

Regulatory Impact Statement

Lyttelton Port Company – Options for an Order in Council under the Canterbury Earthquake Recovery Act 2011 for a 10 hectare reclamation and waste disposal

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment (MfE). It provides an analysis of three options for a streamlined resource consent process to be included in an Order in Council (OIC) for the Lyttelton Port Company (LPC) to construct a reclamation up to 10 hectares (ha). The reclamation is required to assist with the recovery of the Port and to aid the wider recovery of Christchurch City following the Canterbury Earthquake of 4 September 2010 and the aftershock of 22 February 2011 and subsequent aftershocks.

The urgency of the issue has required the MfE to limit consultation to affected local authorities (Christchurch City Council and Environment Canterbury), the Department of Conservation (DOC), the Canterbury Earthquake Recovery Agency (CERA) and LPC.

LPC has provided the majority of the information relating to the proposed OIC. This RIS has been developed in the knowledge of the reliance on the information provided by LPC and in the absence of information and data relating to wider waste disposal issues in the greater Christchurch area as a result of the Canterbury earthquake events. The limited scope of consultation and information reduces the certainty of the analysis set out in the RIS. However, given the importance of LPC's activities to Christchurch City's earthquake recovery efforts, delaying policy approval to allow more time for this information to feed into the RIS would have implications that are neither desirable nor practical.

The preferred option is for an OIC to provide for the reclamation up to 10ha by LPC as a non-notified controlled activity (which must be granted consent) subject to a specified pre-application consultation process and a shortened deadline for decision-making.

The proposed OIC restricts written approval requirements, notification, objection and general appeal rights provided under the Resource Management Act 1991 (RMA). Although the option of judicial review has been retained, this potentially raises access to justice issues. The speed with which this proposal has been developed has not allowed sufficient time to evaluate the implications of this with the Ministry of Justice.

Kevin Currie, Director – Environmental Protection

Date

1.0 Executive Summary

- 1.1 LPC has suffered significant damage from the earthquakes and is operating below normal capacity. The Port is an essential link in the recovery and rebuild of Christchurch. In order for the Port to recover and maintain its operations a reclamation up to 10ha is needed urgently. The reclamation will also provide an additional waste disposal option to assist with Christchurch City's wider recovery in the short term. Under standard RMA processes the reclamation requires resource consent applications to both Environment Canterbury and Christchurch City Council. The scale of the reclamation, its associated environmental effects and location would mean that any resource consent applications are likely to be publicly notified. Timeframes under the RMA for a notified resource consent application and any subsequent appeal are uncertain and lengthy, and could result in significant delays in the Port commencing its urgent recovery works.

2.0 Context

- 2.1 LPC is the main deep-water Port in the South Island providing a vital link in international trade routes and transport. The Port acts as a conduit for economic activity playing an essential role in Canterbury's economy and providing a gateway for a majority of the regions trade. In the absence of Government intervention there is a risk that LPC will not be fully able to participate in, and support Canterbury's recovery efforts and become a constraint in the supply chain.
- 2.2 LPC is a "lifeline utility" for the Canterbury region and is recognised as such in the Civil Defence Emergency Management Act 2002 (CDEMA). Accordingly, LPC is obliged to "ensure that it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency".
- 2.3 LPC has sustained significant and extensive damage to its infrastructure as a result of the Canterbury earthquake events. Wharves, breakwaters, quays and reclaimed land have moved in some instances in excess of 0.5m laterally and over 0.8m horizontally. Based on external engineering reports LPC needs to carry out major rebuild activities on all of its significant wharf structures. Moreover, due to ongoing settlement LPC anticipate having to resurface the container terminal paving (14ha) at least twice over the coming three to five years due to settlement in order to return the Port to pre-September 2010 levels of service.
- 2.4 The Port is currently operating significantly below its normal capacity. Due to the loss of operational space (25 to 35%) it is already experiencing a number of significant problems and therefore the sooner the reclamation can be progressed; the sooner the Port can return to normal operations. Furthermore, this situation is exasperated by the increase in trade volumes, which in part can be attributed to additional materials and plant being delivered to Canterbury as part of the earthquake recovery process.
- 2.5 LPC has sought the assistance of Government to facilitate the approval of a reclamation up to 10ha using earthquake demolition waste material, supplemented by material from the Port's own quarry to assist in its recovery from the Canterbury Earthquake of 4 September 2010, aftershock of 22 February 2011 and subsequent aftershocks.

