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Resource Consent Applications for Dairy Farming Under-Cover in the Mackenzie Basin

Date:	8 January 2010	MfE Priority:	Urgent
Security Level:	APPROVED FOR RELEASE	Number of Attachments:	
		MfE Ref No:	10-B-00003

Action Sought

	Action Sought	Deadline
Minister for the Environment Hon Dr Nick Smith	<p>(a) Agree the appointment of a Project Coordinator, after consultation with the Council, other Ministers and cabinet is the appropriate course of action for these applications</p> <p>(b) Approve the appointment of a Project Coordinator, being the Manager, Consenting for the Environmental Protection Authority (EPA), or her delegate</p> <p>(c) Sign the attached letter of response to Dr Jenkins, Chief Executive, Environment Canterbury</p> <p>(d) Note the deadline for calling in the applications is 2 February 2010.</p>	11 January 2010

Ministry for the Environment Contacts [if required]

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Director- Approval to send to Minister's office

Director		Date	7/1/10
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Executive Summary

This briefing note discusses options for Ministerial Intervention on under-cover dairy farming proposals that have applications for resource consent lodged with Environment Canterbury. It also provides a response to the letter of Dr Jenkins, Chief Executive of Environment Canterbury, on the said applications.

The briefing note confirms that animal welfare issues sit outside of the realm of "effects" to be considered in the Resource Management Act consenting process. It notes that the relevant Act to be applied to the applications is the 2005 Act, hence the new provisions for Ministerial Intervention cannot be applied.

Relying on the 2005 Act, you have the option of Calling In the applications, appointing a Project Coordinator to advise the Council on the applications, or letting the normal consenting process run its course. Direct referral to the Environment Court is not an option available to the applicant's given they lodged these applications prior to 1 October 2009.

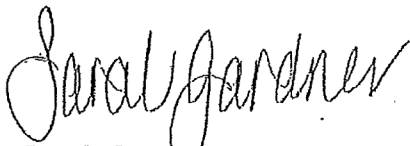
It is recommended that the appropriate course of action, given the nature of the applications and the current review of the consenting process at Environment Canterbury, is to appoint a Project Coordinator to the applications as soon as possible, after giving due consideration to the views on such action of both the Council, other Ministers and cabinet.

The deadline for calling in the applications is 2 February 2010.

Recommended Actions

We recommend that you:

- (a) **Agree** the appointment of a Project Coordinator, after consultation with the Council, other Ministers and cabinet is the appropriate intervention for these applications **Yes / No**
- (b) **Approve** the appointment of a Project Coordinator, being the Manager, Consenting for the EPA, or her delegate **Yes / No**
- (c) **Sign** the attached letter of response to Dr Jenkins, Chief Executive, Environment Canterbury
- (d) **Note** the deadline for calling in the applications is 2 February 2010.



Sarah Gardner
Manager Consenting (EPA), Environmental Protection Directorate

7-1-2010

Date

Hon Dr Nick Smith
Minister for the Environment

Date

Purpose of Report

1. This briefing provides background information on applications for under-cover dairy farming in the MacKenzie Basin. It outlines the content of the letter you received from Dr Bryan Jenkins on 24 December 2009 and provides a suggested response. It also outlines options for Ministerial Intervention in the consenting process and recommends an option for your consideration.

Background:

2. The following applications have been made for under-cover farming operations in the MacKenzie Basin:
 - a) *Williamson Holdings Limited (also known as Southdown Holdings Limited)*
These applications are for the under-cover farming of 3850 cows. Effluent from the operation will discharge into three effluent ponds holding 24,000 cubic metres of effluent each. Effluent will be spread onto land on the property from those ponds.
 - b) *Five Rivers Limited*
These applications are for the under-cover farming of 7000 cows. Seven effluent ponds holding 30,000 cubic metres of effluent each are required. Effluent from the ponds will be spread onto land.
 - c) *Southdown Holdings Limited*
These applications are for the under-cover farming of 7000 cows. Six effluent ponds that hold 22,000 cubic metres of effluent each will be used to store effluent that is later spread onto land.

