA) could introduce sequencing issues and timing implications. The proposal leaves it to the commissioners to manage the transition of processes already well underway to the new regime, to schedule hearings, to decide on the appropriate approach to making decisions (whether to issue interim decisions or not) and to set the sequencing of their decisions. This last point is particularly important because the commissioners will not be able to issue any decisions on the NRRP, even interim decisions, which are inconsistent with WCOs as they currently stand. If WCOs are subsequently amended, the parameters within which the commissioners' decisions on the NRRP were made could change, prompting the need to re-visit the NRRP. This could limit opportunities to take a coordinated and strategic approach to fresh water planning.
7. Under this proposal there is a heightened risk of community frustration at the truncated appeal rights (increasing the risk of procedural appeals), process

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8. Additional resources could be required from the Ministry for the Environment, Department of Internal Affairs and Ministry of Agriculture and Forestry in order to assist the commissioners in succeeding. Although it is difficult to predict exactly what support would be required, it would impact on existing work programmes. If the resource requirement is significant, resources will need to be reallocated to preserve the ability of Central Government to deliver on priority work programmes, such as the New Start for Fresh Water.
9. Government intervention to address ECan's problems could increase the number of formal requests for intervention in other regions.
10. Such a significant intervention will be disruptive for staff and initiatives within and related to ECan, with a risk that momentum on positive work will be lost. The intervention may possibly have backlash on engagement and relationships between central government and local government, both at the political level and at the level of officials. Collaboration on projects currently under way could suffer. The fact that the intervention focuses on addressing the problem rather than on the ECan staff should mitigate this risk. The risk is mitigated by supportive statements for intervention made by Local Government New Zealand: "There is a need for swift, drastic action but there must be a firm commitment to elections in 2013 or earlier."
11. As the commissioners will be appointed by the Minister for the Environment and Minister of Local Government, consideration will need to be given to ensuring that the Crown's position as a good-faith Treaty partner with Ngai Tahu is not jeopardised by the actions of the commissioners. It is worth noting that Ngai Tahu has both significant cultural and economic interests in the management of Canterbury's fresh water. This risk is being mitigated through continued good faith engagement with Ngai Tahu, and the requirement for at least one commissioner to have knowledge of tikanga Māori (Ngai Tahu customary values and practice).
12. Removing rights of appeal to the Environment Court leads to a heightened risk of community frustration and provides an incentive for procedural or technical challenges to the High Court. Clearly successful challenges that result in requirements to rehear matters are undesirable. This risk will be mitigated by commissioners engaging with stakeholders and the community and by taking steps to ensure proper process, including considering whether to issue interim decisions and to take steps to allow for technical matters to be resolved. The legislation will also include a provision to make it clear that the amended regime does not in itself mean that matters must be reheard. Removing the right to appeal the merits of decisions on the NRRP and RPS removes an avenue for testing and ensuring the quality of the policy and planning

- ¹⁰ This risk is
- to be mitigated by encouraging the commissioners to work closely and be advised on major matters by people with significant experience and standing on resource management issues, and to request that the commissioners consider the merits of issuing interim decisions and seeking comment from participants on matters of technical detail.
13. Some stakeholders will perceive the proposal to amend the criteria against which recommendations and decisions are made in relation to WCOs, and applications to amend WCOs in Canterbury, as a significant dilution of both the processes and purpose of the WCO mechanism. This intervention is restricted to Canterbury and no significant national level decisions on fresh water will be made prior to the Land and Water Forum reporting back in July 2010.
 14. Establishing an amended process to alter WCOs in Canterbury will create a precedent that will increase the risk associated with decisions to reject requests to alter other WCOs. These risks will potentially be most significant and challenging when associated with Treaty settlement processes.

Transitional/implementation issues

93. There are a number of significant issues which need to be further explored. These include:
 1. Transitional issues: one example would be where current hearing panels on the proposed NRRP comprise both independent hearing commissioners and ECan councillors. When the councillors are removed, their role as hearing commissioners becomes unclear. The Government-appointed commissioners would have the power, just as any local authority does, to revoke delegations and make appointments if they wished. A second example would be where panels are currently in deliberations, raising uncertainty about the appropriateness of making decisions under an altered decision-making framework (appeal rights and criteria). It is proposed to minimise the risk of procedural challenges and delays to the process by clarifying that commissioners when making decisions on the planning framework may, but are not required to, provide parties with an opportunity to make further submissions or to conduct re-hearings solely as a result of the appointment of commissioners or changes to statutory criteria. A third transitional issue arises during the period between enactment of the legislation and the appointment of commissioners, where ECan's councillors may make decisions (financially or otherwise) that would not be in the best interests of the incoming commissioners.
 2. Logistical reality for commissioners: the impact of the proposed changes on the functions of ECan will be significant. The Commissioners will be required to carry out a broad and complex workload. There is a significant risk that it will not be possible for the Commissioners to effectively manage this workload including sitting on numerous committees and making the large number of decisions necessary to allow ECan to continue to operate and carry out the

¹⁰ From "Departmental Report on the Resource Management (Simplifying and Streamlining) Amendment Bill" prepared by the Ministry for the Environment, June 2009, page 193.

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functions required through the various relevant Acts alongside providing advice to Government and resolving fresh water management issues in the region. I propose to direct officials to work closely with ECan officers to minimise these risks once cabinet approval has been granted.

3. Exact ongoing role for Central Government: it will be critical the success of the intervention to define the ongoing role of Central Government and clarify what expectations the commissioners can reasonably have.
4. Timing: commissioner appointments are likely to take effect no later than 1 May 2010. This will fall in the middle of ECan's annual plan and budgeting process. The annual plan will almost certainly have been notified and the draft budget completed, with commissioners required to hear submissions on a plan and budget that they have had no role in preparing.

Consultation

94. In undertaking the review of ECan, the Review Group interviewed representatives of Ngai Tahu and a broad range of stakeholders in Canterbury resource management matters including environmental groups, territorial authorities, transport providers, energy providers, primary sector groups, law firms and ECan. The view expressed in these interviews influenced and were reflected in the Review Group's conclusions.
95. Following public release of the Review Group's report, the Minister of Local Government and I met with ECan councillors and mayors, chief executives of Canterbury territorial authorities, Ngai Tahu and key Canterbury stakeholders. These discussions informed the consideration of options and this resulting proposal.
96. ECan's initial response to the Review Group's report identified strategic, integration, political and funding risks associated with the Canterbury Regional Water Authority proposal, which is among the reasons why this element of the Review Group's recommendation is not being pursued at this time. Instead, the proposal affords the commissioners time to make recommendations on the future institutional framework for fresh water management in Canterbury, including how and if such a proposal is desirable.
97. ECan's Council wrote to the Minister of Local Government and Minister for the Environment on 2 March 2010 with a proposed "negotiated agreement" to address the findings of the Review Group. ECan proposes to request that the Government appoint a commissioner/advisor under section 255 of the LGA and invite the commissioner/advisor to exercise functions under section 25 of the RMA. It is, however, unclear what role the secondary advisory group would fulfil, and specifically how it would relate to elected members and the Government. The proposal focuses on the specific recommendations relating to water management, and it is not clear whether and how broader organisational issues (such as culture, management, stakeholder relationships) would be addressed. It would appear that the same issues of potential conflict and uncertainty apply to this proposal, which may limit its ability to address ingrained system issues.
98. Ngai Tahu wrote to the Minister of Local Government and Minister for the Environment on 3 March 2010 and indicated their opinion that, on the whole, the problem definition provided by the Review Group was correct. They went on to "regretfully support" the need for commissioners as a transitional arrangement. Ngai Tahu valuably highlighted the importance of giving effect to the Treaty partner status of Ngai Tahu and the taonga status of fresh water in any potential

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99. Meridian Energy has also written, highlighting the importance of hydrogeneration in Canterbury to the region and nation and discussing that, while having broad support, the CWMS has some issues which need to be worked through and a better balance struck. Meridian concludes that "Our principle concern is for the significance to New Zealand of productive uses of water in the region, including hydro generation, to be reflected in Commissioner and subsequent CWMS considerations."
100. This proposal has been prepared by the Ministry for the Environment in consultation with the Department of Internal Affairs, Ministry of Agriculture and Forestry and State Services Commission. The Department of the Prime Minister and Cabinet was informed of this proposal.
101. Consultation on an earlier version of this Cabinet paper was undertaken with the Department of Internal Affairs, Ministry of Agriculture and Forestry, the Treasury, State Services Commission, Ministry of Economic Development, Department of Conservation, Ministry of Justice, Ministry of Transport and Te Puni Kokiri. The Department of the Prime Minister and Cabinet was informed of the contents of the earlier proposal.
102. The following concerns were raised by departments on the earlier version of the Cabinet paper:
 1. The Ministry of Justice does not agree with the proposals to replace the elected Councillors for all of ECan's functions, defer local body elections or remove the right of appeal on the NRRP or water conservation orders, except on points of law. The proposals to replace the elected Councillors and defer local body elections are of constitutional significance. The proposals to remove the right of appeal on the NRRP or water conservation orders, except on points of law, present an access to justice issue. The Ministry of Justice is concerned that this is not consistent with the Government's statement on regulation: "better regulation, less regulation" which requires "a particularly strong case [to be] made for any regulatory proposals that are likely to override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee guidelines). These common law principles include "the right of citizens to have access to the courts." The Ministry of Justice considers that this is a significant proposal, which combined with the removal of the elected councillors means that parties with a stake in Canterbury's natural resources have significantly less ability to protect their rights and interests than elsewhere in the country."
 2. The Department of Conservation agrees that there is a need to make urgent progress with water management frameworks in Canterbury, but has concerns about the recommendations in this paper. It believes the Report does not justify the transferral of ECan's complete role to commissioners. The Department of Conservation also supports the views of the Ministry of Justice regarding the removal of rights of appeal on content, and in addition considers that this would be likely to result in poor water management frameworks that would not provide the long term certainty that is needed in Canterbury. The Department of Conservation also has concerns about

