

Proposals for the Environmental Protection Authority

Reference number:

CAB Min (10) 19/9

Portfolio: Environment

On 31 May 2010, following reference from the Cabinet Business Committee, Cabinet:

Background

1. **1** noted that in September 2009, Cabinet:
 1. 1.1 agreed that the purpose of creating an Environmental Protection Authority (EPA) is to more effectively, efficiently, and transparently manage the regulation of New Zealand's environment and natural resources by providing greater central government direction on the regulation of the environment, consolidating regulatory and technical skills, and building on synergies between similar functions and powers;
 2. 1.2 agreed that the scope of the statutory functions of the EPA be centred on regulatory functions under the following legislation:
 1. 1.2.1 Resource Management Act 1991 (RMA);
 2. 1.2.2 Hazardous Substances and New Organisms Act 1996 (the HSNO Act);
 3. 1.2.3 Ozone Layer Protection Act 1996;
 4. 1.2.4 Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 under the Imports and Exports (Restrictions) Act 1988;
 5. 1.2.5 Climate Change Response Act 2008 with regard to the administration of the Emissions Trading Scheme;
 6. 1.2.6 Exclusive Economic Zone legislation (if this is passed);
 3. 1.3 agreed that the choice of a preferred option to meet the above purpose be guided by the extent to which:
 1. 1.3.1 greater central government direction and consistency in the management and regulation of the environment can be delivered;
 2. 1.3.2 scarce technical skills can be concentrated and efficiency gains can be achieved by grouping similar activities and functions together in one organisation;
 3. 1.3.3 certainty of process for natural resource users and applicants can be improved through clarifying responsibilities;
 4. 1.3.4 organisational form is appropriate for the functions and powers to be exercised;
 5. 1.3.5 public perception of undue political influence over regulatory decisions by Ministers can be dispelled;
 6. 1.3.6 additional marginal costs to government can be minimised;
 7. 1.3.7 organisational arrangements are flexible to meet future demands, and changes can be made to the scope of the EPA with minimal disruption;

8. 1.3.8 the organisation's form and functions reflect the Crown-Maori relationship;
4. 1.4 agreed in principle, subject to further reporting, to proceed with the establishment of the EPA as a stand-alone Crown agent that combines the functions of the Environmental Risk Management Authority (ERMA) with other national-level consenting and administrative functions, as the preferred option for the development of the EPA;
2. [CAB Min deleted]

2 noted that in November 2009, the Cabinet Economic Growth and Infrastructure Committee (EGI):

3. 2.1 noted that further analysis would be undertaken on options for the National Radiation Laboratory (in terms of transferring these functions to the EPA);
4. 2.2 agreed that the Minister for the Environment (the Minister) would investigate further the option of the EPA being established within the Ministry for the Environment (MfE);
5. 2.3 agreed to focus consultation with iwi Maori, to seek input into how Maori can best be involved in the EPA;
6. 2.4 invited the Minister to report to EGI by 31 March 2010 on the costs and implications of setting up the EPA within MfE, and as a stand-alone entity operating as a Crown agent;
7. 2.5 directed MfE, in consultation with other departments and relevant science agencies as appropriate, to also report to EGI by 31 March 2010 on what formal processes may need to be built into the design of the EPA to facilitate effective connections between the EPA and the science sector;
8. [EGI Min deleted]

High level objectives for the EPA

1. **3 agreed** that, in addition to the criteria set out in paragraph 1.3 above, the assessment of a preferred option for the EPA also consider:
 1. 3.1 the wider impact of the number of environmental entities operating at the national level;
 2. 3.2 career opportunities for staff of the EPA;

Disestablishment of existing entities

1. **4 agreed** to disestablish, when the functions are transferred by Order in Council:
 1. 4.1 the existing Environmental Risk Management Authority (ERMA) established under the HSNO Act;
 2. 4.2 the EPA statutory office established under the Resource Management (Simplifying and Streamlining) Amendment Act 2009;
2. **5 noted** that on the disestablishment of ERMA, the appointments to Nga Kaihautu Tikanga Taiao under the HSNO Act and the ERMA agency chief executive will expire;