Public Notification

3. All applications for land use consent and discharge permits to Environment Canterbury were publically notified together. The Williamson Holdings Limited applications were then re-notified because of the omission of a parcel of land from the original notification. Five Rivers Limited and Southdown Holdings Limited's submission period closed on 18 December 2009. Williamson Holdings Limited re-notification ends with submissions closing on 15 January 2010.
4. More than 3000 submissions have been received on the applications made by Five Rivers Limited and Southdown Holdings. Many cite animal welfare issues. Environment Canterbury has a tentative hearing timetable on its website that suggests the applications will be heard in March 2010. Earlier advice received by Officials was that the applications are to be heard as early as 10 February 2010.

Other Resource Consents Sought

5. All three applicants have also made applications for water permits in the Waitaki Catchment. Those permits have been processed separately thus far and the hearings on those applications commenced in October 2009 and are due to be completed in January 2010. The Hearing Commissioners are Paul Rogers (Chair), Michael Bowden, Dr Jim Cooke and Edward Ellison.
6. On speaking to the Hearings Administrator at Environment Canterbury, she confirms that the same Commissioners are likely to hear the discharge permits but have not yet been appointed. It is unclear, from speaking to Environment Canterbury, about whether the Hearing for the water permits will continue to hear the discharge permits, or if a separate hearing will be convened. The representative of Environment Canterbury did

comment that this is as yet undecided and complicated by the separate processing of the water permits and discharge permits to date.

7. The separate processing of the water permits and discharge permits is contrary to the provisions of section 103 of the Act which requires that the applications, if sufficiently related, be processed together. Environment Canterbury would have to have considered the applications "*sufficiently unrelated*" to separate the water permit process from the other resource consents sought. The section also requires that in such a case the applicants agree that "*a combined hearing need not be held*".
8. A memorandum of Counsel on behalf of the applicant's made to the Hearing Commissioners on 22 December 2010 sought deferral of the discharge permit applications to the Environment Court. This is not an option for applications lodged prior to 1 October 2009, such as these. The memorandum stated "*I also maintain that it is not necessary to hear the water rights applications at the same time as the effluent applications as the Committee has sufficient information to understand the potential effects of irrigation*".
9. If the applications were not received at the same time, Environment Canterbury would have had sufficient understanding of what was proposed to invoke section 91(1)(a) and (b) of the Act which would have allowed for deferral of the water permits pending the discharge permit applications because:
 - (a) Other resource consents under this Act will also be required in respect of the proposal to which the applications relates, and
 - (b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.
10. Applications made to Waitaki District Council for intensive farming (use of cow barns) and land use consents for associated excavation for each under-cover dairy farming proposal have already been granted. Waitaki District Council has also issued certificates of compliance for feed crop production. Whether joint processing was discussed with Environment Canterbury cannot yet be confirmed as Waitaki District Council is closed until 11 January 2010.

Letter from Dr Jenkins, Environment Canterbury

11. Dr Jenkins wrote to you on 23 December 2009 explaining the applications sought and their consenting process. He also outlined legal advice he received about the animal welfare concerns generated by the applications. He appropriately concludes that these matters are for the Animal Welfare Act 1999 rather than the Resource Management Act 1991 (RMA).
12. Dr Jenkins also suggests that the effect of the proposals on New Zealand's farming image is one that lies within the scope of the land use consents for the activities rather than the discharge permits and that as such the Regional Council consent applications can give that issue little weight.
13. Dr Jenkins seeks your advice on the matter of Call-In. He considers animal welfare could not be the subject of Call In and seeks confirmation of this view. Dr Jenkins correctly notes that although direct referral to the Environment Court is now the preference of all applicants, the lodgement date for the applications was prior to 1 October 2009, hence this new provision does not apply to these applications.

Response to Letter from Dr Jenkins

14. A draft letter of response to Dr Jenkins is attached (see Appendix 1). The letter:
- confirms that animal welfare issues sit outside the Resource Management Act, and are not a matter for call in;
 - concurs that direct referral of the applications is not an option available for the applications; and
 - suggests the option of appointing a Project Coordinator and seeks the Council's views on this option.

