



**Joint Briefing:** Use of regulations drafted under section 360(1)(d) of the RMA to achieve the policy approved by Cabinet in February 2008 for the measurement of water takes

<b>Date:</b>	10 June 2009	<b>MfE Priority:</b>	<b>URGENT</b>
<b>Security Level:</b>	CLASSIFICATION	<b>Number of Attachments:</b>	Nil
		<b>MfE Ref No:</b>	09-B-1529

**Action Sought**

	<b>Action Sought</b>	<b>Deadline</b>
Minister for the Environment Hon Dr Nick Smith  Minister of Agriculture and Forestry Hon David Carter	(a) <b>Note</b> the contents of this briefing on the benefits of using regulations made under section 360(1)(d) of the RMA to achieve the policy in relation to the measurement of water takes.  (b) <b>Approve</b> the use of s360(1)(d) regulations to achieve the policy in relation to the measurement of water takes in place of the proposed national environment standard.  (c) <b>Approve</b> the preparation of a paper to Cabinet seeking approval to use regulations made under section 360(1)(d) of the RMA to achieve the policy instead of the proposed national environment standard.  (d) <b>Approve</b> officials continuing to consult with the Implementation Taskforce Group on the details of the regulations as they are drafted	19 June 2009

**Ministry for the Environment Contacts**

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## Executive Summary

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Officials have investigated an alternative approach to achieve the outcomes of the proposed national environmental standard (NES) on the measurement of water takes, in response to concerns raised by regional councils. Council concerns focus on the high transactional costs and resources required for extensive reviews of existing consents necessary to implement an NES.

We propose, instead, that regulations be made under section 360(1)(d) of the RMA ('s360 regulations') to achieve the outcomes of the proposed NES, which will negate the need to review existing consents to meet the required minimum national standards. This approach meets the requirements for a national standard, while not imposing unnecessary transaction costs for regional councils and end-users. While s360 regulations can achieve the same policy outcomes as the proposed NES, there is a difference in process between the two forms of regulation. This new approach will require Cabinet approval.

We have consulted with stakeholders, via an Implementation Taskforce Group for the proposed NES, on the alternative proposal to use s360 regulations instead of the proposed NES. The Taskforce agrees to the proposed use of s360 regulations and the intended approach to exemptions. As requested by the Taskforce, we seek your approval to continue to consult with it on the final form of the regulations as they are drafted.

## Recommended Action

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### We recommend that you:

- (a) **Note** the contents of this briefing note on the benefits of using regulations made under section 360(1)(d) of the RMA to achieve the policy in relation to the measurement of water takes
- (b) **Approve** the use of s360(1)(d) regulations to achieve the policy in relation to the measurement of water takes in place of the proposed national environment standard **Yes / No**
- (c) **Approve** the preparation of a paper to Cabinet seeking approval to use regulations made under section 360(1)(d) of the RMA to achieve the policy instead of the proposed national environment standard **Yes / No**
- (d) **Approve** officials to continue to consult with the Implementation Taskforce Group on the details of the regulations as they are drafted **Yes / No**

Sue Powell  
General Manager  
**Local Government Group**

Date

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

Date

Hon David Carter  
**Minister for Agriculture and Forestry**

Date

## **Purpose of Report**

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1. To propose that regulations be made under section 360(1)(d) of the RMA to achieve the policy in relation to the measurement of water takes in place of an NES. The differences in process between regulations made under section 360(1)(d) and under an NES, and the benefits of using s360 regulations, are explained.
2. To seek your approval to consult the Implementation Taskforce Group on the regulations during the drafting process.
3. To seek your agreement to take this matter to Cabinet.

## **Background:**

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4. Following widespread consultation, Cabinet approved a proposal for a national environmental standard for the measurement of water takes on 20 February 2008, and authorised the Parliamentary Counsel Office to prepare draft regulations [POL Min (08) 2/2 refers]. Cabinet also directed officials to engage with regional councils and industry representatives to both assess possible exemptions from the standard (for approval by the Minister for the Environment) and to identify requirements for the implementation of the proposed NES.
5. The proposal for an NES applies to all new and existing water takes requiring consent under section 14 of the RMA including mining privileges (deemed as water permits under section 413 of the RMA).
6. While most councils already impose conditions on water permits requiring metering, these conditions may not cover all of the minimum standards set out in the proposed NES. Therefore, to achieve consistency in measuring and reporting, existing permits would need to be reviewed under section 128 of the RMA.

