

Proposals for the Environmental Protection Authority

Office of the Minister for the Environment

Cabinet Economic Growth and Infrastructure Committee

Proposal

1. The purpose of this paper is to seek Cabinet agreement to:
 - proceed with the establishment of a fully formed Environmental Protection Authority (EPA) incorporating the functions of the Environmental Risk Management Authority (ERMA) with other national-level regulatory and processing functions
 - proceed with one of the two organisational form options presented in this paper for the EPA
 - issue drafting instructions to Parliamentary Counsel Office.

Executive summary

2. The purpose for creating an EPA is to more effectively, efficiently and transparently manage the regulation of New Zealand's environment and natural resources. The agreed scope of legislation under which the EPA could perform functions is [CAB Min **[withheld]**]:
 - Resource Management Act 1991
 - Hazardous Substances and New Organisms Act 1996
 - Ozone Layer Protection Act 1996
 - Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 under Imports and Exports (Restrictions) Act 1988
 - Climate Change Response Act 2002 with regard to administration of the Emissions Trading Scheme
 - Exclusive Economic Zone legislation (if this is passed).
3. The Cabinet Economic Growth and Infrastructure Committee (EGI) invited me to report back on the costs and implications of setting up the EPA within the Ministry for the Environment (the Ministry) and as a stand-alone Crown agent [EGI Min **[withheld]**]. This paper considers two broad options for the organisational form for the EPA:
 - 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
 - option 2: as a statutory office operating within the Ministry, headed by a statutory officer accountable to the Secretary for the Environment, exercising some national-level environmental regulatory and consenting functions. An independent committee, appointed by the Minister for the Environment, would exercise the decision-making powers under the Hazardous Substances and New Organisms Act (HSNO Act), serviced by the EPA statutory office.
4. The key implications of option 1 (stand-alone Crown agent) are that it:

- creates a clear split between the policy functions of the Ministry and implementation and technical functions
 - increases the risk of duplicating policy resources in the EPA and at the Ministry
 - has less perception of Ministerial influence over decisions compared to option 2
 - is the preferred option amongst participants in the consultation with Māori, due to increased perception of independence from political influence
 - has lower one-off establishment costs, though this is offset by greater ongoing operating costs
 - is flexible to add functions to, though harder to move functions back into a department.
5. The key implications of option 2 (statutory office) are that it:
- provides the opportunity for more direct feedback between implementation and policy
 - reduces the potential for duplicating policy resources in the EPA and the Ministry
 - will need to more actively manage the perception of independence the EPA statutory office will have from the Ministry's core business, through clear delineation from the Ministry's core business and through independent Ministerial-appointed decision-makers
 - more directly gives effect to the Crown- Māori relationship and principles of the Treaty of Waitangi through the closer relationship with Ministers and the Crown
 - reduces whole of government transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning and reporting
 - has higher one-off establishment costs, though 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 the Ministry and ERMA
 - is flexible and more easily transferable to another entity (eg department or Crown entity).
6. For either option, provisions for a statutory Māori advisory committee to the EPA will be included to provide advice and assistance on matters relating to HSNO Act policy, process, and applications, similar to the current provisions contained in the HSNO Act.
7. This paper seeks Cabinet agreement to proceed with the establishment of the EPA. I also seek agreement to the issuing of drafting instructions to the Parliamentary Counsel Office to draft an EPA Bill and make the necessary consequential amendments to relevant statutes to give effect to this proposal.

Background

8. The purpose for creating an 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 [CAB Min **[withheld]**].
9. To give effect to this purpose, Cabinet also agreed that a preferred option for establishing an EPA should be based on the following criteria:
- greater central government direction and consistency in the management and regulation of the environment can be delivered