Ministerial Intervention Options

15. There are several possible options for Ministerial Intervention in the consenting process for the applications. These are identified in Appendix Two. None of the provisions of the Simplifying and Streamlining amendments to the Resource Management Act 2009 apply to these applications because they were lodged prior to 1 October 2009 when that Act came into force.

Call In

16. Section 141A(4)(b) of the Resource Management Act provides for you to Call In the applications. Those provisions require that the applications meet one of the tests for having national significance. The strongest weight of the test for national significance for the applications is likely to fall under Section 141B(2)(a) of the 2005 Act that refers to "(a) *has aroused widespread public concern or interest regarding its actual or likely effect on the environment, including the global environment*". It is understood that you have already publically stated that you do not consider the applications appropriate for Call In.
17. It is important to note the distinction between the 2005 provisions and the 2009 Act. The 2005 provisions allow for Call In up to five working days prior to the commencement of the hearing on the applications, rather than the 2009 provisions which require Call In to occur not more than five working days after submissions close on an application.
18. While the situation is fluid at Environment Canterbury in that Hearing dates appear tentative, the last day that Call In is available to you is Tuesday 2 February 2010. This is correct if the Hearing commences on 10 February 2010, as per advice to Officials in late December 2009.

Submission on the Matter for the Crown

19. This option is extinguished for both the Five Rivers Limited and Southdown Holdings Limited applications because submissions have closed. A submission can still be made on the Williamson Holdings Limited applications because that submission period doesn't close until 15 January 2010.
20. You could choose to make a late submission on the applications of Five Rivers Limited and Southdown Holdings Limited but they would not be automatically accepted. Procedure can be different in various Councils but the acceptance of such a late submission is usually at the discretion of the Hearing Commissioners.
21. The effectiveness of any submission would be no greater than a submission from any other party. It would require in depth analysis of the actual and potential environmental effects of the proposals and the preparation of evidence by expert witnesses if the Crown wished to be heard. There is little time available for Officials to prepare such a submission before the submission period closes for Williamson Holdings Limited.

Appointment of a Project Coordinator

22. Section 141A(4)(d) of the 2005 Act provides for you to appoint a project coordinator to advise the consent authority on the applications. The Act is silent on the extent of that coordinator's role except to limit it to advising the consent authority.
23. It should be noted that such advice may not always be taken up, nor might it influence the outcome of the decision on the applications.
24. The public concern on the applications is predominantly related to animal welfare and farming image, rather than adverse environmental effects. For this reason the appointment of a Project Coordinator is recommended.
25. The current review you are undertaking of Environment Canterbury, particularly its consenting function, gives weight to this option. This is particularly so if the report on the review is to be released prior to decisions on the applications.
26. In addition, section 141A(3)(i) and (ii) apply. Should you consider that Environment Canterbury do not have the capacity to process and decide the application you can choose to exercise your intervention powers, including both Call In and the appointment of a Project Coordinator.
27. Environment Canterbury has significant project management challenges in its consenting process, due in part to its technically focused staff and lack of case management and planning capability. This suggests that the assistance of a central government appointed Project Coordinator, with specific planning skills, project management and consenting experience might be of significant benefit to the process. The Ministry for the Environment has these skills available, in particular in the Consenting Team within the EPA.

Appointment of a Hearing Commissioner

28. You can choose to appoint a Hearing Commissioner, in addition to any Commissioners appointed by Environment Canterbury, to hear and decide the applications. That Commissioner would be awarded the same duties, functions and powers as those appointed by the Council.
29. Appointing a Hearing Commissioner late in the process is an issue if the hearing of the water permits continues and hears the discharge permits, as per the provisions of section 103. This is because any Commissioner you appoint would not have heard the evidence on the water permits.
30. Appointing a Commissioner that only hears the discharge permits, if the hearings are separate also has some difficulty. This is because the Commissioner would be deciding applications that have not been processed according to the provisions in the Act.