3.0 Status Quo

- 3.1 Under normal RMA processes any new applications, such as the proposed 10ha reclamation would require resource consent applications to both Environment Canterbury and Christchurch City Council. Depending on the provisions of the relevant

council's regional or district plan and the significance of the proposal's environmental effects, a consent application would either be processed non-notified, limited notified or publicly notified. Given the original 10ha reclamation resource consent applications (lodged prior to the 4 September 2010 earthquake) were publicly notified, it is fairly certain that a publicly notified resource consent process would also apply to the new consent applications.

- 3.2 Resource consents are required under the RMA when the environmental effects of a proposed activity cannot meet the standards of the relevant city/district or regional plan. The scale of the environmental effects generated by a proposal determine whether a council would require a resource consent to be non-notified, limited notified (where only those affected persons who are notified can make a submission) or publicly notified (anyone can make a submission). Different timeframes are set under the RMA according to the type of notification process that must be followed.
- 3.3 The CDEMA and RMA provide emergency powers while a state of emergency has been declared and is in place. This can be used to temporarily override normal RMA plan restrictions with regard to the use of land (and other resources) or buildings. A national state of emergency was declared on 23 February 2011 and has recently expired with the establishment of the Canterbury Earthquake Recovery Authority (CERA).
- 3.4 In response to the exceptional circumstances associated with the Canterbury Earthquake, Parliament passed the Canterbury Earthquake Response and Recovery Act 2010 (CERRA), which has recently been repealed by the Canterbury Earthquake Recovery Act 2011 (CER Act). Amongst other things, the CER Act allows Orders in Council (OIC) to be made to achieve the purpose of the CER Act to facilitate and direct, if necessary, greater Christchurch and its communities to respond to, and recover from, the impacts of the Canterbury earthquakes. These OICs can provide for the exemption, modification or extension of statutory provisions.

4.0 Decisions already taken and legislative and regulatory powers available

- 4.1 LPC obtained approval from the Civil Defence National Controller to dispose of earthquake waste material into an approximate 5ha reclamation area, which forms part of the current 10ha proposal. To date, LPC estimate approximately 28,000m³ of waste material has been deposited in the 5ha reclamation area. Of this, approximately 7,000m³ is from the LPC area (5,000m³ of rock from Sumner Road area and 2,000³ from the Port) and the remaining 21,000³ from wider Christchurch. This disposal ceased in March.
- 4.2 LPC also has resource consent applications before the Environment Court for a 10ha reclamation to support the proposed expansion of its existing coal stockyard operation, which were lodged prior to the 4th September earthquake. These applications have been publicly notified, submissions received, and are currently pending a hearing before the Environment Court, which has been put on hold at the request of the applicant due to the earthquake.
- 4.3 LPC consider that the proposed 10ha reclamation resource consent applications before the Environment Court are no longer viable or applicable due to the extensive nature and significance of the damage resulting from the 4 September 2010 earthquake and aftershock of 22 February 2011. These events have changed the scope of the original

application and have prompted the need for new applications from the Port so it can undertake its necessary repair and recovery works.

5.0 Problem timeframes

5.1 The timeframes prescribed for processing resource consents as set out in the RMA and associated Resource Management (Discount on Administrative Charges) Regulations 2010 are as follows:

Application	Working days
Non-notified (no hearing)	20
Publicly or limited notified (no hearing)	50
Publicly or limited notified (hearing and no pre-circulation of evidence)	70
Publicly or limited notified (hearing with pre-circulation of evidence)	85

5.2 However, in reality the timeframes can be much longer than this. The timeframes listed above do not take into account periods where councils are waiting on further information requested from consent applicants, or the time associated with hearing an application. Councils may also extend timeframes (with the permission of applicants or where special circumstances apply). Including these additional timeframes means that the actual notified resource consent application process can generally take in excess of three months, and is more likely to take more than six months for complex works (such as for the proposed Port recovery works). The RMA enables the applicant and any person who made a submission the right to appeal the council's decision to the Environment Court. Appeals, although not counted in the timeframes listed above, add the potential for significant further delays of six months to a year or more to resolve.