- scarce technical skills can be concentrated and efficiency gains can be achieved by grouping similar activities and functions together in one organisation
 - certainty of process for natural resource users and applicants can be improved through clarifying responsibilities
 - organisational form is appropriate for the functions and powers to be exercised
 - public perception of undue political influence over regulatory decisions by Ministers can be dispelled
 - additional marginal costs (costs over and above the status quo in respect to the proposed functions of the EPA) to government can be minimised
 - organisational arrangements are flexible to meet future demands, and changes can be made to the scope of the EPA with minimal disruption.
10. The Resource Management (Simplifying and Streamlining) Amendment Act 2009 established a statutory office called the EPA, exercised by the Secretary for the Environment. This was intended as a transitional EPA and became operational on 1 October 2009. It performs regulatory functions and duties under the Resource Management Act 1991 (RMA), which include processing applications for proposals of national significance.
11. In September 2009, Cabinet considered a paper on the development aspects for a fully formed EPA as part of the Phase II Resource Management Reforms [CAB Min **[withheld]**]. The criteria against which the proposed options for the EPA would be measured were agreed in that paper. Three options for the form and functions of the EPA were also presented.
12. Cabinet agreed that the scope of the statutory functions of the EPA is to be centred on regulatory functions under the following legislation:
- Resource Management Act 1991
 - Hazardous Substances and New Organisms Act 1996
 - Ozone Layer Protection Act 1996
 - Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 under Imports and Exports (Restrictions) Act 1988
 - Climate Change Response Act 2002 with regard to administration of the Emissions Trading Scheme
 - Exclusive Economic Zone legislation (subject to Cabinet decisions).
13. Cabinet agreed in principle, subject to further reporting, to proceed with the establishment of an EPA as a stand-alone Crown agent that combines national-level consenting and administrative functions, as the preferred option for the establishment of the EPA.
14. In November 2009, EGI noted the more detailed analysis of the option for a stand-alone EPA, including estimated fiscal implications [EGI Min **[withheld]**]. It was agreed to investigate further the option of the EPA being established within the Ministry. The EGI also agreed to focused consultation with iwi Māori, to seek input into how Māori can best be involved in the EPA.
15. The EGI invited me to report back on the costs and implications of setting up the EPA within the Ministry and as a stand-alone Crown agent, as well as:
- to examine what formal processes may need to be built into the design of the EPA to facilitate effective communications between the EPA and the science sector
 - noting the machinery of government implications for the national radiation laboratory to be transferred to the EPA if established within the Ministry.

Functions to be transferred to the EPA

16. To provide the EPA with the mandate to achieve its purpose and objectives, the EPA will need to be established with the appropriate range of statutory powers, functions and duties. The scope of the statutory functions will be focused on regulatory functions under existing statutes. Table 1 indicates the range of functions that I consider to be within scope of the EPA proposal.

Table 1: Scope of existing regulatory functions for the EPA proposal

Legislation	Statutory functions	Non-statutory functions
Resource Management Act 1991 (RMA) (currently within the Phase I EPA and the Ministry)	<ul style="list-style-type: none"> processing applications for: <ul style="list-style-type: none"> proposals of national significance and other call-ins determining applications for certificates of compliance servicing independent decision-making processes (including providing expert reports on proposals) for: <ul style="list-style-type: none"> proposals of national significance and other call-ins Water Conservation Orders 	<ul style="list-style-type: none"> technical input into National Environmental Standards monitoring the implementation of National Environmental Standards
HSNO Act (currently within ERMA)	<ul style="list-style-type: none"> advising the Minister on any matter relating to the purpose of the Act processing applications for approvals making decisions on applications for approvals and setting related controls monitoring and co-ordinating HSNO compliance and enforcement activities promoting public awareness of the risks of hazardous substances and new organisms preparing reports for the Minister for the Environment in relation to applications that have been called in by the Minister issue, amend and revoke group standards for hazardous substances maintaining registers relating to hazardous substances and new organisms participating in the work of international bodies dealing with hazardous substances and new organisms 	<ul style="list-style-type: none"> technical input into the drafting of HSNO Act standards and regulations monitoring the implementation of regulations support to the Māori advisory committee

	<ul style="list-style-type: none"> provide technical advice and carry out consultation processes, in relation to ministerial proposals for orders in council under the Act 	
Climate Change Response Act 2002 in relation to the Emissions Trading Scheme (currently within the Ministry of Economic Development (MED))	<ul style="list-style-type: none"> administration of the Emissions Unit Register administering applications for allocation issuing units in accordance with Ministerial directions transferring units in accordance with chief executive or Ministerial directions conducting compliance and enforcement activities making emissions rulings 	<ul style="list-style-type: none"> technical input into regulations monitoring the implementation of regulations operating the Climate Change contact centre
Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 in relation to the Stockholm and Rotterdam conventions (administered by the MED)	<ul style="list-style-type: none"> processing applications for import and export permits deciding import and export permits compliance and enforcement of import and export permits 	<ul style="list-style-type: none"> maintaining the registry technical input into the development of regulations
Imports and Exports (Living Modified Organisms) Prohibition Order 2005 (administered by MED)	<ul style="list-style-type: none"> liaising with applicants seeking approval to export living modified organisms notifying decisions on export approvals for living modified organisms to the Biosafety Clearing House 	<ul style="list-style-type: none"> providing technical advice to the Ministry for the Environment to inform the recommendation of the Ministry to the Minister for the Environment on an application
Antarctica (Environmental Protection) Act 1994	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> advice to the Ministry of Foreign Affairs and Trade on environmental impact assessments