Decide Not To Intervene

31. You can choose not to intervene in the processing of these applications. There is no legal impediment in doing so. The applications are due to be heard on 10 February 2010 or somewhere there about. A decision to intervene on the processing of these applications may have limited influence over the outcome of those hearings, because of the independence of that decision making from the EPA (that would ultimately administer the process under Call In or provide the expertise of Project Coordinator).

Process for Intervention

32. Under the provisions of the 2005 Amendment Act, it is good process for you to consult with the local authority on any course of intervention that you may consider. Your response to Dr Jenkins considers the appointment of a Project Coordinator. His views are sought on any potential appointment.
33. In addition, Cabinet Circular CO (06) 7 requires that if you wish to either Call In the applications or make a Crown submission you would need to take such a proposal to Cabinet for discussion. See Appendix Three for the wording from the Circular. Should you agree with the recommendation to appoint a Project Coordinator you may wish to circulate this briefing note to other Ministers for their information or consult with them prior to making any direction. We recommend as a minimum, you discuss your decision with the duty Minister and then make an oral note to the first Cabinet meeting.
34. Taking the above into account, there is some urgency required to progress this matter. A decision on Call In is required by 2 February 2010 at this stage. In order to give the greatest effect to the appointment of a Project Coordinator this needs to occur well in advance of the Hearing. This is particularly so given there is still the ability to influence how the applications are heard i.e. together rather than separately.

Matters Beyond the Resource Management Act

35. It is noted that these proposals have raised matters, in particular of animal welfare and of New Zealand's farming image, that sit outside the powers of the Resource Management Act 1991. To that end this briefing note has not considered those matters outside the Act, except in response to the letter of Dr Jenkins. A briefing note will be provided at a later time to discuss the broader issues that these applications have raised in a policy context.
 36. Consultation with the Ministry of Agriculture and Forestry has been undertaken around the issues of animal welfare and farming image. Briefing notes from that Ministry have been provided to Officials. They acknowledge the issues and suggest that further work is required on the matters raised.
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Dr Bryan Jenkins
Chief Executive
Environment Canterbury
P O Box 345
CHRISTCHURCH

Dear Dr Jenkins

**Resource Consent Applications for Under-Cover Dairy Farming
in the MacKenzie Basin**

Thank you for your letter discussing the applications to your Council for dairy farming under-cover. I understand that your Council has had substantial response to the notification of these applications and that the process will be challenging to manage.

Animal Welfare

You correctly identify that animal welfare is not a matter for consideration under the Resource Management Act 1991. That responsibility lies with the Animal Welfare Act 1999. This view has been communicated to the Department of the Prime Minister and Cabinet and to the Ministry of Agriculture and Forestry.

Ministerial Intervention

Call In

As you correctly note, the Resource Management Act 2005 applies to these applications and therefore the 2009 amendments do not have effect. This being the case I have available to me the option to Call In the applications, by 2 February 2010. This is different to the understanding in your letter, because the 2005 Act allows for Call In up to five working days prior to the hearing of the applications.

In order to Call In the applications they would need to meet the test for national significance. In this case, with a great majority of the focus on the applications being, as you state, animal welfare and farming reputation, I am not currently of the view that Call In is the appropriate mechanism for intervention.

Appointment of a Project Coordinator

I do have available to me the option of appointing a Project Coordinator to advise your Council on the processing of the applications. This is an option that I am seriously considering because it allows, under this model, Environment Canterbury to obtain government assistance without the need to Call In the applications. This means that your Council appointed Commissioners would remain the decision makers and all parties would maintain rights of appeal to the Environment Court.

I would appreciate your early response to this proposal, including your views on how your Council might best work with the Project Coordinator in the process. With the hearings set for 10 February 2010 it is advantageous to decide on a course of action as soon as possible.