5.3 A notified resource consent process would present significant delay to the Port commencing its recovery works and hinder the Port's ability to receive demolition waste from the wider Christchurch City.

6.0 Objectives

6.1 The objective is to provide a method to expedite resource consent application processes under the RMA for reclamation and waste disposal works that are consistent with the purpose of the CER Act to:

- Ensure that RMA consent application processes do not present undue delays or costs to LPC undertaking its urgent recovery works;
- Aid in the restoration of the social, economic, cultural and environmental well-being of greater Christchurch.

6.1 The options proposed have been assessed against the following criteria. The first criteria, to minimise delay has been given the highest weighting due to the need for the works to be undertaken urgently. The three criteria are weighted in order of importance. Assessment criteria include:

- To minimise delay to the commencement of reclamation and waste disposal works; and

- To ensure that local authorities can still require activities to be managed in such a way as to adequately avoid, remedy or mitigate the adverse effects on the environment; and
- To preserve opportunities for consultation.

7.0 Regulatory impact analysis

7.1 The CER Act 2011 provides a range of planning tools to assist in the recovery and rebuilding of Christchurch. These include a Recovery Strategy, Recovery Plans, Orders in Councils, Minister for Canterbury Earthquake Recovery powers and powers of the Chief Executive of CERA, as well as standard RMA consent processes. Each of these planning tools serves a different function. To address the scale of problem to be resolved, which is the urgency of the recovery works required by LPC, it is considered that in these unique circumstances an OIC is the best option and meets the purposes of the CER Act 2011. An OIC can be progressed quickly, it minimises any potential delay to the commencement of the recovery works, provides greater certainty for the Port and benefits the wider Christchurch City's recovery.

7.2 It is important to note that all of these options for an Order in Council (OIC) have a risk of being judicially reviewed.

7.3 Three OIC options have been identified to achieve the above objectives:

- **Option 1:** (preferred option) Order in Council which provides for a non-notified controlled activity resource consent application without public participation but with specified pre-application consultation and decision making by the council in five or ten working days.
- **Option 2:** Order in Council which provides for a non-notified controlled activity resource consent application with public participation.
- **Option 3:** Order in Council which deems a consent with conditions drafted by Central Government in liaison with councils and LPC

Option 1: Order in Council which provides for a non-notified controlled activity resource consent application without public participation but with specified pre-application consultation and decision making by the council in five or ten working days.

7.4 Under this option the Port's recovery works would be deemed a controlled activity and follow a non-notified resource consent process. The statutory timeframe for councils to make a decision on the consent applications would be reduced from the standard 20 working days for a non-notified consent to 5 or 10 working days.

7.5 Providing for the application as non-notified removes the need for written approvals from affected parties or the opportunity for wider public notification, reducing overall timeframes. The controlled activity status restricts the matters over which council has control (such matters would be specified in the Order) and removes the ability for councils to decline the application. Councils can still impose consent conditions to avoid, remedy or mitigate adverse effects on the environment, relating to matters of control. The OIC would override any district council and regional plan rules. The provisions of the OIC would have to be very specific about the matters control would be exercised over.

7.6 To compensate for removing formal participation rights the Order will require the applicant to consult with specific parties and will specify who those parties are, including Te Runanga o Ngai Tahu, (Ngai Tahu) [or any relevant runanga authorised by Ngai Tahu (i.e. Rapaki)], DoC, NZ Historic Places Trust, Maritime New Zealand, Land Information New Zealand, Lyttelton Community Association, Diamond Harbour Community Association and any other person the applicant considers appropriate prior to the lodging of its application. The Order also requires the applicant to set out in its application a summary of the consultation undertaken, the views of those consulted and how these matters have been responded to.