(currently within the Ministry)		for activities in Antarctica
If passed into legislation:		
Exclusive Economic Zone (EEZ) legislation (subject to Cabinet decisions)	<ul style="list-style-type: none"> regulatory functions under the proposed EEZ legislation consistent with the other functions of the EPA 	

Radiation protection activities

17. The Minister of Health, Minister of State Services and I propose that there is 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. This is irrespective of whether the decision is for the EPA to be established as a 'stand-alone' agency or as a business unit within the Ministry for the Environment.
18. The focus, statutory framework, client base and contractual relationships of the National Radiation Laboratory differ from the EPA's purpose of managing the regulation of New Zealand's environment and natural resources at a national level. The functions associated with radiation protection activities are predominately health-focused as indicated by the Radiation Protection Act 1965 which regulates for the effects of ionising radiation on human health and aims to safeguard health outcomes through maintaining the quality and safety of radiation services.

Options for the organisational form for the EPA

19. This paper considers two broad options for the organisational form for the EPA. These are discussed below in terms of the organisational structure and decision-making model. The two options are:
 - 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
 - option 2: as a statutory office operating within the Ministry, headed by a statutory officer, accountable to the Secretary for the Environment, exercising some national-level environmental regulatory and consenting functions. An independent committee, appointed by the Minister for the Environment, would exercise the decision-making powers under the HSNO Act, serviced by the EPA statutory office.

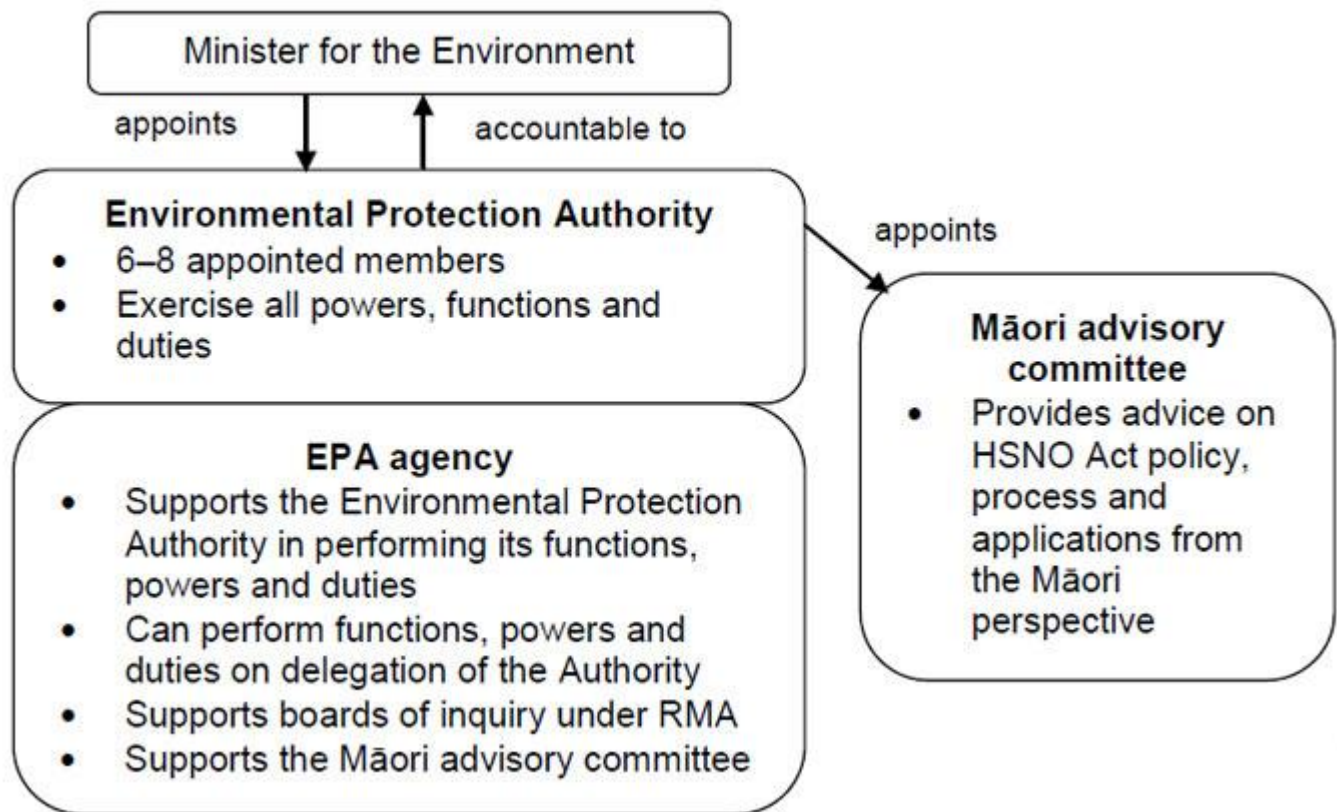
Option 1: establishing the EPA as a stand-alone Crown agent