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- i. The Department of Conservation considers that a better approach would be to adopt an approach similar to Option 6, but with three key differences, namely (1) putting in place a commissioner or commissioners to sit alongside ECan and push the policy framework broadly set out in the paper through, and (2) by leaving the WCO provisions in the RMA intact, and (3) introducing the ability to put applications to take water on hold. Under the Department of Conservation's proposed option, ECan would be assisted to resolve all the issues raised in the report, with targeted support and assistance provided to drive this. This could include:
 1. appointing a commissioner or commissioners and experienced staff from other councils to sit alongside ECan's elected councillors with a specific mandate to drive through the structural, cultural and process reforms proposed by the review group;
 2. providing additional planning support to ECan and to facilitate and/or fund the secondment of additional experts with a proven track record in applying a balanced and effective approach to resource management
 3. filling the immediate skill gaps in other areas such as social and economic planning
 4. increasing project management capacity
 5. setting statutory deadlines for the next stage of the NRRP officials work
 6. requiring ECan to prioritise the elements of the water planning work, and to progress these through existing processes as a matter of urgency
 7. asking the Environment Court to give priority to appeals on ECan planning documents
 8. retaining the existing hearing commissioners for the NRRP and related plans (and therefore retaining their experience and knowledge), but ensuring that they are organised to rapidly deliver on priority work areas;
 9. providing further assistance to allow the hearing commissioners to progress issues faster.
 - ii. The Department of Conservation considers that such an approach would allow the work done over the last 10 or so years to be rapidly completed, and that this could deliver a framework that would be widely accepted and workable. The ability to put applications on hold would give reassurance to both users, and those concerned that conservation and other values be retained, that consents would not continue to be issued on an ad hoc basis, but rather in a managed way through the new framework.
3. In the case of the NRRP, the Department of Conservation considers that the recommendations could add significant legal uncertainty to the process, which will reduce both the ability to make rapid progress and the chances of successfully achieving a robust planning framework. The Department of

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4. In the case of WCOs, the Department of Conservation believes the recommendations would prevent achievement of the purpose of the WCO section in the RMA, and lead to the loss of outstanding water body values. The proposed changes may therefore be highly controversial, particularly among those groups who have initiated WCO processes (e.g. fish and game councils and recreational groups). There is no evidence in the Review report or elsewhere indicating that WCOs are “out of date” and not reflecting the current community’s aspirations or that they are causing problems for water management in the Canterbury region. WCO provisions are specifically for the protection of outstanding water bodies only – to change the criteria to sustainable management would not align with this purpose. Changes to the WCOs may mean more and/or lengthy appeals as they would remove the certainty that has been established over many years of case law.
5. Te Puni Kōkiri would support the requirement for the panel of commissioners to be for more than one member with specific expertise in tikanga Māori (Ngai Tahu customary values and practice) and Treaty of Waitangi issues. This membership is required to mitigate risks that the Crown appointment of natural resource management decision-making roles being inconsistent with the Treaty relationship. This is particularly important in light of the proposal to remove the rights of appeal on the NRRP and water conservation orders. While Te Puni Kōkiri is supportive of getting a robust resource management regime in place for Canterbury in a timely manner, we note that the loss of appeal rights presents natural justice issues. These risks need to be carefully managed if the new regime is to be effective and supported by iwi, stakeholders and the wider community.

Financial implications

103. Commissioners’ remuneration will be met by existing ECan funding. The costs of commissioners will not exceed the total cost of current Council members. Any support which commissioners require from Central Government will be met by existing departmental baseline funding. Costs associated with plan implementation will be met by ECan funding resources.

Human Rights and Bill of Rights

104. The proposal appears to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

105. This proposal requires the introduction of legislation under Urgency. The Bill has not been given a slot in the legislation programme. It is anticipated that the Bill will be passed immediately on introduction.

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Regulatory impact analysis

Regulatory Impact Analysis requirements

106. Regulatory Impact Analysis requirements apply to the proposals in this paper, and a Regulatory Impact Statement (RIS) has been prepared and is attached to this paper as Appendix 1.

Quality of the Impact Analysis

107. The Regulatory Impact Analysis Team (RIAT) has, at short notice, undertaken a high-level review of a draft RIS prepared by the Ministry for the Environment. With the caveat that this review has not been in-depth, RIAT considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.

108. RIAT considers that the information in the RIS is as complete as could be expected given the timeframes for policy development, and sufficiently identifies the main risks and uncertainties. Ideally, more in-depth analysis would be undertaken before decisions are taken, in particular on:

1. how the proposals will deliver changes (including a planning framework, and cultural and institutional changes) that will be enduring beyond the term of the Commissioners;
2. the risks of the preferred option (including the potential impacts of the additional powers to be granted to the Commissioners under legislation); and
3. the relative merits of instead using the current intervention powers in existing legislation.

Consistency with Government Statement on Regulation

109. I have considered the analysis and advice of officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

1. are required in the public interest
2. will deliver the highest net benefits of the practical options available, and
3. are consistent with our commitments in the Government statement "Better Regulation, Less Regulation."

Publicity

110. On Tuesday 31 March 2010, the Minister for the Environment will hold conference calls with ECan, the Mayors of Canterbury and the chairman of Ngai Tahu. The Minister for the Environment and Minister of Local Government will jointly write to ECan, Canterbury Territorial Authorities and Ngai Tahu advising them of the new legislation. The Ministers will hold a press conference at 12 noon on 31 March 2010 and will issue a press release outlining the government's intentions.

111. It is not my intention to release this paper until after the Bill has been passed.

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Recommendations

112. The Minister for the Environment recommends that Cabinet:

Background

1. note that fresh water in Canterbury is economically, environmentally, socially and culturally significant to the Canterbury region and to New Zealand
2. note that on 15 February 2010, Cabinet invited the Minister for the Environment and the Minister of Local Government, in consultation with the Minister of Economic Development, Minister of Agriculture and Minister of Conservation, to develop the government's response to the report and to submit a paper to Cabinet on 1 March 2010 addressing the government's response and next steps [CAB Min (10) 5/13 refers]. Cabinet considered the issue again on 8 March 2010 [CAB Min (10) 8/4 refers]. Cabinet deferred decisions on the submission attached to CAB (10) 86 but invited the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office for the preparation of a Bill to give effect to the proposals in the submission attached to CAB (10) 86.
3. note that Cabinet invited the Minister for the Environment to submit to Cabinet on 22 March 2010, if possible:
 1. a final proposal;
 2. a draft Bill to give effect to the proposals; and
 3. a paper on the appointment of the proposed commissioners.
4. note the Minister for the Environment and the Minister of Local Government's intention to bring a paper to Cabinet on 12 April 2010 outlining the appointments proposed for the commissioners.
5. note that poor past history of management of fresh water in Canterbury and poor performance in meeting statutory consent processing timeframes led to the decision being taken for a statutory investigation of the Canterbury Regional Council under the Resource Management Act 1991 and non-statutory assessment of performance under the Local Government Act 2002 and other statutes
6. note that the findings of the Review Group appointed by the Minister for the Environment and Minister of Local Government, chaired by Wyatt Creech, are that there are major failings in the way the Canterbury Regional Council is managing fresh water and that there are long running institutional problems

Response

7. agree with the conclusion of the Review Group that the Canterbury Regional Council's performance on freshwater policy and management falls well short of what is required and warrants appointment of commissioners in place of the current Council
8. agree to use legislation to appoint commissioners in place of the Canterbury Regional Council's councillors to take over all governance functions of Environment Canterbury and to give the commissioners additional powers to allow them to expeditiously resolve resource management planning issues in Canterbury
9. agree that legislation be pursued to appoint commissioners.