Benefits

- A controlled activity status would provide greater certainty for the applicant as it removes any doubt about whether an application would be granted consent or not.
- This option would provide for a streamlined and timely resource consent process within 5 or 10 working days to enable the commencement of the Port's and Greater Christchurch's recovery works.
- Controlled activity status provides certainty to LPC as to the subject matter around which conditions of consent may be imposed, while still allowing flexibility for the actual terms and conditions to be negotiated with the Councils.
- Cost and time savings for LPC commencing its recovery works as any submission, hearing or appeal process is avoided.
- Reduces the administrative and consultative burden on LPC and Councils by limiting consultation to the pre-application stage. This saves time and reduces cost on both LPC and the Councils. Due to the previous resource consent applications lodged both LPC and the Councils are aware of the key stakeholders.
- The intent of RMA processes remain largely intact as resource consent is still required for the Port's recovery works and Councils are still able to impose conditions of consent to manage the adverse effects of the activities.
- The Councils retain the ability to monitor conditions of consent and take enforcement action with respect to any breaches.
- The cost effective and timely removal of debris from Greater Christchurch will support business owners' re-establishment efforts, minimising on-going reliance on financial support mechanisms, including need for business continuity insurance.
- Significant cost savings for the wider economy by transporting waste directly from demolition sites to the reclamation and the Port accepting waste free of charge.

Costs/limitations

- Persons severely affected by the application would have no opportunity to be part of the resource consent process as there would be no requirement to consult with the wider community.
- A controlled activity option could potentially favour the applicant as local authorities would have no ability/discretion to decline an application if it is likely to have

significant long term environmental effects. Councils may have to rely on general RMA environmental protection duties and responsibilities under sections 16 and 17 to manage some unforeseen environmental effects.

- 7.7 This is considered the best option to achieve the objective of avoiding undue delays and additional cost. This process enables the Port to undertake its recovery works in an expeditious manner and assist in the wider City's recovery by directly taking demolition waste. The proposed OIC provides for a streamlined resource consent process, which is tailored to provide for pre-application consultation. . By retaining a resource consent process this ensures that the effects of the proposed reclamation can be appropriately assessed by the councils, where adverse effects can be avoided, remedied or mitigated by way of conditions of consent. It is considered that the councils are in the best position to determine conditions of consent in collaboration with LPC and other relevant parties, such as Ngai Tahu, Department of Conservation and Land Information New Zealand.
- 7.8 The 10ha reclamation will provide substantial cost savings for earthquake rubble disposal. Debris Taskforce analysis estimate between \$59 to \$120 million (volume and price dependent) in cost savings from sending rubble direct from demolition sites to the Port's proposed reclamation, as it will be accepted free of charge. This is based on a total volume of 4 million tonnes, with an estimated 25% coming direct to Lyttelton. Furthermore, receiving sorted clean fill from an intermediate facility could also result in an estimated further \$87 million of potential savings from simplification of processing and handling and the removal of resale/rebate risks.
- 7.9 It is also considered that this option enables the expedited recovery and repair of the Port of Lyttelton and is consistent with the purposes of the Canterbury Earthquake Recovery Act 2011 in respect to:
1. Section 3(d): Enabling a focussed, timely, and expedited recovery;
 2. Section 3(f); to facilitate, coordinate and direct the planning, rebuilding and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property
 3. Section 3(g) to restore the social, economic, cultural and environmental well-being of greater Christchurch communities.

Option 2: Order in Council which provides for a non-notified controlled activity resource consent application with public participation.

- 7.10 Option 2 is to provide for the proposal as a non-notified controlled activity as per option 1, but to provide for some form of public participation in the consent process. For example, once the application is lodged with the council, the council could be required to consult with potentially adversely affected parties to seek feedback within a reduced time period (i.e. ten working days). This would keep stakeholders engaged in the process and enable feedback to be built into the resource consent decision. A similar consultative approach was provided by the Canterbury Earthquake (Resource Management Act) Order 2011 for land remediation works. Under this option the twenty working day period for making a decision on the application would still apply.
- 7.11 This option would also provide for no right of appeal except on the part of the applicant. There would also be no ability for any person (other than the council) to take enforcement action. Lengthy enforcement proceedings would undermine the purpose of providing for streamlined non-notified consent processing.

7.12 This option represents less of a significant departure from standard RMA process compared to option 1, however it is more time consuming than option 1 (by at least 3 weeks) and therefore is not preferred.

Benefits

- A controlled activity status would provide greater certainty for the applicant as it removes any doubt about whether an application would be granted consent or not.
- It provides for the council to consider and avoid, remedy or mitigate environmental effects through conditions of consent.
- Time and cost savings for the applicant in commencing recovery works as no appeal process.
- Retaining the ability for councils to consult with the public promotes well informed decision making, albeit in a restricted manner. It provides an opportunity for the affected parties to have their views considered before a decision on an application is made.