## **Issue:**

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7. Regional councils have raised concerns about the high transactional costs and resources required for extensive reviews of existing consents to implement the proposed NES. Regional councils' estimates of these costs are substantial (up to \$9 million, based on all consents needing review).
8. Officials have investigated an alternative to the NES approach to achieve the outcomes of the policy proposal while reducing the costs imposed on councils and their communities (water users).

## **The use of s360(1)(d) regulations instead of the proposed NES**

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9. Officials propose that regulations be made under section 360(1)(d) of the RMA ('s360 regulations') to achieve the outcomes of the initial proposal for an NES.
10. Section 360(1)(d) provides for regulations to be made:  
*requiring the holders of water permits ... to keep records for any purpose under this Act, and prescribing the nature of records, information, and returns, and the form, manner, and times in or at which they shall be kept or furnished.*
11. These s360(1)(d) regulations could achieve the same policy outcomes as that approved by Cabinet in respect of the proposal for an NES. Furthermore, they provide the ability to set the minimum requirements for records and reporting on all water take consents, including on existing consents, without the need to review those consents to meet those minimum standards.

12. There is a difference in process between the two forms of regulation (NES and s360). Section 360 regulations would impact directly on existing consent holders without the need for their consent conditions to be reviewed to meet the minimum standards. We propose that a transitional provision of 5 years is provided in the regulations for existing consents, to match the period for reviews to be done which was set out in the Cabinet decision for the NES.
13. In contrast, once an NES is in force, the RMA provides a process for review of consent conditions to meet the minimum standards set by the NES. This is very similar to a resource consent application process, but with the costs being borne by the council (ie, ratepayers). The consent holder could object to the review of conditions and ultimately have the matter determined by the Environment Court. However, we consider that the likely success of any appeal to such a review would be very low and therefore the cost of providing for this process is not justifiable.
14. In addition, subject to your (or Cabinet's) approval, we propose that the regulations :
  - will provide for circumstances where it is physically or extremely impracticable to meet requirements around accuracy, point of measurement and frequency of measurement/reporting.
  - will not apply to temporary and non-consumptive water takes.
15. Overall, because the regulations will be tailored to meet impracticality concerns and a transitional period could be provided, it is considered that the impacts on consent holders as a result of the difference between the NES and s360 regulations processes will not be significant.

### **Consultation with the Implementation Taskforce Group**

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16. Following Cabinet's directive, officials established an Implementation Taskforce Group of interested and relevant stakeholders in early 2008. This Taskforce is made up of representatives from regional councils, industry, NGOs and water users.
17. We have held several meetings with the Implementation Taskforce Group at which we have consulted with these stakeholders on the alternative proposal to use s360 regulations instead of the proposed NES. The Taskforce agrees to the proposed use of s360 regulations and the intended approach to exemptions. It has requested that they continue to be consulted on the final form of the regulations as they are drafted. Officials agree that this would add value and ensure buy-in to the implementation of these regulations.
18. We therefore seek your approval to continue to consult with the Taskforce on the details of the regulations as they are drafted.

### **Approval by Cabinet**

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19. While s360 regulations could achieve the same policy outcomes as the proposed NES, there is a difference in process between the two forms of regulation. This new proposal will require approval by Cabinet.
20. We seek your agreement to take this matter to Cabinet.
21. An indicative timeline for this process follows:

29<sup>th</sup> June 2009 Final draft Cabinet paper (incorporating comments from all relevant departments) sent to your offices for your review

9<sup>th</sup> July 2009 Submit final Cabinet paper to Officials Economic Growth and Infrastructure Committee

22<sup>nd</sup> July 2009 Economic Growth and Infrastructure Committee meeting

27<sup>th</sup> July 2009 Cabinet meeting