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Legislation

10. agree that the legislation provide for:
 - 10.1. replacement of the elected Council of the Canterbury Regional Council with four to seven commissioners, and removal of elected Council from office
 - 10.2. commissioners becoming the governing body of the Canterbury Regional Council and having all the duties, powers and functions of the Canterbury Regional Council councillors provided under all relevant legislation
 - 10.3. the Minister for the Environment and the Minister of Local Government appointing Commissioners, a chairperson and a deputy chairperson, and set the terms of reference for the commissioners in consultation with relevant Ministers
 - 10.4. Canterbury Regional Council local body elections not being held in 2010
 - 10.5. commissioners' appointments to expire in November 2013, or earlier as determined by the commissioners when their task is complete, and for elected councillors to again take office under the Local Government Act 2002
 - 10.6. commissioners to have, collectively, demonstrated organisational change and water management competencies, local authority governance and management, knowledge of the Canterbury region and its people and knowledge of tikanga Māori (Ngai Tahu customary values and practice)
 - 10.7. a requirement that commissioners establish mechanisms where they can seek advice from Canterbury territorial authority mayors on issues that impact on roles, functions and performance of Canterbury Regional Council
 - 10.8. the Vision and principles of the Canterbury Water Management Strategy being included as a Schedule to the legislation (as per Appendix 2 of this Cabinet Paper)
 - 10.9. commissioners' (or their delegates') decisions on the RMA planning framework (proposed regional plan and policy statement) to be made after having particular regard to the Vision and Principles of the Canterbury Water Management Strategy, in addition to existing statutory criteria
 - 10.10. limited appeal rights on the commissioners' decisions on the RMA planning framework, and on the commissioners' recommendations on water conservation orders; no provision for appeals on the merits of these decisions, but provisions for appeals to the High Court on points of law

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- 10.11. requiring the Minister for the Environment to direct applications for new Canterbury water conservation orders or applications to alter existing water conservation orders in Canterbury to the commissioners rather than a Special Tribunal
- 10.12. making recommendations to the Minister on whether to make, amend or revoke a WCO, the commissioners (or their delegates) must:
 1. accord primacy to the purpose and principles of Part 2 of the RMA
 2. have particular regard to the vision and principles of the Canterbury Water Management Strategy, in addition to existing statutory criteria
- 10.13. the Minister for the Environment to refer the application for a WCO over the Hurunui River to the commissioners and for the current Environment Court processes with respect to that application to cease
- 10.14. persons who made submissions to the special tribunal for Hurunui application (including those who made submissions to the Environment Court) to be given an opportunity to make submissions to the commissioners and participate in hearings on the application
- 10.15. the commissioners to consider the Hurunui application and submissions on it against the decision-making criteria as set out in recommendation 10.12 above
- 10.16. commissioners to put in place, subject to the approval of the Minister for the Environment, targeted moratoria, which would enable commissioners to refuse to accept new consent applications and/or to put current consent applications on hold for a defined resource in a defined area for a defined period of time
- 10.17. the Minister for the Environment and the commissioners, in any area and at any time, to revoke a moratorium
- 10.18. after a moratorium has been lifted, that all applications are to be processed by reference to any new planning framework that has been put in place
- 10.19. a suitable period of time for applicants whose applications were put on hold to amend their applications as necessary to reflect the new planning framework under which they will be considered without prejudice to their position in the processing queue
- 10.18. resource consents that are due to expire during the intervention period to be deemed to continue until a suitable period after the end of the moratorium; with that additional period of time giving the holders of those resource consents an opportunity to seek to apply for replacement consents

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Implementation

11. agree that any support which is required from central government for commissioners will come out of baseline funding
12. authorise the Minister for the Environment, Minister of Local Government and Minister of Agriculture to resolve any outstanding transitional issues necessary to implement this policy

Publicity

13. note that the Minister for the Environment and the Minister of Local Government intend to make announcements on the agreed government response following legislation being approved by Cabinet and prior to the Bill being introduced to the House
14. agree that the Minister for the Environment may release this paper, subject to appropriate withholds, after the legislation has been considered in the House.

Hon Dr Nick Smith
Minister for the Environment

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Appendix 1. Regulatory Impact Statement

Regulatory Impact Statement

Response to review of Environment Canterbury

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment (the Ministry). It provides an analysis of options for responding to the recommendations of the "Investigation of the Performance of Environment Canterbury under the Resource Management Act & Local Government Act".

The Ministry is convinced of the need for government intervention to address ECan related issues. While the Ministry has a general preference for using existing intervention powers where possible, there are strong arguments for legislative amendment in this case; and also for replacing the whole ECan council. However, on the basis of currently available information, the Ministry has not been able to fully quantify the risks/costs of the proposal.

There are significant risks associated with the Review Group's recommendation to temporarily suspend planned triennial elections for regional councillors (scheduled for October 2010) and to transfer the functions and responsibilities of Environment Canterbury's (ECan) elected councillors to government-appointed commissioners until elections in 2013 at the latest. Elections are a right and privilege of any citizen in New Zealand. The suspension of such a right should only be considered in exceptional circumstances. Such a decision is correct to sit with Parliament.

The Minister for the Environment intends to progress the proposed legislation under Urgency. This, alongside the proposal to limit appeal rights on decisions/recommendations made by commissioners on Canterbury's Natural Resources Regional Plan and on water conservation orders in the region potentially alienates Canterbury rate payers and the general public from decisions made on natural resources in the Canterbury region. This raises equity and access to justice issues.

The decisions/recommendations of commissioners on Canterbury's resource management policy and planning framework, including Water Conservation Orders, would be made using an altered decision-making process and statutory test. The outcomes of this change are not entirely clear.

Targeted consultation was undertaken during the statutory investigation of ECan and ECan has been consulted on the draft recommendations of the investigators. However, there has been no public consultation on the proposals contained in this Regulatory Impact Statement. The short timeframe available for formulating and drafting the legislation necessary to enable the government's proposed intervention has not allowed for a comprehensive assessment of risks and alternatives. This increases the risk that intervention could be incorrectly targeted and/or could require subsequent amendment to address unforeseen circumstances.

ECan's proposal to enter into a negotiated agreement between the Minister for the Environment and the councillors regarding what is to be delivered to improve fresh water management in the Canterbury region may have some merit. However, it is not clear whether and how the proposal would address broader organisational issues (such as culture, management, stakeholder relationships), or whether such an agreement would be

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durable. More information and consultation with the Department of Internal Affairs would be required before we can reliably determine whether this is a viable option and evaluate its ability to address problems in ECan.

Mark Sowden, Director Natural and Built Systems, Ministry for the Environment

22 March 2010

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Status quo and problem definition

Significance of the Canterbury region in a national context and status quo

The Canterbury region has an estimated 2.62 million hectares of land in agricultural and horticultural production¹¹. The region has 50% of New Zealand's grain, seed and fodder crops, 44% of tussock lands and 15% of all grasslands. Canterbury had the second largest number of dairy cows being milked of any region in New Zealand, and has experienced the greatest increase in dairy cows since 2002.

A 2006 survey by the Ministry for the Environment found that ECan has granted two-thirds (equivalent to 647,000 hectares) of all irrigation consents nationwide. A Ministry of Agriculture and Forestry study in 2004 (Technical Paper 04/01), calculated the net (farm gate) value of irrigation in Canterbury at \$335 million (or \$1,170 per hectare) in the 2002/03 season. This figure was over and above the value that would have been produced without irrigation, and was based on a milk payout just over half of what it currently is. Analysis completed for the Canterbury Water Management Strategy updated the (farm gate) contribution of irrigation to New Zealand's gross domestic product (GDP) to \$1700 per irrigated hectare, or \$800 million. Agriculture's contribution to New Zealand's gross domestic product GDP in 2008 was \$11,231 million (SONZAF, 2009) and the output from irrigated agriculture in Canterbury contributed approximately 7% of total GDP.

Estimates (taking into account environmental, cultural and other values), are that, it is potentially feasible to increase the area of irrigable land in the Canterbury region to approximately 1,000,000 hectares. This, however, requires a region-wide strategic approach and, despite being required by statute to do so, ECan has not seen this as its role. Based on available estimates of farm gate value from irrigation in Canterbury, unlocking the future irrigation potential in Canterbury could contribute an additional \$0.6 to \$0.8 billion a year to the regional and national economy; increasing the total contribution of irrigation in Canterbury to the regional and national economy to approximately \$1.2 to \$2 billion per year¹².

While Canterbury has sufficient water resources in total to support this level of irrigation, climate patterns undermine the reliability of supply during the mid to late summer period. The region also experiences prolonged dry periods and the effects of climate change are predicted to exacerbate the current situation. Extrapolating from the current usage levels, approximately 14% of the available water supply (within the region) would be required to irrigate an additional one million hectares of land in Canterbury.

The Canterbury region has seen the development of an additional 213,000 ha of new irrigation since 2002 from individual water takes. Three storage and irrigation schemes have been built since 1991, with a total irrigated area of 38,000 ha. The most recently built scheme was completed in 2005 (4000 ha) while the two other schemes were completed in 1998 and 1999 contributing 34,000 ha between them. Three more irrigation schemes have received resource consent, potentially contributing a further 72,000 ha of irrigated land. A further two schemes (40,800 ha) are awaiting the outcome of consent hearings, and the Central Plains and Hurunui schemes are working their way through the application and hearing processes (noting that the Central Plains Water scheme has been granted water take consents in an interim Court decision, but that the withdrawal of the storage component of the scheme has

¹¹ As at June 2008

¹² In the 02/03 season Fonterra payout was approximately \$3.16 per kilogram of milk solids, while it is forecast to be approximately \$6.05 for the 09/10 season..