Costs / Limitations

- Public participation will add time delays and impose burden on LPC and the Councils.
- LPC has already been involved in extensive public consultation for a similar proposal (original 10ha reclamation proposal on hold before the Environment Court).
- A controlled activity option could potentially favour the applicant as local authorities would have no ability/discretion to decline an application if it is likely to have significant long term environmental effects.
- Providing for a limited consultation process would mean that affected parties are not asked to give their written approvals, rather to provide comments. Whilst their concerns will be taken into account during the council's consideration of a resource consent application their only right to challenge the decision made is through a judicial review (restricting them to challenges on points of law).

7.13 This option represents the least significant departure from the intent of standard RMA process and therefore carries the least judicial review risk of the three options. However, it is the most time consuming option and is therefore not preferred.

Option 3: Order in Council which deems a consent with conditions drafted by Central Government in liaison with councils and LPC

7.14 Under this option the Port's recovery works would be granted through resource consent subject to terms and conditions as drafted by Central Government in liaison with Environment Canterbury and Christchurch City and LPC. As such, no resource consent application would be required. This option would be reliant on the applicant clarifying what activities are proposed and how the effects are going to be managed (i.e. conditions of consent). The OIC would override any council district and regional plan rules that would otherwise have required resource consent to be obtained. To avoid

other activities being inadvertently deemed, the provisions of the OIC would have to be very specific.

Benefits










- A permitted activity status would provide greater certainty as it removes any doubt about whether an application would be granted consent or not, which means the Port's recovery works could start without undue delay.
- There is potential time and cost savings for the applicant associated with the need to prepare comprehensive resource consent applications and it removes burden on the local authorities to undertake an assessment of an application.
- Avoids any appeal process and associated time delays.

Costs/limitations

- This option would be reliant on the applicant clarifying what activities are proposed and how the effects would be mitigated i.e. through conditions of consent. It is unlikely that information to confirm likely conditions of consent in an OIC will be available within the timeframes required for the drafting of the OIC.
- This option is unlikely to adequately avoid, remedy or mitigate adverse effects on the environment. Controls in the OIC are unlikely to be sophisticated or flexible enough to adequately anticipate and manage the range and variability of environmental effects generated.
- As it is the council's role and responsibility to monitor and enforce conditions of consent on an ongoing basis, it is the council's that are best placed to lead and deal with conditions through a consent process, not Central Government.
- Persons severely affected by the application would not get an opportunity to be part of the resource consent process as there would be no requirement to consult with affected parties. This could increase the risk of being judicially reviewed.

7.15 This option is the least preferred by all parties. It would be overly complex and a lengthy process for preparing an OIC. It would present the least flexibility for LPC and the Councils to negotiate a mutually acceptable set of consent conditions. Furthermore, due to the nature and scope of the Port's recovery works it is considered that a fuller consent approval process is more appropriate, which involves the expertise and knowledge of the Councils and provides for ongoing monitoring and enforcement.

7.16 The following table summarises the discussion addressed above and shows how each of the three options being considered meets or does not meet the objectives of the Order in Council. The greatest weighting has been given to minimising delays.

Issue: Options for formulation of an OIC	Objectives		
	Minimise delay	Avoid, remedy or mitigate adverse effects on environment	Preserve opportunities for consultation
Option 1 Non-notified controlled activity resource consent process with specified pre-application consultation and no hearing or appeal rights with decision making in 5 working days.	 Time savings of at least 50 working days		
Option 2: Non-notified controlled activity resource consent application with public participation and no hearing or appeal rights	 Additional time spent consulting with affected parties		
Option 3: Deems a resource consent with conditions drafted by Central Government in liaison with councils and LPC	 Time saving of at least 50 working days		

8.0 Consultation

8.1 The following Government departments have been consulted: Department of Conservation, Department of Internal Affairs, Land Information New Zealand, Ministry of Economic Development, Ministry of Justice, Ministry of Transport, Ministry of Culture and Heritage, Te Punk Kokiri, Canterbury Earthquake Recovery Authority and Treasury. The Department of Prime Minister and Cabinet has been informed.