Yours sincerely

Hon Dr Nick Smith
Minister for the Environment

- *141A Minister's power to intervene*
 - “(1) This section applies when the Minister—
 - “(a) receives a request to intervene on a matter from—
 - “(i) 1 or more applicants; or
 - “(ii) a local authority required to process and decide a matter; or
 - “(b) decides to apply the section.
 - ““(2) The Minister—
 - “(a) must have regard to the factors described in subsection (3); and
 - “(b) may exercise 1 or more of the powers described in subsection (4).
 - ““(3) The factors are—
 - “(a) the extent to which a matter is or is part of a proposal of national significance under section 141B(2); and
 - “(b) whether the local authorities that would process and decide the matter if the Minister did not call it in—
 - “(i) have the capacity to process and decide it; and
 - “(ii) consider that the exercise of any of the powers in subsection (4) would be appropriate.
 - ““(4) The powers are—
 - “(a) to decide not to intervene;
 - “(b) to call in the matter under section 141B;
 - “(c) to make a submission on the matter for the Crown;
 - “(d) to appoint a project co-ordinator for a matter to advise the consent authority on anything relating to the matter;
 - “(e) if the matter involves more than 1 consent authority, to direct the consent authorities to hold a joint hearing on the matter;
 - “(f) if a consent authority appoints 1 or more hearings commissioners for a matter, to appoint 1 additional hearings commissioner for the matter.
 - ““(5) If the Minister gives a direction under subsection (4)(e),—
 - “(a) the consent authorities to which it is given must hold the joint hearing; and
 - “(b) section 102 applies, with the necessary modifications, to the hearing.
 - ““(6) If the Minister appoints a hearings commissioner under subsection (4)(f), the commissioner has the same powers, functions, and duties as a commissioner appointed by the consent authority.
- *“141B Minister's power to call in matters that are or are part of proposals of national significance*
 - “(1) When the Minister considers that a matter is or is part of a proposal of national significance, the Minister may call in the matter by making 1 of the following directions:
 - “(a) a direction that the matter be referred for decision to a board of inquiry under sections 146 to 149; or
 - “(b) a direction that the matter, after the receipt of any submissions that the local authority or the Minister called for, be referred for decision to the Environment Court under section 150AA.
 - ““(2) In deciding whether a matter is or is part of a proposal of national significance, the Minister may have regard to any relevant factor, including whether the matter—
 - “(a) has aroused widespread public concern or interest regarding its actual or likely effect on the environment, including the global environment; or
 - “(b) involves or is likely to involve significant use of natural and physical resources; or
 - “(c) affects or is likely to affect any structure, feature, place, or area of national significance; or
 - “(d) affects or is likely to affect more than one region or district; or

- “(e) affects or is likely to affect or is relevant to New Zealand's international obligations to the global environment; or
- “(f) involves or is likely to involve technology, processes, or methods which are new to New Zealand and which may affect the environment; or
- “(g) results or is likely to result in or contribute to significant or irreversible changes to the environment, including the global environment; or
- “(h) is or is likely to be significant in terms of section 8 (Treaty of Waitangi).

“141C Form and effect of Minister's direction

- A direction by the Minister under section 141B(1) must—
 - “(a) be in writing signed by the Minister; and
 - “(b) state the reasons for calling the matter in; and
 - “(c) be served on the local authority that would have been required to process and decide the matter if the Minister had not made the direction; and
 - “(d) be served,—
 - “(i) if the matter has not yet come before the local authority, as soon as practicable after the direction is made:
 - “(ii) if the matter has come before the local authority and no hearing is to be held on it, before the authority notifies its decision or recommendation on the matter:
 - “(iii) if the matter has come before the local authority and a hearing is to be held on it, at least 5 working days before the date fixed for the commencement of the hearing.”

The key points in this circular are:

- When considering whether or not to intervene under section 141A of the RMA, the Minister should consider seeking the views of other Ministers at Cabinet, depending on factors such as the national significance of the proposal, the level of public interest and whether other portfolios might be affected.
- If the Minister is proposing to call in a proposal under section 141A(4)(b) or to make a Crown submission under section 141A(4)(c), the Minister must refer the issue to Cabinet for discussion, before making the decision.
- If the Minister decides to intervene by way of Crown submission, a lead department (usually the Ministry for the Environment or the Department of Conservation) will coordinate consultation with other relevant departments when preparing the submission. To the extent possible, the Crown submission should represent a whole of government view.
- All Crown submissions must be approved by Cabinet before being lodged.