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significantly reduced the viability of the proposal). Overall, irrigation in Canterbury has developed in an ad hoc manner. The schemes themselves have tended to be relatively small scale, and have not been able to take advantage of economies of scale or integration.

Given the potential for irrigation in the region – the CWMS targets an additional 350,000 hectares in an integrated pattern of development – this rate of progress is modest at best. Scheme proponents and decision-makers have been seriously hindered by the lack of a clear regulatory framework against which to design and consider applications respectively. This has led to serial requests for further information from council processing staff, significant delays, additional costs and has contributed to community polarisation.

The Canterbury region has around 34% of New Zealand's hydro-generation capacity and electricity generated in the region accounts for approximately 18% of New Zealand's total generation in (based on a relatively normal hydrological year). Most of this generation capacity is in the Waitaki Catchment, which also provides around 70% of New Zealand's generation storage.

The cultural value of Canterbury's fresh water to both Ngai Tahu and all New Zealanders is particularly high, and the ecological values of the region's many braided rivers are both individually and collectively nationally significant. Canterbury's network of braided rivers, approximately 60% of the national total, are ecosystems of national importance, providing links between the mountains and the sea and a habitat for a diversity of bird species including several threatened species (e.g. wrybill/ngutu parore, banded dotteral, black fronted tern, Caspian tern, black-billed gulls, black stilt/kaki). Canterbury has around 8% of the remaining national inland wetlands, and just over 10% of its remaining historic wetlands. Coastal streams in the Kaikoura area and on Banks Peninsular have high native fish diversity. Shortjaw kokupu populations north of Kaikoura are the only records for the entire east coast of the South Island and some native fish occur only in Canterbury (e.g. mudfish and lowland/upland non-migratory galaxids, Stokell's smelt). Canterbury also has several nationally and internationally recognised water-dependent geodiversity and geothermal features of national importance. The Rakaia river braids, Rakaia Gorge and terraces and Opihi are considered internationally significant rare freshwater ecosystems on this basis.

The region's fresh water resources are similarly significant as a destination for national and international tourism and recreation; it is estimated that the approximate 60,000 recreator-days per year on the lower Waitaki River alone contribute annual recreation benefits in the order of \$2 million.

Problem

In recent years Canterbury's water resources have been coming under pressure. Demand for access to water is high and competition between different interests is increasing. The ecological health of lowland streams, high country lakes and groundwater has continued to decline, there has been a loss of cultural and recreational opportunities, and the availability of water for use by agriculture is becoming less reliable.

ECan is the regional council for the Canterbury region. ECan operates primarily under the Local Government Act 2002 (the LGA) and the RMA, and has additional responsibilities and roles under other Acts (including the Soil Conservation and Rivers Control Act 1941, Building Act 2004, Biosecurity Act 1993 and Land Transport Management Act 2003).

There have been longstanding and widely-held concerns regarding ECan's ability to effectively undertake its planning, management and regulatory functions, particularly in relation to the region's fresh water resources. Between April 2009 and January 2010, a

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significant proportion (close to a majority) of the Council's agenda was related to freshwater management and the RMA.

These concerns eventually prompted all the Mayors in the Canterbury region to send a joint letter to the Minister of Local Government on 18 September 2009 emphasising the seriousness of this issue and noting that it had the potential to impact on the future well-being and prosperity of Canterbury.

In December 2009, Auditor-General Lyn Provost found that four ECan councillors had broken the law by debating and voting on proposed water charges. They had conflicts of interests as water consent holders or partners of water consent holders.

Following poor performance in the 2007/2008 RMA Survey of Local Authorities, the Minister for the Environment decided to investigate the performance of ECan under section 24A of the RMA. Subsequently, the Minister for the Environment and Minister of Local Government decided this investigation would be undertaken jointly alongside a non-statutory assessment on the wider performance of ECan under the Local Government Act 2002 and other legislation.

The report of the joint investigation into ECan identified major failings in the way that ECan is managing water in Canterbury and long running institutional problems. The report notes that the investigators were struck by the gap – characterised as “enormous and unprecedented” – between what needs to be done in Canterbury to appropriately manage water and ECan's ability to do so.

The review group, in interviews with stakeholders, was repeatedly told of an expensive and adversarial consenting process, for both applicants and submitters. The Group found timeframes for the processing of consents for significant projects to be excessive, as it has been for many water-related consents. The Group also identified an ingrained imbalance between environmental, economic, social and cultural perspectives in ECan, which tended to be risk averse, technically and scientifically driven, and skewed towards environmental protection. This is inconsistent with the role of the council under the RMA and LGA. The Group also highlighted the issue of council officers taking an “advocacy” role in hearings, failing to consider the beneficial effects of proposals under consideration. The Group also identified a tendency by ECan to blame the RMA for its inability to manage water, and found performance issues with ECan's Planning and Consenting Division.

Due in large part to institutional failure, technical deficits and ingrained organisational-culture problems, despite the 19 years since enactment of the RMA, ECan has not been able to support its elected representatives to develop an operative over-arching planning and policy framework for the region's natural resources. The investigation panel concluded that this has resulted in a piecemeal, fragmented, inefficient and ineffective approach to the management of fresh water in the region. Related to this, ECan has a reputation for failing to meet statutory timeframes for processing resource consent applications. In the 2007/08 Ministry for the Environment RMA Survey of Local Authorities, ECan reported only 29 percent compliance with statutory timeframes.

Concerns from recreation and conservation interests over the adequacy of river flows in Canterbury (stemming in part from the lack of a robust water management planning framework) have the potential to prompt applications for Water conservation orders as a proxy planning mechanism. A trend in this direction is beginning to emerge. Water conservation orders are not designed to be a substitute for planning, and the conservation presumption at the heart of this statutory tool can, and has, prevented more holistic

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consideration of options for managing water in Canterbury along the spectrum from conservation to development.

ECan's failure to adequately implement the plan for the Waitaki catchment, prepared by the Waitaki Water Allocation Board after central government intervention, provides further evidence of institutional failure and inability to adequately manage nationally significant water resources.

The costs of the status quo, in the absence of government action, are substantial and difficult to quantify but at a rough estimate could be in excess of \$2-3 billion per year¹³. They include direct litigation costs to applicants, opportunity costs from lost or significantly delayed opportunities for investment, potential damage to some of New Zealand's most important tourism and recreational resources, degradation of intrinsic cultural and ecological values and damage to New Zealand's international brand.

Recent efforts to address longstanding performance issues have resulted in improvements but the conclusion of the review group is that, while commendable, these improvements will not be sufficient to satisfactorily resolve the systemic and organisational-culture issues that are underpinning problems with ECan.

Having particular regard to the results of the recent joint investigation of ECan, it is evident that the natural and physical resource management problems in the Canterbury region are both institutional and technical, are strongly influenced by the capacity and organisational-culture of ECan and will not be able to be addressed by either waiting for another election or encouraging ECan to lift its performance.

Objectives

The government's policy objectives are to ensure that:

1. Canterbury's natural resources are managed in a comprehensive and holistic manner, which results in resilient outcomes that effectively balance social, cultural, economic and environmental outcomes
2. the institutional framework for managing natural resources in the Canterbury region is integrated, effective, transparent and supports robust decision-making
3. the Natural Resources Regional Plan provides an operative efficient and enduring planning framework in Canterbury, which facilitates good-quality, cost-effective and timely decisions that effectively balance social, cultural, economic and environmental outcomes.

¹³ A Ministry of Agriculture and Forestry study in 2004 (Technical Paper 04/01) calculated the net (farm gate) value of irrigation in Canterbury at \$335 million (or \$1,170 per hectare) in the 2002/03 season. This figure was over and above the value that would have been produced without irrigation, and was based on a milk payout just over half of what it currently is. In the 02/03 season Fonterra payout was approximately \$3.16 per kilogram of milk solids, while it is forecast to be approximately \$6.05 for the 09/10 season. Based on the figures used in 2004 and potentially irrigable land, the value of future irrigation in Canterbury could lift the economic contribution of agriculture to the Canterbury economy to \$1.2 to \$2 billion per year. This \$2 billion does not include the value of tourism, of New Zealand's image, nor of application and litigation costs, hence the \$2-3 billion estimate.

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Regulatory impact analysis

General discussion of options

The range of options for addressing the problems in Canterbury has been evaluated below against their ability to achieve the government's objectives. A summary table of this analysis is included in Appendix 1 to this Regulatory Impact Statement.

Options fall into three general categories:

- Transferring the functions and responsibilities of ECan's councillors (ranging from all functions to just water-related functions) to Government-appointed commissioners.
- Using current intervention powers in existing legislation
- Supporting ECan with targeted assistance to improve its performance.