Structure

20. The EPA could be established as a Crown agent under its own enabling legislation, with the provisions of the Crown Entities 2004 applying to it. Under this option, the EPA would be an entity legally separate from the Crown. This legal separation establishes a degree of separation between the functions and powers of the EPA and Ministerial influence. However, a Crown agent can be directed to give effect to government policy related to its objectives, subject to any independent powers specified in legislation. Examples of Crown agents are the Accident Compensation Corporation and the Energy Efficiency and Conservation Authority.
21. As a Crown agent, the EPA would be under the control of a governance board with authority to exercise the EPA's powers and perform its functions, as provided by the Crown Entities Act (see figure 1). Its members (no less than 6, no more than 8) would need to be experienced in environmental issues and the administration of environmental regulation to reflect the depth and breadth of matters likely to come before it, including at least one member to have knowledge and experience of the Treaty of Waitangi and tikanga Māori.
22. The EPA board would appoint the Māori advisory committee and set the committee's terms of reference (see later section for details of the committees' role and membership).

Figure 1: structure of the EPA under option 1

Relationship between the EPA and the Minister



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Decision-making

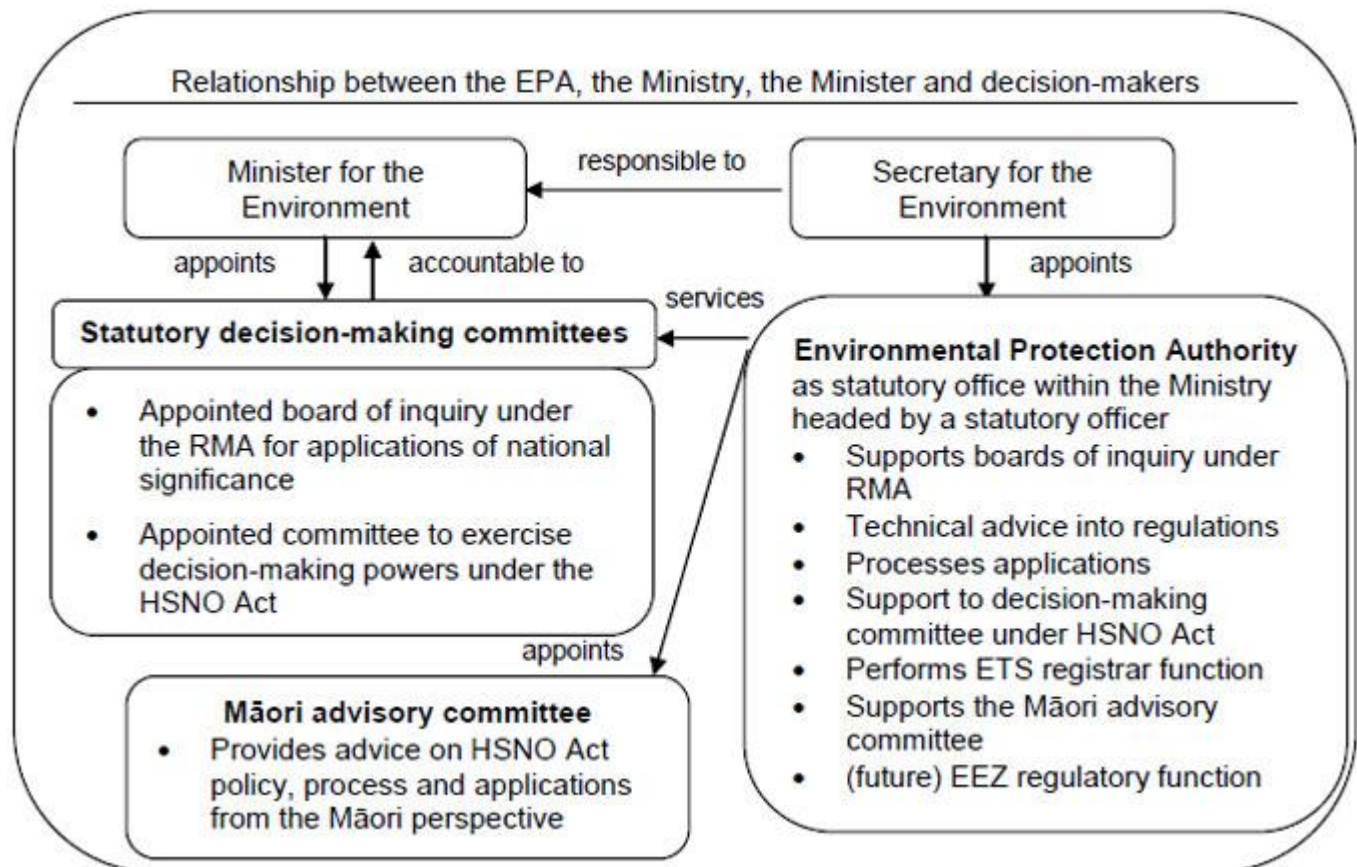
23. The EPA would be responsible for any decision making powers given to it under statute. The statute could provide for the delegation of some of the decision making powers to committees it appoints, with at least one member of the EPA on the committee, or to the EPA agency to perform on its behalf.
24. The existing delegation arrangement for decision-making powers for some hazardous substances and new organism applications in the HSNO Act should be retained and exercised by the EPA. For example, the existing delegation of decision making to Institutional Biological Safety Committees and responsible Chief Executives may continue under the new arrangement, with the EPA monitoring the decisions. The current ability of the Minister for the Environment to intervene to decide specific decisions will also be retained. The existing delegations to the chief executive of the ERMA agency will need to be transferred to an appropriate similar person(s).