Options for establishing the EPA

1. **6 noted** that there are two options for the organisational form of the EPA:
 1. 6.1 option 1: as a stand-alone Crown agent under the control of a governance board that combines the functions of ERMA with other national-level regulatory and consenting functions;
 2. 6.2 option 2: as a statutory office operating within MfE, headed by a statutory officer accountable to the Secretary for the Environment, with an independent committee appointed by the Minister to exercise the decision-making powers under the HSNO Act;

Functions to be transferred to the EPA

1. **7 agreed** that the EPA should perform:
 1. 7.1 the following powers, functions and duties under the RMA:
 1. 7.1.1 processing proposals of national significance;
 2. 7.1.2 making recommendations to the Minister on whether the proposal should be referred to a board of inquiry, the Environment Court, or the local authority for a decision;
 3. 7.1.3 determining applications for certificates of compliance in relation to proposals of national significance;
 4. 7.1.4 providing secretariat support to any board of inquiry established to make decisions on those applications;
 5. 7.1.5 providing secretariat support to any special tribunal appointed to make a recommendation to the Minister on applications, including amendment applications, for Water Conservation Orders;
 6. 7.1.6 providing technical advice and input into the development of national environmental standards;
 7. 7.1.7 monitoring the implementation of national environmental standards by local authorities;
 2. 7.2 the following powers, functions and duties relating to the New Zealand Emissions Trading Scheme under the Climate Change Response Act 2002:
 1. 7.2.1 administering the Emissions Unit Register;
 2. 7.2.2 administering applications for allocation;
 3. 7.2.3 issuing units in accordance with Ministerial directions;
 4. 7.2.4 transferring units in accordance with chief executive or Ministerial directions;
 5. 7.2.5 conducting compliance and enforcement activities;
 6. 7.2.6 making emissions rulings;
 7. 7.2.7 providing technical advice and input into the development of regulation;
 8. 7.2.8 operating the Climate Change Contact Centre;
 3. 7.3 the following powers, functions and duties under the Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 in relation to the Stockholm and Rotterdam Conventions:
 1. 7.3.1 processing applications for import and export permits;
 2. 7.3.2 deciding import and export permits;
 3. 7.3.3 compliance and enforcement of certain import and export permits;
 4. 7.3.4 maintaining registries;
 5. 7.3.5 technical input into development of standards;

4. 7.4 the following powers, functions and duties under the Imports and Exports (Living Modified Organisms) Prohibition Order 2005:
 1. 7.4.1 liaising with applicants seeking approval to export living modified organisms;
 2. 7.4.2 providing technical advice to MfE to inform the recommendation to the Minister as the decision-maker;
 3. 7.4.3 notifying decisions on export approvals for living modified organisms to the Biosafety Clearing House;
5. 7.5 the following non-statutory functions under the Antarctica (Environmental Protection) Act 1994, currently performed by MfE:
 1. 7.5.1 advice to the Ministry of Foreign Affairs and Trade on environmental impact assessments for activities in Antarctica;
2. 8 **agreed** that the transfer of functions referred to in paragraph 7.2 above to the EPA exclude the transfer of any regulatory functions in relation to the forestry sector, currently undertaken by the Ministry of Agriculture and Forestry under delegation;
3. 9 **agreed** that, for the HSNO Act functions, the EPA will perform all of the functions of ERMA under the HSNO Act;
4. 10 **agreed** that the EPA have enabling powers to be able to contract out some of its functions as appropriate;
5. 11 **agreed** that there is an insufficient case for transferring radiation protection regulatory functions (presently the responsibility of the Ministry of Health and administered by the National Radiation Laboratory, a unit of the Ministry of Health) to the EPA;