With all options, where objectives are met, benefits will most significantly be felt by the region, although positive economic benefits will also be felt at a national scale. The costs of the various options will, in most cases, be met by the existing ECan funding base and will, therefore, lie where they currently fall. Some additional support may be required from central government. The cost of any such financial support will be met by existing departmental baselines.

Options that rely on introducing legislation in a very short timeframe increase the risk of poor or misdirected intervention resulting in unintended consequences and the need for subsequent intervention to remedy these consequences. Ad hoc intervention also potentially undermines the integrity and credibility of existing legislative provisions. However, in this instance, because any national level decisions on water management (particularly WCOs) have the potential to undermine the government's New Start for Freshwater policy programme and the work of the Land and Water Forum, it is considered preferable for any intervention to have a narrow Canterbury-specific focus in the first instance. The results of any intervention could provide useful information for decision-makers on the outcomes of the New Start for Freshwater policy programme and potentially an opportunity to trial alternative policy settings in a confined context.

Any intervention that alters the nature of the relationship between Ngai Tahu and the body responsible for governance and decision-making on natural resources, particularly water, will need to be designed in light of the Crown's Treaty responsibilities. In particular, commissioners will individually and/or collectively need to have a strong understanding of the Ngai Tahu perspective, rights and interests.

There are significant risks associated with any approach that proposes implementing legislation to temporarily suspend planned triennial elections and to transfer the functions and responsibilities of ECan's elected councillors to Government-appointed commissioners. Elections are a right and privilege of any citizen in New Zealand. The suspension of such a right should only be considered in exceptional circumstances. In this case the proposal is to empower government-appointed commissioners to provide the governance and leadership necessary to rapidly develop and implement an operative and effective resource management framework and to solve the immediate lack of confidence in ECan. The explicit intent is for the commissioners to withdraw and to be replaced by elected representatives as soon as this task is achieved, but no later than local body elections scheduled for late-2013.

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Democracy will reassert itself as soon as the present systemic issues facing ECan have been averted.

Under such proposals, commissioners would be required to carry out a broad and complex workload. There is a significant risk that it will not be possible for the Commissioners to effectively manage this workload. If the Government is to intervene in such a way, key factors leading to a successful outcome would include a realistic workload, sufficient capacity, and sufficient skills and experience, including experience of running councils (either in a governance or management capacity) and making resource management decisions (potentially requiring a current or retired Environment Court Judge).

Proposals that would limit appeal rights on decisions/recommendations made by commissioners on Canterbury's NRRP and on WCOs in the region risk alienating Canterbury rate payers and the general public from decisions made on natural resources in the Canterbury region. A degree of political tension on is a healthy attribute of a democratically elected body. However, in the context of an organisation that has been unable to effectively support its elected representatives, the political divide between ECan's councillors appears to have materially affected ECan's ability to produce a robust and certain planning framework against which the public can design and lodge applications for resource consent. The uncertainty this has created has specifically led to the development of a litigious and adversarial culture amongst those seeking access to, or the protection of, fresh water resources in Canterbury. There is little incentive for the public to invest in more environmentally and economically sustainable solutions in Canterbury when it is economically more efficient for them to simply challenge ECan in Court. Central government intervention is necessary and justified to address this issue.

ECan has proposed entering into a negotiated agreement between the Minister for the Environment and the councillors regarding what is to be delivered to improve fresh water management in the Canterbury region. Under this approach a commissioner/advisor would be appointed to oversee implementation of the negotiated agreement and a secondary advisory group would provide further oversight of the Government's and ECan's progress. The agreement would require among other things the:

- rapid notification of decisions on the NRRP
- rapid notification of a second generation RPS
- completion of a 'fit-for-purpose' review of the current organisation structure to fill capacity gaps in response to the findings of the Review Group and focusing on the planning and consenting directorate
- establishment of zonal committees and the Water Executive proposed in the Canterbury Water Management Strategy (CWMS) along with statutory recognition of the zonal and regional implementation programmes anticipated by the CWMS
- complete review of current iwi liaison functions.

ECan proposes to request that the Government appoint a commissioner/advisor and invite the commissioner/advisor to exercise water management functions under the RMA. Importantly, it is unclear whether ECan's proposal would involve a formal request under section 255 of the LGA for the Government to appoint a Commission. Further, it is unclear what role the secondary advisory group would fulfil, and specifically how it would relate to elected members and the Government. The proposal also focuses on the specific

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recommendations relating to water management, and it is not clear whether and how a proposal – possibly constrained in scope to what is already available under section 25 of the RMA – would address broader organisational issues (such as culture, management, stakeholder relationships). It is also unclear whether such an agreement would be durable following elections scheduled for October 2010, or whether statutory intervention would be required to bind incoming councillors to comply with its terms. It would appear that the same issues of potential conflict and uncertainty apply to this proposal, which may limit its ability to address ingrained system issues.

ECan's proposal draws strongly on changes anticipated by the CWMS to the institutional and resource management decision-making frameworks in Canterbury. While the proposals in the CWMS may have merit we believe they need to be considered further. The Ministry for the Environment has reservations at this stage about giving statutory recognition to the zonal and regional implementation programmes as it is unclear what decisions the zonal and regional committees would be making and what effect these decisions would have on the statutory planning framework.

More information and consultation with the Department of Internal Affairs will be required before we can reliably determine whether ECan's proposal represents a viable option and to enable us to evaluate it against the Government's objectives.

Option 1: Legislation to replace ECan councillors with commissioners

In this option, legislation would transfer the functions and responsibilities of ECan's councillors to Government-appointed commissioners. The commissioners would take the place of elected councillors as the governing body of ECan until such time as they are able to satisfactorily address the immediate issues facing ECan but no later than the local body elections scheduled for late 2013.

The commissioners would have all the powers provided under the LGA (i.e. would take over the full powers of the Council) augmented by specific additional powers¹⁴ relating to the management of natural resources. These additional powers would give commissioners the ability to expeditiously finalise the proposed Natural Resources Regional Plan (NRRP), and the ability to make recommendations to the Minister for the Environment on changes to Water conservation orders (WCOs) in Canterbury – during the period of intervention, the Minister for the Environment would be required to direct applications for WCOs in Canterbury to the commissioners rather than a Special Tribunal. Decisions on the NRRP and recommendations on WCOs would be made against a decision-making framework amended to ensure that appropriate regard is given to the most recently expressed aspirations of the local community, as reflected in the vision and principles of the CWMS. The Minister for the Environment would have the final decision making role on WCOs in accordance with existing RMA provisions. The decisions of commissioners on the NRRP and their recommendations on WCOs would be appealable to the High Court on points of law only.

There are four general options for giving special weight to the CWMS in relation to existing WCOs:

- i. Retain the current 'conservation' purpose of WCOs and require commissioners to give particular regard to the vision and principles of the CWMS in addition to existing statutory criteria.

¹⁴ Note that these special powers would also be included in Option 2.

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- ii. Make consideration of existing WCOs ultimately subject to the sustainable management purpose of Part 2 of the RMA rather than the 'conservation' purpose of Part 9 of the RMA, and require commissioners to give particular regard to the vision and principles of the CWMS in addition to existing statutory criteria. This would displace the statutory purpose of WCOs as an instrument for protecting outstanding amenity or intrinsic values of water bodies and would allow decisions on the allocation of water from these water bodies to be made in the context of sustainable management of resources.
- iii. Extend option (ii) by requiring the commissioners to have particular regard to the vision, principles and targets of the CWMS. The targets of the CWMS set out expected outcomes and could potentially increase the certainty of change in the direction of these outcomes. However, the targets of the CWMS have only recently been developed and have not been subject to thorough analysis or consultation with the Canterbury community. It is unclear at this stage what implications this option would have.
- iv. Introduce a new statutory test against which decisions on Canterbury's existing WCOs will be made. This test would be derived from the vision, principles, and potentially targets, of the CWMS and would be designed to provide the commissioners with the greatest degree of latitude possible when making decisions on the allocation of water currently covered by existing WCOs. Implications of this are difficult to predict but potentially fundamental in that existing RMA case law would no longer be relevant and there would likely be a period of significant uncertainty following the introduction of this new test until its interpretation became clear.

In addition, there are two general options for dealing with WCOs that are 'proposed' but have not been finalised and gazetted at the time of implementing this intervention. These options relate directly to the proposed Huruniu WCO:

- i. Intervene now to 'stop' the current process and transfer consideration of the proposed Huruniu WCO to the commissioners. This would prevent further investment, of time and money, in a judicial process that is obliged to be decided against the existing planning context in Canterbury and without any obligation to have special regard to the vision and principles of the CWMS. This would also have the additional benefit of avoiding an adversarial process that has the potential to further polarise community groups in the catchment and region. An intervention of this type would, however, oblige the executive to intervene directly in a matter before the judiciary.
- ii. Let the current process run to its conclusion and consider options once final recommendations are made to me as Minister for the Environment. While this would avoid the need to intervene directly in a matter before the judiciary it could place the Minister, as ultimate decision-maker, in a difficult position if he considers that the recommendations of the Environment Court do not effectively respond to the changing context of resource management planning in the region, and the vision and principles of the CWMS in particular.