Option 2: establishing the EPA within the Ministry, with independent decision-making committees

Structure

25. The EPA could be established as a statutory office operating within the Ministry, headed by a statutory officer. The advisory and administrative functions and duties proposed for the EPA would be the responsibility of the office to perform, with the statutory officer accountable to the Secretary for the Environment for the performance of the EPA office. An example of this model is the Immigration Advisors Authority.
26. For the EPA office and statutory officer to operate within the Ministry both must be appointed by the Secretary for the Environment to ensure the Secretary is accountable for the Ministry as a whole. Thus, those persons appointed to the EPA would be Ministry employees, with a statutory function separate to the Ministry's core business and clear accountability to the Secretary. This is to ensure that reporting and accountability lines and the framework of the State Sector Act 1988 and Public Finance Act 1989 are preserved.
27. The EPA, in consultation with the committee that will exercise decision-making powers under the HSNO Act, would appoint the Māori advisory committee and set the committee's terms of reference (see later section for details of the advisory committees' role and membership).

Figure 2: structure of the EPA under option 2



[Read a description for this image](#)

Decision-making

28. To ensure continuation of a strong perception of independence for decisions made under the HSNO Act, the statute would provide for the Minister for the Environment to appoint a statutory committee to exercise the decision-making powers. Decisions under the HSNO Act would thus be made independent of the Ministry and EPA, with the EPA providing secretariat support to, and technical advice or procuring advice on the behalf of the committee, similar to the (ad hoc) RMA board of inquiry model.
29. The committee's members (no less than 6, no more than 8) would need to be experienced in hazardous substance and new organism matters to reflect the depth and breadth of matters likely to come before it, and include at least one member with knowledge and experience of the Treaty of Waitangi and tikanga Māori.
30. The existing delegation arrangement for decision-making powers for some hazardous substances and new organism applications in the HSNO Act could be retained, enabling the statutory committee to delegate decisions, such as the delegation of some new organism decisions to Institutional Biological Safety Committees and responsible Chief Executives with the statutory committee, assisted by the EPA, monitoring the decisions.
31. The decision-making committee would also be able to delegate to the EPA some of the lower risk, more technical decisions, as is currently done by the ERMA board and its agency, or to other appropriate persons. The current ability of the Minister for the Environment to intervene to decide specific decisions will also be retained.