Giving effect to the Crown-Maori relationship

1. 12 **noted** that the establishment of the EPA will not prevent Maori having a direct relationship with the Crown on policy and other strategic matters related to natural resources;
2. 13 **noted** that focused consultation with iwi has been undertaken to seek input into how Maori can best be involved in the EPA, and that the following five key themes emerged:
 1. 13.1 Maori representation on decision-making board(s) should be increased to at least two members with expertise in the Treaty of Waitangi and tikanga Maori, and preferably increased to a 50/50 split;
 2. 13.2 support for a statutory Maori advisory committee provision;
 3. 13.3 the role of the committee should be to advise on applications, policy, and processes in relation to both the RMA and the HSNO Act;
 4. 13.4 the committee should not be seen as a substitute for local iwi engagement;
 5. 13.5 a preference for the EPA to be established as a stand-alone Crown agent;
3. 14 **noted** that the HSNO Act currently requires the membership of ERMA to include “a balanced mix of knowledge and experience in matters likely to come before the Authority”, including “matters relating to the Treaty of Waitangi and tikanga Maori” (sections 16(1) and 16(2));
4. 15 **agreed** that the membership provisions of the new board to exercise decision-making powers under the HSNO Act require at least one member to have knowledge and experience in matters relating to the Treaty of Waitangi and tikanga Maori;
5. 16 **noted** there are two options for establishing a statutory Maori advisory committee to the EPA:

1. 16.1 maintaining the existing scope of providing advice on the HSNO Act functions; or
2. 16.2 expanding the scope to include functions under both the HSNO Act and the RMA;
6. 17 **agreed** to establish a statutory Maori advisory committee to the EPA, as set out in paragraph 16.1 above, with the following conditions:
 1. 17.1 the committee has no fewer than four, and no more than eight, members;
 2. 17.2 the committee provides advice and assistance on policy, process, and applications from the Maori perspective, to those performing the functions under the HSNO Act;
 3. 17.3 the committee operates within terms of reference that are reviewed every three years;
7. 18 **noted** that the Minister of Maori Affairs supports the establishment of the statutory Maori advisory committee as set out in paragraph 16.2 above;

Comparison of options for establishing the EPA

1. 19 **noted** that both options for establishing the EPA, as outlined in paragraph 6 above:
 1. 19.1 provide efficiency and performance gains from grouping similar activities and skills, and reducing unnecessary duplication;
 2. 19.2 create certainty through having one organisation responsible for national-level regulation;
 3. 19.3 can have the government direct it to give effect to policy related to its statutory objectives;
 4. 19.4 do not enable the government to intervene in individual applications (other than where Ministerial powers are provided for in statute);
 5. 19.5 do not propose any significant changes to Ministerial decision-making powers on regulatory matters;
 6. 19.6 provide for statutory decision making, independent of Ministerial influence;
 7. 19.7 provide for the same statutory provision for Maori involvement;
 8. 19.8 would require legislative amendment to change the scope or range of functions and powers of the EPA in the future;
2. 20 **noted** that the specific advantages and disadvantages of option 1 (paragraph 6.1 above) are that the stand-alone Crown agent:
 1. 20.1 creates a clear split between the policy functions of MfE and implementation and technical functions;
 2. 20.2 increases the risk of duplicating policy resources in the EPA and at MfE;
 3. 20.3 has less perception of Ministerial influence over decisions compared with option 2;
 4. 20.4 is the preferred option amongst participants in the consultation with Maori, due to increased perception of independence from political influence;
 5. 20.5 has lower one-off establishment costs, although this is offset by a greater ongoing operating cost;
 6. 20.6 is flexible to enable further functions to be added, although it will be harder to move functions back into a department;