The proposal to provide the commissioners with the ability to refuse to accept applications and to put current applications 'on-hold' in particular circumstances gives them a mechanism with which to expeditiously address over-allocation and to address any speculative applications seeking to gain benefit from the current uncertain planning framework (prior to the commissioners making the NRRP operative).

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Ability to meet objectives: Commissioners would have the mandate to provide leadership and direction for institutional change (objective 2), and would be in a position to make decisions and recommendations across the full fresh water planning framework from the NRRP to WCOs (objectives 1 and 3). The statutory test against which these decisions will be made is not yet clear, but there is flexibility to tailor it to meet the government's preference.

Key costs/savings: Aside from the difficult-to-quantify cost savings attributable to a robust and clear regulatory framework and effective institutional decision-making, this option will save ECan ratepayers the cost of the 2010 local body election of approximately \$300,000-350,000¹⁵. Additional savings to the Canterbury community will be the approximately \$850,000 per annum¹⁶ to pay councillors, although this will largely be offset by remuneration for commissioners, anticipated to be \$750,000 per annum. Additional costs of approximately \$200,000¹⁷ may be borne by Central Government to provide appropriate support to the commissioners. Drafting costs and Parliament's time spent on the bill are anticipated to be less than \$100,000, based on previous drafting experience and the very short time the bill will be before Parliament.

Risks: The legislation for the use of commissioners in place of elected representatives is specific to the various Acts under which the Government is empowered to intervene, and dictates the nature and scope of powers. Commissioners have previously been appointed under the:

- New Zealand Public Health and Disability Act 2000
- Local Government Act 1974
- Education Act 1989.

A commissioner has only been appointed once under the New Zealand Public Health and Disability Act 2000. In February 2008 a Commissioner was appointed to replace the Hawke's Bay District Health Board. This decision was immediately subject to judicial review. The judicial review was dropped when it was agreed that the disestablished board would form an advisory committee making decisions with the commissioner. The advisory committee currently forms a functioning decision making board, however, the relationship with government is very sensitive.

The Appointment of a Commissioner at Rodney District Council in April 2000 is the only time a commissioner has been appointed under the Local Government Act in the last 30 years (previous use was pre 1975). The intervention was taken after the findings of a Ministerial Review Authority prompted seven of the fourteen councillors to resign. The council could have legally continued to operate with seven councillors, however, the Government felt intervention was warranted. A sole commissioner took on the political, administrative and legal roles of the councillors. The Government subsequently introduced legislation allowing an election to be brought forward. The election allowed the re-establishment of the council which has continued to function effectively since that time.

¹⁵ Based on 290,000 budgeted for 2010 election by Greater Wellington Regional Council, extrapolated onto the higher population of Canterbury, with figure of approximately 338,400. Information on Environment Canterbury was not readily available. Please note local authorities will still carry out elections in 2010, with the costs of those borne by their ratepayers.

¹⁶ From Remuneration Authority information on Environment Canterbury: Chair \$142,365, Deputy Chair \$56,719, Councillors \$53,280 each, plus \$4200 for Councillor members of Hearings Committees for Variation 1 & 2 of the NRRP chapters 4-8(2).

¹⁷ Based on 1 FTE at \$150,000 (including overheads) plus \$50,000 for travel.

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The Ministry of Education used specialist help to pull schools out of trouble in 47 cases in 2009. Under the Education Act 1989, the Ministry of Education can intervene where it believes there is risk to the operation of the school or the welfare or educational performance of the students.

In 2009 there were 31 commissioners in schools nationwide. A further 43 limited statutory managers were in place. As these schools continue to operate, the intervention could therefore be judged a broad success. Every case is reviewed at least every 12 months and adjusted according to its success.

Existing consents granted by ECan under current WCO provisions have a significant influence over the availability of water and the degree of flexibility commissioners will have in reconfiguring water management and allocation regimes. The intervention does not give power to address existing consents, meaning that the scope of review undertaken by the commissioners (if considered necessary) will be limited by existing statutory criteria¹⁸, unlikely to be broad enough to facilitate a truly comprehensive reconfiguration, potentially limiting the effectiveness of the intervention.

Appointing commissioners to replace Council represents a significant intrusion into local government powers. It conflicts with the key principle of the local government system: that communities have the right to decide their local affairs and pay for them through their elected representatives. There is a risk that the Canterbury community will perceive that the Government is removing the democratic rights of Canterbury without consultation. This response is unprecedented under the LGA and RMA, and if unsuccessful is likely to result in the Government coming under significant criticism.

Direct intervention via new legislation risks disrupting the integrity of the parent legislation; the RMA and LGA. If planning and consenting decisions during the period of intervention are to be made under an altered statutory test – one that presumes that water should be managed to increase reliability year-round in order to facilitate more intensive land use – it may be impossible to revert back to the previous statutory test once the intervention is complete without significant uncertainty and inconsistency. However, this risk will be mitigated if decisions are made subject to the existing statutory test in the RMA, but with particular regard being given to the CWMS.

Such a significant intervention will also be disruptive for staff and initiatives currently underway; bringing with it the risk that momentum on positive work will be lost. Similarly, disaffected staff may contribute to the difficulty the commissioners face in changing the organisational culture of ECan and may contribute to institutional dysfunction.

We consider that the last 19 years of operation under the RMA and 8 years of operation under the LGA have contributed to the development of a body of experts in New Zealand with the appropriate skills and experience to enable a successful intervention of the type contemplated here. However, the scope of the commissioners' work will be broad, making the task more challenging, and this may not be efficient or justifiable given that the review team found that ECan was adequately performing its non-water related functions and general governance roles.

¹⁸ See section 128 of the RMA which sets out the circumstances when resource consent conditions can be reviewed

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Option 2: Legislation appointing commissioners to take over resource management functions only

Legislation would be used to put a commission in place and transfer the governance of resource management functions to the commissioners. Legislation would provide the appointment mechanisms and outline functions¹⁹ and duties, including roles in relation to fresh water. As for option 1, the role of the commission would expire following a suitable period of transition after the 2013 local elections. The commissioners would work with the Chief Executive to assist ECan to develop the capability and structure required to meet the government's objectives. Under this option, elections for regional councillors could go ahead in October 2010, with elected council governing other council functions.

Ability to meet objectives: This option would likely deliver a clear resource management planning framework (objective 3) but governance functions would be split, potentially leading to a loss of cohesion between related portfolios. Accordingly, there would be no guarantee that natural resources would be managed in a comprehensive and holistic manner (objective 1). Under this option, the mandate to provide leadership and direction for institutional change would remain with Council rather than the commissioners; it is unlikely that this arrangement would deliver the improvements to the institutional framework sought by government (objective 2).

Key costs/savings: It is likely that the Canterbury community would bear additional costs to cover the remuneration of commissioners. Central Government would bear the costs of any additional secretariat support for commissioners.

Risks: This option requires more complicated legislation, may take more time to put in place and is more likely to require subsequent amendment in the future to address unpredictable implications arising from the split of powers between commissioners and councillors. This split of powers is also likely to create friction and uncertainty within ECan and between ECan and the community. This could undermine its efficiency and the clarity of the commissioners' reform mandate. This option intrudes on local government powers, but to a lesser degree than option 1 as the council would still be in place and would retain a governance role, albeit a limited one relative to the status quo.

Option 3: Legislation replacing council with commission tasked with transitioning to Canterbury Regional Water Authority

A commission would take the place of councillors and would assume all of ECan's functions while also being charged with establishing and transferring appropriate functions to a Canterbury Regional Water Authority. This is the option recommended in the report of the ECan investigation.

Ability to meet objectives: This option assumes, without complete development and analysis, that the Canterbury Regional Water Authority is the best institution to manage fresh water in Canterbury and to achieve other objectives. At this time, however, it is unclear whether this model will achieve any/all of the policy objectives.

¹⁹ These would include the additional powers related to reviewing Canterbury Water Conservation Orders, and taking away the ability to appeal to Environment Court on decisions in relation to WCOs and the proposed NRRP.

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Key costs/savings: This option is likely to have similar costs and savings to option 1, although additional costs associated with the establishment of a Canterbury Regional Water Authority could be in the order of hundreds of thousands to millions of dollars.

Risks: This option, too, will require complicated legislation. Additionally, it is putting full faith in the idea that the Canterbury Regional Water Authority is the best way to proceed. At this stage little analysis has been conducted of this option and it is unclear whether this is an advisable approach to achieving the institutional improvements government seeks. There is the risk that separating the management of water from land and air in Canterbury could lead to non-integrated resource management outcomes. The implications of such a major restructure of governance and decision-making roles for the regime created by the LGA and RMA are uncertain. Attendant political and funding risks associated with the Canterbury Water Management Authority are significant.

Option 4: Implement Canterbury Water Management Strategy

In this option, Central Government would support, through legislative change and potentially funding, the adoption and implementation of the Canterbury Water Management Strategy.