Giving effect to the Crown-Māori relationship

32. The establishment of the EPA will not change the existing Crown-Māori relationship under the Treaty of Waitangi, as the Crown retains responsibility for policy and other strategic matters related to natural resources.
33. In November 2009, Cabinet agreed to focused consultation with iwi Māori to seek input into how Māori can best be involved in the EPA [EGI Min **[withheld]**]. Iwi Māori are increasingly seeking enhanced participation in policy development and operational decision-making, especially in relation to natural resources and their management.
34. The Ministry undertook this consultation with Te Puni Kōkiri. The key themes that emerged were:
 - Māori representation on decision-making board(s) should be increased to at least two members with expertise in the Treaty of Waitangi and tikanga Māori, and preferably increased to a 50/50 split
 - a Māori advisory committee, such as currently provided for in the HSNO Act, should be statutorily provided for in the EPA design
 - the role of such a committee should be to advise on all EPA processes from pre-application through to the actual decision, in relation to both RMA and HSNO Act processes
 - such a committee should advise whether appropriate consultation with local iwi has occurred, rather than serve as a replacement for consultation
 - a preference for the EPA to be a Crown agent, primarily due to increased perception of independence from political influence.
35. In regard to increased Māori representation on decision-making board(s), I do not propose to change any of the national-level decision-making arrangements under the RMA. These will remain with independent boards of inquiry, the Environment Court and special tribunals.
36. As currently drafted, the HSNO Act 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 Māori” [s16(1)(2)]. While in practice this has usually resulted in at least one member of ERMA having expertise in the Treaty of Waitangi and tikanga Māori, statutorily enshrining this practice will provide more certainty.
37. I propose the membership provisions of new board(s) that exercise decision-making powers under the HSNO Act to require at least one member to have knowledge and experience in matters relating to the Treaty of Waitangi and tikanga Māori. This will reflect the Crown-Māori relationship by statutorily ensuring Māori have a voice in HSNO Act decision-making at the national-level, and is a step towards addressing a concern raised during the consultation. This membership requirement is reflected in each of the organisational form options presented above.
38. I consider that the current provision in the HSNO Act for a statutory Māori advisory committee, to provide advice from the Māori perspective on policy, processes and applications, provides a good model for maintaining Māori involvement in the EPA. As currently drafted, the EEZ policy recommends a similar statutory model..
39. I propose that a statutory Māori advisory committee be established to the EPA, with no fewer than 4 and no more than 8 members, to provide advice on policy, processes and applications from the Māori perspective.
40. There are two options for the scope of the new Māori advisory committee’s role:
 - maintaining the existing scope of providing advice on the HSNO Act functions
 - expanding the scope to include functions under both the HSNO Act and RMA.
41. I propose maintaining the scope of the existing Māori advisory committee of providing advice on the HSNO Act functions to ease the transition to the fully formed EPA and

allow time for the wider operational processes of the EPA to be developed and embedded. A terms of reference will be agreed between the committee and the EPA, to be reviewed every three years.

42. There will be an opportunity to reconsider the scope of the Māori advisory committee when the Ministry undertakes a review of the EPA post-establishment, as proposed in paragraph 73 of this paper.

Comparison of options for establishing the EPA

43. The option for establishing the EPA should be selected based on an evaluation against the criteria outlined in paragraph 9 above. In addition to these, I also consider other matters to be central to assessing options for the EPA: the ability to give effect to the Crown-Māori relationship, the wider impact of the number of environmental entities operating at the national level and career opportunities for staff of the EPA (see appendix 1 for full comparison).

44. I consider that both options:

- provide efficiency and performance gains from grouping similar activities and skills and reducing unnecessary duplication
- create certainty through having one organisation responsible for national-level regulation
- can have the government direct it to give effect to policy related to its objectives but cannot intervene in individual applications (other than where Ministerial powers are provided for in statute)
- do not propose any significant changes to Ministerial decision-making powers on regulatory matters
- provide for statutory decision-making independent of Ministerial influence
- provide for the same statutory provision for Māori involvement
- would require legislative amendment to change the scope or range of functions and powers of the EPA in the future.

45. The specific advantages and disadvantages of option 1 (Stand-alone Crown agent) are that it:

- creates a clear split between the policy functions of the Ministry and implementation and technical functions
- increases the risk of duplicating policy resources in the EPA and at the Ministry
- has less perception of Ministerial influence over decisions compared to option 2
- is the preferred option amongst participants in the consultation with Māori, due to increased perception of independence from political influence
- has lower one-off establishment costs, though this is offset by greater ongoing operating costs
- is flexible to add further functions to, though harder to move functions back into a department.

46. The specific advantages and disadvantages of option 2 (statutory office) are that it:

- provides the opportunity for more direct feedback between implementation and policy
- reduces the potential for duplicating policy resources in the EPA and the Ministry
- will need to more actively manage the perception of independence the EPA statutory office will have from the Ministry's core business, through clear

- delineation from the Ministry's core business and through independent Ministerial-appointed decision-makers
- more directly gives effect to the Crown- Māori relationship and principles of the Treaty of Waitangi through the closer relationship with Ministers and the Crown
- reduces whole of government transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning and reporting
- has higher one-off establishment costs, though 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 the Ministry and ERMA
- is flexible and more easily transferable to another entity (eg department or Crown entity).