7. 21 **noted** that the specific advantages and disadvantages of option 2 (paragraph 6.2 above) are that a statutory office within MfE:
 1. 21.1 provides the opportunity for more direct feedback between implementation and policy;
 2. 21.2 reduces the potential for duplicating policy resources in the EPA and MfE;
 3. 21.3 will need to more actively manage the perception of independence that the EPA statutory office will have from MfE's core business, through clear delineation from MfE's core business, and through independent Ministerial-appointed decision-makers;
 4. 21.4 more directly gives effect to the Crown-Maori relationship and the principles of the Treaty of Waitangi through the closer relationship with Ministers and the Crown;
 5. 21.5 reduces whole-of-government transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning, and reporting;
 6. 21.6 provides corporate savings associated with combining the corporate services of MfE and ERMA;
 7. 21.7 has higher one-off establishment costs, although these are likely to be recovered within the first year of operation as it delivers an overall reduction in ongoing operating costs by combining the corporate services of MfE and ERMA;
 8. 21.8 is flexible and more easily transferable to another entity (e.g. department or Crown entity);
8. 22 **noted** the estimated fiscal costs of each option, as follows:
 1. 22.1 option 1 (stand-alone Crown agent): up to \$3.5 million in one-off establishment costs, and up to \$1.6 million in additional annual operating costs;
 2. 22.2 option 2 (statutory office): up to \$3.8 million in one-off establishment costs, and up to \$0.9 million in additional annual operating costs;

Selection of option

1. 23 **agreed** to proceed with option 1, which:
 1. 23.1 establishes the EPA as a stand-alone Crown agent under the control of a governance board with expertise in governance and administration of environmental and risk management frameworks in relation to matters likely to come before the EPA;
 2. 23.2 requires the membership of the EPA board to consist of no fewer than six members and no more than eight members (including the Chair and at least one member with knowledge and experience in the Treaty of Waitangi and tikanga Maori);
 3. 23.3 provides for members of the EPA board to hold office for a period of up to three years, with renewals of term possible;
 4. 23.4 provides for the EPA board to exercise the powers and perform its functions as specified in paragraphs 7 and 9 above, for delegation powers for these and other functions as appropriate, and for the provisions of the Crown Entities Act 2004 to apply to it;
 5. 23.5 requires the EPA board to appoint the statutory Maori advisory committee referred to in paragraph 17, and to agree to its terms of reference;
 6. 23.6 provides for the EPA to support the decision-making committee and the Maori advisory committee;

Implementation considerations

1. **24** **noted** that the intended operational date of the EPA is 1 July 2011;
2. **25** **agreed** that the functions listed in paragraphs 7.1, 7.3, 7.4, 7.5 and 9 above be transferred to the EPA from a date as prescribed by Order in Council;
3. **26** **noted** that there is a risk with the transferring of the Emissions Unit Registry and other Climate Change Response Act 2002 functions in time for the intended operational date of 1 July 2011, associated with high level of activity over the period leading up to, and including July 2011;
4. **27** **agreed** that the transfer of functions to the EPA referred to in paragraph 7.2 above (excluding those functions referred to in paragraph 8) be delayed until 30 September 2011 or some later date, as prescribed by Order in Council;
5. **28** **noted** that the Minister intends to submit a proposed Exclusive Economic Zone policy to EGI for consideration in late 2010, including an analysis of the appropriate institutional arrangements of the functions proposed (including that the EPA could potentially perform the proposed regulatory consenting functions);

Transitional issues

1. **29** **agreed** that the existing staff from the ERMA agency (other than the expired appointments) and the existing EPA, and any other staff who are involved in performing the transferring functions, be transferred to the new EPA when the functions are transferred by Order in Council;
2. **30** **agreed** that the existing staff undertaking related emissions trading or emissions unit registry functions be transferred to the new EPA by 30 September 2011 or some later date when functions are transferred by Order in Council (excluding staff from the Ministry of Agriculture and Forestry as referred to in paragraph 8 above);
3. **31** **noted** that at the time of transfer, rationalisation and reorganisation could occur to avoid the duplication of roles;
4. **32** **noted** that provisions relating to the final ERMA annual report may be needed, and that the implications for final decisions made by ERMA being appealed will be addressed in the transitional arrangements;
5. **33** **noted** that MfE will work closely with all affected agencies throughout the transition and implementation period to give effect to this institutional change;