8.2 The Department of Conservation, Ministry of Civil Defence and Emergency Management, CERA, Environment Canterbury and Christchurch City Council have been involved in discussions relating to the LPC's reclamation proposal and a possible

OIC. LPC and their lawyers, Lane Neave has also been involved in the development of the proposed OIC and are supportive of the recommended approach.

- 8.3 Section 73(2) of the CER Act 2011 requires the Canterbury Earthquake Recovery Review Panel to review all draft Orders in Council before they are recommended under section 71 of that Act. Consultation with the Review Panel is being undertaken and the outcome of this consultation will be advised prior to Cabinet on 16 May 2011.

9.0 Conclusions and recommendations

- 9.1 The preferred option is for an OIC which provides for the Port's reclamation up to 10ha as a non-notified controlled activity resource consent with specified pre-application consultation, and decision making by the councils in 5 or 10 working days (Option 1).
- 9.2 Proceeding with Option 1 could result in a time saving of at least 50 working days (for those applications that would have been notified). It also retains a largely intact RMA process, whereby affected parties as specified in the Order are consulted with by LPC during the pre-application stage. Furthermore, the Councils are still able to impose and review conditions of consent to manage any adverse effects of the Port's activities.
- 9.3 Option 1 provides for significant time and cost savings for LPC, the Councils and the wider City. LPC can commence its urgent recovery works without undue delay and cost as well as assisting with the City's wider recovery and rebuilding by accepting demolition waste.

10.0 Implementation

- 10.1 A definition of the Port's reclamation activities and a sunset clause are likely to be incorporated into any OIC. The proposed OIC will only be in force for a set period of time (for the duration of CER Act until 19 April 2016). An expiry date will ensure that consent applications are unable to use the OIC provisions in perpetuity where such an ability cannot be justified.
- 10.2 It is acknowledged that there is a risk that Port recovery works may still be required after the OIC expiry date. Should this occur an option exists for a resource consent to be applied for before the expiry date to ensure technical compliance with the RMA and relevant plans after that date.
- 10.3 The combined effect of these OIC's is that they will reduce the usual opportunities for land owners and affected parties to participate in statutory approval processes and to remove, or restrict, any rights of appeal. While such restrictions are not desirable, they are considered necessary to ensure that the Port's recovery works can get underway as soon as possible and Canterbury can benefit from the restoration of key infrastructure that is important to the region's economy. Furthermore, wider Christchurch benefits from the Port being able to take rubble to assist with the City's earthquake recovery and rebuilding.
- 10.4 The proposed reclamation involves the construction of the reclamation itself and associated activities, including quarry extraction and haul road construction. Detailed conditions relating to these matters will be agreed with Environment Canterbury, Christchurch City Council and DOC and/or LINZ. All matters will be managed under a detailed Reclamation Construction and Operations Environmental Management Plan that provides for the obligations under the agreed conditions.

- 10.5 It is proposed that normal RMA enforcement provisions will apply to any resource consents issued under the proposed streamlined resource consent process. The relevant local authorities would retain responsibility for ensuring any resource consents issued are monitored, and recovery works are carried out in accordance with conditions of consent.
- 10.6 The preferred option seeks to reduce the normal statutory timeframe within which a council is required to issue a resource consent decision from 20 to five or ten working days. Both councils want decision making within ten working days rather than five so they have more time to organise independent commissioners, verify the consultation undertaken by LPC, and to generally give them a greater degree of comfort that the timeframe can be met. A reduced timeframe is based on LPC, the local authorities and relevant government departments, such as Department of Conservation, Land Information New Zealand and Ngai Tahu working together prior to the lodging of applications and drafting suitable conditions of consent.
- 10.7 Due to the urgency of the recovery works Cabinet will be asked to agree to seek a waiver of the 28 day rule to enable the Order in Council to commence the day it is approved by Executive Council. As mentioned above, the Order will expire on the expiry of the CER Act 2011.

11.0 Monitoring, evaluation and review

- 11.1 Ministry for the Environment officials will monitor the effect of the OIC by liaising with the local authorities to see if the OIC is being used, whether it has been successful in providing for the timely provision of the Port's recovery work, and to determine the level of community concern over the use and effect of the OIC.