Summary of cost comparison

47. The fiscal cost to establish and operate the EPA, regardless of organisational form, will need to be met from the Ministry's baseline funding. The financial analysis has grouped the costs into one-off establishment costs (for the 2011/2012 fiscal year) and the marginal increase to the ongoing annual operating costs (2011/2012 onwards) that would be required to be covered (see appendix 2 for full comparison).
48. The costs (summarised in table 3 below) take into consideration the existing fiscal appropriations that fund the proposed functions under current arrangements. It also accounts for third party revenue, such as cost recovery regimes, provided for in the functions to be transferred. These have been estimated at \$5.435M per annum in.
49. It is anticipated that there will be a transfer of existing staff with the transfer of functions to the EPA. The cost analysis is based on a forecasted staff level of full time equivalents (FTE), across all of the functions as at 1 July 2011. If, at the time of transfer, the forecasted level of FTEs has not been reached and additional staff are not required, there will be an immediate decrease in the estimated expenditure.

Table 3: Summary of estimated costs for the EPA organisational forms

Cost description	Stand-alone Crown agent	Statutory office
Marginal increase to annual cost	Up to \$1.6M	Up to \$0.9M
One-off establishment costs	\$1.2M - \$2.2M	\$1.5M - \$2.5M
One-off capital costs	\$900,000 - \$1.3M (BP House or new building)	

50. The lower ongoing annual cost of the statutory office model (estimated at \$700,000 per annum) is largely a reflection of a reduction in overall corporate service FTEs required. This is a result of transferring the existing capability of the ERMA agency into the statutory office, which will be serviced by the Ministry's corporate service. There could also be a whole of government reduction in transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning and reporting.

51. The implementation of the EPA is not inherently more expensive than the status quo. The marginal increase to ongoing costs is largely a result of two factors. Firstly, the analysis includes costs to resource the proposed regulatory functions under the draft EEZ policy. This includes three new FTEs and associated office costs, estimated at \$300,000 in ongoing costs and \$100,000 in one-off costs. Although this is a cost to government to undertake a new function, and not directly attributable to the expansion of the EPA, it is possible that the EPA will perform these functions and so the cost has been included in the fiscal analysis of establishing the EPA.
52. In addition to this cost, the analysis also includes up to 12 new FTEs and associated office costs to service the capability need to provide technical input into and monitoring of regulations. Six of these FTEs are included as a necessary base to service the new functions at existing levels of activity, eg the current rate of development of national environmental standards. The additional six FTEs provided for will only be required should there be an increase in the number of national environmental standards developed annually from the current level of activity, at an estimated cost of \$1M in ongoing costs and \$194,000 in one-off costs.
53. Accommodation costs are a true additional cost of establishing the EPA. The transfer of staff to the EPA as it becomes responsible for its new functions will incur accommodation costs for each of the FTEs. It is unlikely that a reduction in FTE numbers at the Ministry or MED will result in any corresponding accommodation savings. This is due to the small number of staff anticipated to be transferred (up to 25 FTEs from the Ministry and up to 27 FTEs from MED).

Implementation considerations

Emissions Trading Scheme

54. I propose the administration of the ETS under the Climate Change Response Act, including the Emissions Unit Registry, be transferred to the new EPA on **[withheld]** 2011.
55. I consider the risk of transferring the ETS functions in time for the proposed operational date for the EPA of 1 July 2011 is too high. Between January 2011 and July 2011, the ETS participants and MED will be, for the first time, dealing with the requirements of filing emissions returns and surrendering units for the stationary energy, industrial processes and liquid fossil fuels sectors, and the application of the fixed price mechanism.
56. Notwithstanding table 1 in paragraph 16, I do not propose to transfer any of the ETS regulatory functions in relation to the forestry sector, currently undertaken by the Ministry of Agriculture and Forestry (MAF) under delegation. I consider that MAF remains the most appropriate organisation to manage the forestry sector under the ETS. Bringing the forestry functions into the EPA would risk losing synergies with MAF's other functions under the ETS.
57. The agriculture sector is currently proposed to be administered by MED, not MAF, and so the ongoing administration of this sector will be transferred to the EPA. However, if the point of obligation is changed to farm level, then responsibility for implementation and ongoing administration could likely transfer to MAF.

International convention regulatory functions

58. The EPA has been signalled as a possible administrator for the permitting regimes that, through domestic regulations under the Imports and Exports (Restrictions) Act,

give effect to New Zealand's obligations under the Stockholm, Rotterdam, Basel and Waigani Conventions and Cartagena Protocol, and through the Ozone Layer Protection Act, the Montreal Protocol.