Connecting the EPA and science

1. **34** **noted** that one of the aims of the EPA is to address an implementation gap at the national level in the regulation of natural and physical resources under the RMA [CAB Min deleted];
2. **35** **agreed** that the EPA provide and/or facilitate the technical advisory input from across government and the science sector, or for any other advice necessary with regard to its statutory functions;
3. **36** **noted** that the above decision is not intended to limit MfE from seeking other advice or undertaking consultation on these processes as required;

Suitability for future expansion of functions

1. **37 agreed** that any activities proposed to be transferred to the EPA in the future be assessed against the following principles:
 1. 37.1 is best performed at the national level under the organisational form of the EPA;
 2. 37.2 is of a regulatory nature (including standard-setting, licensing, and enforcement), rather than of policy targeted at complex environmental problems;
 3. 37.3 is of a technical nature, with a low level of discretion to be applied by the EPA;
 4. 37.4 is able to maintain or enhance certainty of process for resource users and applicants;
 5. 37.5 is of a similar nature to existing functions to enable efficiency gains;
 6. 37.6 will result in greater concentration of technical and expert skills, and not a duplication of skills and expertise;
 7. 37.7 is able to maintain or enhance the role of Maori in the regulation of New Zealand's environment and natural resources;
2. **38 directed** MfE to:
 1. 38.1 initiate a review of the effectiveness of the EPA three years after the EPA becomes operational;
 2. 38.2 report to EGI on the outcome of the review referred to in paragraph 38.1 above;

Financial implications

1. **39 agreed** that the fiscal appropriations relevant to the powers, functions and duties of the EPA be transferred to Vote Environment at the time that it becomes responsible for the corresponding powers, functions, and duties;
2. **40 authorised** the Minister of Finance and the Vote Ministers of Environment, Climate Change, and Energy, to agree the details of the fiscal appropriations (paragraph 39 above);
3. **41 noted** that the transitional one-off costs of establishing the EPA will be met by MfE's baseline funding, and potentially from working capital on ERMA's balance sheet;

Legislative implications

1. **42 noted** that the Environmental Protection Authority Bill (the Bill) has a category 4 priority on the 2010 Legislation Programme (to be referred to a select committee in 2010);
2. **43 noted** that it is appropriate for the EPA legislation to be binding on the Crown, as to be effective in achieving greater central government direction for environmental regulation, it needs to apply to the Crown in the same way as any other party;
3. **44 agreed** that the EPA legislation include a provision stating that the Act will bind the Crown;

Next steps

1. 45 **invited** the Minister to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;
2. 46 **authorised** the Minister, in consultation with the Minister of Finance and the Minister of State Services, to approve any further technical matters that may be required for inclusion in the Bill;
3. 47 **invited** the Minister to submit the draft Bill to the Cabinet Legislation Committee for approval for introduction to the House of Representatives, by the end of [deleted] 2010;
4. 48 **noted** that the Minister for the Environment intends to introduce the EPA Bill into the House before the end of [deleted] 2010, and to have the EPA operational by 1 July 2011;
5. 49 **agreed** that the Prime Minister announce Cabinet's decisions on the future form and functions of the expanded EPA in early June 2010;
6. 50 **noted** that the Minister intends to release the paper under CAB (10) 270, together with previous policy papers, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Secretary of the Cabinet Reference: CAB (10) 270; CAB Min (10) 17/1A; CBC Min (10) 6/5; EGI Min (10) 9/3

Secretary's Note: *Cabinet amended paragraph 49. This minute accordingly replaces CBC Min 10) 6/4.*