Ability to meet objectives: This option would lead to the establishment of an entirely new institutional and governance arrangement designed to deliver the vision and principles of the CWMS. This may satisfy objective 2. However, the implementation details of the CWMS have gone through a period of development and evolution since the vision was published in late 2009. Although it would appear that most of the planning and institutional arrangements proposed by the CWMS can be implemented under existing legislation (the RMA and LGA are suitably flexible). Noting the conclusions of the ECan review panel that the CWMS, despite having promise, will not be sufficient to resolve the region's water issues, we cannot conclude with certainty at this time that the CWMS would result in a holistic and comprehensive review of resource management in the region or lead to clear and effective resource management planning and decision making (objectives 3 and 1).

Key costs/savings: While the exact costs are unknown, costs associated with legislative change and targeted support would be borne by central government. Additional costs could arise if central government is required to support collaborative processes, undertake underpinning technical work and assist in developing implementation plans. These costs could range from the \$100,000s to the millions depending on the degree of support required to secure the community support required to mandate the vision of the CWMS.

Risks: The strategy is still under development and, while implementation detail has become clearer since it was released in late-2009, there is no clear way to determine at this stage when or even if it will be appropriate for central government to give a statutory mandate and financial support to the CWMS.

The CWMS appears to be based on an overarching presumption that it is in Canterbury's best interests to increase the quantity and reliability of water available for irrigation year round in order to provide more certainty to current water users and enable an increase in the intensity of water-dependent land use in the region. In order to achieve this, the region requires increased investment in and development of water storage and irrigation infrastructure. An important component of the CWMS, central to gaining and holding the social mandate in support of the vision, is an accompanying environmental restoration and enhancement programme to be funded by both a water levy and external funding sources, possibly central government in the first instance. One of the main aims of the storage-based

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approach proposed in the CWMS is to take pressure off over-allocated groundwater resources by reconfiguring the sources for water abstraction to better fit the hydrology of the region. The vision and principles of the CWMS seek balance between environmental, economic, social and cultural outcomes, but this balance is to be achieved under the overarching presumption of more reliable water and more intensive land use – an outcome that has not been subject to assessment against the purpose of sustainable management set down in the RMA.

The potential inconsistency between the overarching presumption behind the vision and principles of the CWMS and the purpose of the RMA has implications for the planning framework in Canterbury post-intervention. If planning and consenting decisions during the period of intervention are to be made under an altered statutory test – one that presumes that water should be managed to increase reliability year-round in order to facilitate more intensive land use – it may be impossible to revert back to the previous statutory test once the intervention is complete without significant uncertainty and inconsistency. However, this risk will be mitigated if decisions are made subject to the existing purpose and principles in the RMA, but with particular regard being given to the CWMS.

Option 5: Use existing RMA intervention powers

The Minister for the Environment has the power to intervene in RMA processes using a range of existing powers. These include the power to direct ECan to prepare a plan, plan-change or plan-variation, or to transfer certain powers to commissioner(s) appointed by the Minister. Note that similar intervention powers under the LGA are not available as ECan does not meet the threshold of wilfully refusing to perform its function. The Minister for the Environment can also call in an application or a proposed plan change.

Ability to meet objectives: These interventions would be implemented under the existing institutional framework and would not provide the commissioners with the ability to make recommendations on WCOs. This makes it unlikely that existing intervention powers would have the scope to meet objectives 1, 2 or 3.

Key costs/savings: Costs and savings would be similar to option 2, though may be higher as there may be duplication of some roles and functions.

Risks: There is uncertainty about the extent to which a person appointed under section 25 would be able to direct the chief executive and spend council money on the performance of RMA functions. There would be potential for conflict in terms of overall leadership and priorities between any commissioner appointed by the Minister and the ECan councillors, making it unlikely that such an intervention would be able to address the systemic and institutional capacity issues that are at the heart of planning dysfunction in Canterbury.

It is similarly unlikely that the ability to call-in applications or a proposed plan would be the best mechanism for addressing the ingrained capacity and organisational-culture problems in Canterbury; using this tool may prompt improvements in specific instances but it is likely that the underlying issues would limit the effectiveness and longevity of outcomes.

Option 6: Targeted assistance to Environment Canterbury

Under this option, Ministers would invite ECan to resolve all issues raised in the report, and provide targeted support and assistance. This could include

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- providing additional planning support to ECan and to facilitate and/or fund the secondment of additional experts with a proven track record in applying a balanced and effective approach to resource management
- filling the immediate skill gaps in areas such as social and economic planning
- increasing project management capacity
- setting statutory deadlines for the next stage of the NRRP officials work
- requiring ECan to prioritise the elements of the water planning work, and to progress these through existing processes as a matter of urgency
- asking the Environment Court to give priority to appeals on ECan planning documents
- providing further assistance to allow the hearing commissioners to progress issues faster.

Ability to meet objectives: Given the strength of the recommendations of the investigation, and government's previous experience with the Waitaki plan, it is considered very unlikely that targeted support of ECan would be sufficient to lift the organisation's performance to the degree necessary to achieve the government's objectives.

Key costs/savings: Costs and savings would be difficult to predict. Central Government may be called upon to finance expert input and advice. Depending on the degree of assistance required, costs could be significant.

Consultation

The terms of reference for the investigation of ECan required the review panel to interview representatives of Ngai Tahu and stakeholders. Interviews were carried out between November 2009 and January 2010 and included representatives from environmental groups, territorial authorities, transport providers, energy providers, primary sector groups, law firms and ECan. The conclusions and recommendations of the review team were influenced by the outcome of this targeted consultation.

Following public release of the Review Team report, the Minister for the Environment met with Ngai Tahu and other key stakeholders in Canterbury, including ECan councillors and mayors and chief executives of Canterbury territorial authorities.

ECan identified strategic, integration, political and funding risks associated with the Canterbury Water Management Authority proposal (part of option 3), which is among the reasons why at this stage that component of the Review Team's recommendation is not being pursued. Instead, the proposal gives time and sets out some considerations for commissioners in terms of considering the future institutional framework for freshwater management in Canterbury, including how and if such a proposal is desirable.

The proposal itself has been prepared by the Ministry for the Environment in consultation with the Department of Internal Affairs, Ministry of Agriculture and Forestry, the Treasury, State Services Commission, Ministry of Justice, Ministry of Transport and Te Puni Kokiri. The Department of the Prime Minister and Cabinet was provided with a copy of the paper.

This consultation identified a number of concerns relating to:

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1. proposals to replace the elected Councillors for all of ECan's functions, suspend local body elections or remove the right of appeal on the NRRP or Water conservation orders, except on points of law. These proposals appear present a prima facie access to justice issue and some departments were concerned that this may not be consistent with the Government's statement on regulation: "better regulation, less regulation" which requires "a particularly strong case [to be] made for any regulatory proposals that are likely to override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee guidelines).
2. the potential for the proposal to mean that parties with a stake in Canterbury's natural resources will have less ability to protect their rights and interests via appeals on resource management decisions than elsewhere in the country.
2. the proposal to transfer the entire range of ECan's roles and responsibilities to commissioners despite the finding that ECan was performing adequately outside of its water-related functions – raising questions of whether the gains of such a move outweigh the costs of removing democratically elected representatives.
3. proposals to change WCO processes, which have the potential to be highly controversial, particularly given that the Government has not signalled such a move in its New Start for Freshwater policy programme.

The proposal was amended to address these concerns in part by:

1. Minimising changes via legislation to the current statutory processes regional councils are required to follow when reviewing and making decisions/recommendations on the statutory RMA plans.
2. providing the commissioners with the flexibility to delegate decision-making powers to panels with specific expertise and experience necessary to carry out particular functions e.g. making decisions on the NRRP and WCOs.
3. Elaborating the discussion of the rational for and risks associated with any decisions to suspend local democratic processes and/or amend the criteria and processes for amending the NRRP and WCOs in Canterbury.

Implementation

The proposal will be given effect to via legislation.

From the time when the 's report on ECan was released on 19 February 2010 to the time government publicises its response will be one of great uncertainty for ECan and others, including those involved in the CWMS. Likewise, there will be uncertainty from when a response is publicised to when the intervention is put in place and effectively carried out. This combined uncertainty is likely to lead to further performance issues, poor morale and possible turnover within ECan, as well as loss of momentum on positive initiatives both within ECan and externally, such as the CWMS.

As such, both a quick government response to the Review Team's recommendations and legislation being prepared under urgency are important to mitigating implementation risks. It is anticipated that a Bill will be introduced and passed on or about 15 March 2010. The

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appointment of commissioners will occur on or shortly after 15 March 2010, with the intention being that the intervention would be established and operational by 1 April 2010.

An expedient transfer of powers will enable ECan staff and others to know the exact powers and terms of reference for the commission, and enable the Commission to give guidance as soon as possible their priorities.

A key component in the success of the proposal will be the appointment of councillors with the appropriate attributes and skills. Also key to the success of the intervention will be clear and accurate terms of reference for the intervention.

