

## **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 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

## 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 production<sup>1</sup>. 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 year<sup>2</sup>.

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

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<sup>1</sup> As at June 2008

<sup>2</sup> 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..

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

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

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 year<sup>3</sup>. 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.

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<sup>3</sup> 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.

## 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.

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

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 powers<sup>4</sup> 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.

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<sup>4</sup> Note that these special powers would also be included in Option 2.

- 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 Hurunui WCO:

- i. Intervene now to 'stop' the current process and transfer consideration of the proposed Hurunui 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).

**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 \$300,000-350,000<sup>5</sup>. Additional savings to the Canterbury community will be the approximately \$850,000 per annum<sup>6</sup> to pay councillors, although this will largely be offset by remuneration for commissioners, anticipated to be \$750,000 per annum. Additional costs of approximately \$200,000<sup>7</sup> 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.

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<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> Based on 1 FTE at \$150,000 (including overheads) plus \$50,000 for travel.

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 criteria<sup>8</sup>, 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.

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<sup>8</sup> See section 128 of the RMA which sets out the circumstances when resource consent conditions can be reviewed

**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 functions<sup>9</sup> 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.

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<sup>9</sup> 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.

**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

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

- 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:

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

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

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.

## 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"> <li>• Misdirected intervention and/or unintended consequences due to legislating at speed</li> <li>• undermining integrity and credibility of existing legislative frameworks</li> <li>• implementation risks</li> <li>• risks to other government workstreams (New Start for Fresh Water)</li> </ul>
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"> <li>• Same risks as option 1 but more complicated legislation and more risk of unintended outcomes</li> <li>• unpredictable implications arising from the split of powers between commissioners and councillors</li> </ul>
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"> <li>• No analysis yet of whether this is an advisable approach to achieving the institutional improvements Government seeks.</li> <li>• Separating the management of water from land and air in Canterbury could lead to non-integrated resource management outcomes.</li> <li>• Attendant political and funding risks associated with the Canterbury Water Management Authority are significant.</li> </ul>
4	Implement Canterbury Water Management	Government support, through legislative change and potentially	?	x	?	<ul style="list-style-type: none"> <li>• The strategy is still under development</li> <li>• Not clear at this stage when or even if it will</li> </ul>

	Strategy (Option 3 of the Review Panel)	funding, the CWMS.				<p>be appropriate for Central Government to give a statutory mandate and financial support to the CWMS.</p> <ul style="list-style-type: none"> <li>• potential inconsistency between the overarching presumption behind the vision and principles of the CWMS and the purpose of the RMA.</li> </ul>
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"> <li>• There would be potential for conflict in terms of overall leadership and priorities between the person and the councillors.</li> <li>• Probably not able to use existing RMA powers to direct the chief executive and spend council money on the performance of RMA functions.</li> <li>• LGA threshold high and considered not to be met</li> <li>• RMA options either rely on Canterbury to request intervention or to carry out a variation, with uncertainty surrounding ability of ECan to do so.</li> </ul>
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"> <li>• Very unlikely that ECan would be able to lift its performance to the degree necessary to achieve the government's objectives.</li> </ul>