Monitoring, evaluation and review

An expiry clause drafted into the legislation will determine that the commissioners will cease to exercise functions and powers in place of ECan at such time as they have satisfactorily addressed systemic and planning issues in ECan, and no later than the local body elections scheduled for late 2013. Time will be given for a clean transition, but elected councillors (possibly in combination with a new entity) will take control as soon as practicable following the 2013 elections.

However, in order to promote consistent and durable outcomes, the altered decision-making framework for WCOs will persist past 2013. Any subsequent review of WCOs will revert to the current process set out in the RMA, i.e. the amended powers of the commissioners will not continue once the elected Council is in place.

Despite the fact that there will be a set expiry date for the commission, there are a number of monitoring, review and evaluation requirements planned to ensure the effectiveness of the commission.

Due to the national importance of high quality resource management in Canterbury and the government's desire to address the problem in a robust and timely manner, there will be an ongoing support, monitoring and evaluation role for central government.

The Terms of Reference for the intervention will require quarterly reporting to the Government on progress. This will provide both an opportunity for the commissioners to highlight any issues to the Government, as well as a regular and formal opportunity for Government to comment and provide direction on any unforeseen or additional issues. It is intended that the Terms of Reference for commissioners will include certain conditions and performance indicators and measures to provide a benchmark for assessment, so that underperformance can be identified and swiftly remedied and, if necessary, to allow commissioners to be replaced.

Measures of success will include:

- The extent to which all applications for resource consent are processed within statutory timeframes
- The development of a clear operative planning framework for the management of natural resources in the Canterbury region
- The creation and successful operation of an institutional framework that is integrated across community, district, regional and national scales, effective, transparent and supports robust decision-making

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The Minister for the Environment's statutory monitoring functions (see section 24 of the RMA) are performed by the Monitoring Compliance and Review team within the Environmental Protection Directorate of the Ministry for the Environment. This monitoring will take place as usual but, in the case of Canterbury, will focus specifically on the above measures of success.

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Summary of Information in Environment Canterbury Intervention Reform Regulatory Impact Statement

KEY: ✓ (green) = option likely to achieve objective, x (red) = option unlikely to achieve objective, ? (orange) = unclear if option will achieve objective, or neutral impact

	Option	Short Description	Objective 1 (Comprehensive & holistic management of fresh water)	Objective 2 (Institutional framework for managing fresh water)	Objective 3 (Efficient planning framework)	Risks
1	Legislation replacing council with commission	Commission appointed for all functions of ECan, replacing council.	✓	✓	✓	<ul style="list-style-type: none"> • Misdirected intervention and/or unintended consequences due to legislating at speed • undermining integrity and credibility of existing legislative frameworks • implementation risks • risks to other government workstreams (New Start for Fresh Water)
2	Legislation appointing commissioners to take over resource management planning functions, while leaving the elected council in place to govern other functions.	<p>Commissioners would put in place an effective RMA regulatory policy and planning framework</p> <p>Work with the council and CEO to assist ECan in developing the capability and structure to effectively support that framework.</p> <p>Elected council would govern other functions.</p>	?	x (unlikely)	✓	<ul style="list-style-type: none"> • Same risks as option 1 but more complicated legislation and more risk of unintended outcomes • unpredictable implications arising from the split of powers between commissioners and councillors
3	Legislation replacing council with commission, commission tasked with transitioning to Canterbury Regional Water Authority (Option 1 of Review Team)	Commission would be put in place, with certain functions, and confirmation, veto and direction rights over decisions taken by councillors. Functions would include establishing and transferring appropriate functions to a Canterbury Regional Water Authority	?	?	?	<ul style="list-style-type: none"> • No analysis yet of whether this is an advisable approach to achieving the institutional improvements Government seeks. • Separating the management of water from land and air in Canterbury could lead to non-integrated resource management outcomes. • Attendant political and funding risks associated with the Canterbury Water

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						Management Authority are significant.
4	Implement Canterbury Water Management Strategy (Option 3 of the Review Panel)	Government support, through legislative change and potentially funding, the CWMS.	?	x	?	<ul style="list-style-type: none"> The strategy is still under development Not clear at this stage when or even if it will be appropriate for Central Government to give a statutory mandate and financial support to the CWMS. potential inconsistency between the overarching presumption behind the vision and principles of the CWMS and the purpose of the RMA.
5	Use existing statutory intervention powers	The Minister for the Environment could appoint one or more persons to perform the functions (water-related or all) in place of ECan.	x	x	✓	<ul style="list-style-type: none"> There would be potential for conflict in terms of overall leadership and priorities between the person and the councillors. Probably not able to use existing RMA powers to direct the chief executive and spend council money on the performance of RMA functions. LGA threshold high and considered not to be met RMA options either rely on Canterbury to request intervention or to carry out a variation, with uncertainty surrounding ability of ECan to do so.
6	Invite and support ECan to resolve issues	Following release of report, invite ECan to resolve issues.	x	x	x	<ul style="list-style-type: none"> Very unlikely that ECan would be able to lift its performance to the degree necessary to achieve the government's objectives.

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Appendix 2: Canterbury Water Management Strategy Vision and Principles

Vision of the Canterbury Water Management Strategy

To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.

Fundamental Principles of the Canterbury Water Management Strategy

Primary Principles

1. Sustainable management

Water is a public resource which must be managed in accordance with sustainability principles and be consistent with the Resource Management and Local Government Acts.

2. Regional Approach

The planning of natural water use is guided by the following:

- first order priority considerations: the environment, customary uses, community supplies and stock water
- second order priority considerations: irrigation, renewable electricity generation, recreation, tourism and amenity
- A consistent regulatory approach to water is applied throughout the Canterbury region, recognising these principles
- Both surface and groundwater are given equal importance
- Further development of scientific knowledge of the region's water resources and the impacts of climate change are given priority
- The actual or potential cumulative effects the taking and using water can have on waterways are recognised and managed within defined standards
- A cautious approach is taken when information is uncertain, unreliable or inadequate
- The need for efficient use of water in existing and new infrastructure is recognised
- There is strong emphasis on the integration of water and land management including protection of indigenous biodiversity and enhancement of water quality
- Current and potential effects of land use intensification is an integral part of decision-making on water takes. This may mean amending regional and district plans.

3. Kaitiakitanga

The exercise of kaitiakitanga by Ngai Tahu applies to all water and lakes, rivers, hapua, waterways and wetlands, and shall be carried out in accordance with tikanga Māori.

Supporting Principles

4. Natural Character

The natural character (mauri) of Canterbury's rivers, streams, lakes, groundwater and wetlands is preserved and enhanced:

- natural flow regimes of rivers are maintained and, where they have been adversely affected by takes, enhanced where possible

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- the dynamic processes of Canterbury's braided rivers define their character and are protected
- environmental flow regimes are established for every waterway where abstraction occurs
- that restoration of natural character and biodiversity, is a priority for degraded waterways, particularly lowland streams and lowland catchments
- the interdependence of waterways and coastal ecosystems is recognised.

5. Indigenous Biodiversity

- Indigenous flora and fauna and their habitats in rivers, streams, lakes, groundwater and wetlands are protected and valued.
- The aims of the Canterbury Biodiversity Strategy are recognised and supported.

6. Access

- Public access to and along rivers, lakes, waterways and wetlands is maintained and, where appropriate, enhanced. Access may need to be limited in situations including where environmental risk, public safety, security of assets, cultural values, biodiversity and farm management require.

7. Quality Drinking Water

- All those living in Canterbury have access to high quality drinking water.
- The region's high quality aquifer-sourced drinking water is protected.
- Where Canterbury's drinking water is currently untreated and safe for drinking, it is maintained at that high standard.
- Rivers, lakes, groundwater and wetlands provide opportunities for enjoyment, recreation and tourism.
- High quality water ensures contact recreation such as swimming, fishing, boating and other water sports are able to be enjoyed throughout Canterbury.
- Adequate environmental flows should ensure that recreational users and tourists can enjoy Canterbury rivers.

8. Recreational and amenity opportunities

- Rivers, lakes, groundwater and wetlands provide opportunities for enjoyment, recreation and tourism.
- High quality water ensures contact recreation such as swimming, fishing, boating and other water sports are able to be enjoyed throughout Canterbury.
- Adequate environmental flows should ensure that recreational users and tourists can enjoy Canterbury rivers.
- Eco-tourism opportunities are recognised and encouraged.

9. Community and Commercial Use

Water resources are used sustainably to enhance quality of life:

- where water is abstracted, it is used effectively and efficiently.
- land use, industry and business practices do not adversely impact on natural water quality.
- discharges to waterways are minimised and do not compromise quality.
- land use practices are monitored and best practice approaches are required.
- agricultural stock is excluded from all waterways in catchments where irrigated farming is practised and all lowland streams.
- where acclimatised wildlife in lowland streams cause contamination, they are appropriately managed.
- degraded waahi taonga are enhanced to restore tangata whenua cultural wellbeing.