59. I propose that the regulations in relation to the Stockholm, Rotterdam and Cartagena Conventions, where most of the regulatory functions are already implemented under the HSNO Act, be transferred to the EPA. ERMA is involved with these functions already (along with the Ministry) and with the ERMA agency being subsumed into the EPA under either option, this would be a natural transition for these functions. As currently drafted, on assumption of ERMA's responsibilities, the EPA will become the Competent National Authority under the Cartagena Protocol with responsibility for the Biosafety Clearing House.
60. Initial analysis indicates that if permitting of trade in hazardous waste and ozone depleting substances under the Montreal, Waigani and Basel agreements were to be transferred from MED, then the Ministry would be the most appropriate organisation to perform the functions as many require a high level of discretion to be exercised. However, no change to the administration of these functions is proposed at present.

Exclusive Economic Zone regulatory functions

61. An Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (EEZ Bill) was partly drafted under the previous government. In principle, I support the underlying policy for the EEZ Bill, and consider the EPA could perform the proposed regulatory consenting functions. This would require changes to the governance and operational provisions in the draft EEZ Bill that would not be possible until final Cabinet decisions are made on the EPA.
62. I anticipate therefore, that Cabinet will consider the EEZ policy in late 2010 after the final Cabinet decisions on the EPA. It may be possible to combine the two work streams through the legislative process, should the analysis identify the EPA as appropriate to undertake any of the EEZ functions.

Connections with the science sector

63. 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 (09) **[withheld]**]. Cabinet has previously noted that regulatory decisions by the EPA need to be underpinned by scientific knowledge and that this will require effective formal connection between the EPA and science agencies [EGI Min (09) **[withheld]**].
64. I propose that the EPA will be expected to provide and/or facilitate the technical advisory input into the RMA processes listed in table 1, from across government and the wider science sector. This is not to limit the Ministry from seeking other policy advice or consultation on these processes.
65. Appropriate processes will need to be established to enable access to the right technical advice for the RMA functions. This could take the form of operational business plans developed by the EPA once established, the functions are integrated and there is a better working understanding of what the information needs will be for the EPA.

Disestablishment of the existing agencies / bodies

66. I anticipate that there will be two existing Authorities that will require disestablishment as a result of this institutional change. The establishment of the EPA will result in the

disestablishment of the autonomous Crown entity, ERMA. The capacity and functions of the ERMA agency will be transferred to the EPA to continue performing functions under the HSNO Act. The appointments of the ERMA Authority will expire when the EPA becomes operational, as will the appointments of the Ngā Kaihautū Tikanga Taiao members and the ERMA agency chief executive which are appointed by the Authority.

67. The statutory office of the EPA established in the Resource Management (Simplifying and Streamlining) Amendment Act 2009 that has its functions limited to the RMA, will also be disestablished, with the capability and functions of that statutory office being transferred to the new EPA.

Transitional considerations for giving effect to the change

68. I anticipate that, as the establishment of the EPA is not fundamentally changing any of the existing functions to be transferred, the existing staff would be transferred to the new EPA to continue to perform the functions, at which time rationalisation and reorganisation could occur to avoid duplication of roles (eg in the corporate area).
69. Appropriate transitional and savings provisions will need to be included in the legislation to ensure a smooth transfer of roles and staff between these entities, before any disestablishment of existing structures. Further analysis of employment agreements covering transfer of staff to new agencies will need to be undertaken.
70. I anticipate that the Ministry will work closely with affected agencies through the transition period to best implement and give effect to this institutional change.
71. The implications for writing ERMA's final annual report will also need to be considered, along with the implications that should any decisions made by ERMA in the final weeks/months may be judicially reviewed or appealed, who will the appeal be against and if the Judge directs an action who will be directed to undertake such an action.

Suitability of future activities

72. To achieve the purpose of the EPA, any activities proposed to be performed or undertaken by the EPA in the future should be assessed against the following principles:
- is best performed at the national level under the organisational form of the EPA
 - is of a regulatory nature (including standard-setting, licensing and enforcement) rather than policy (targeted at complex environmental problems)
 - is of a technical nature with a low level of discretion to be applied by the EPA
 - is able to maintain or enhance certainty of process for resource users and applicants
 - is of a similar nature to existing functions to enable efficiency gains
 - will result in greater concentration of technical and expert skills and not a duplication of skills and expertise
 - is able to maintain or enhance the role of Māori in the regulation of New Zealand's environment and natural resources.
73. I propose that the Ministry for the Environment undertake a review of the EPA three years after becoming operational. The terms of reference of the review will include consideration of the scope of the Māori advisory committee in relation to the wider functions of the EPA. On completion of a review, the Ministry will prepare and publish a report.

Next steps

74. I propose that the Ministry issue drafting instructions to Parliamentary Counsel Office for drafting of an EPA Bill.
75. I propose that the Minister for the Environment, in consultation with the Ministers Finance and State Services be given power to approve any further technical matters as may be required to be included in an EPA Bill to ensure legislation accurately reflects the policy intent of this proposal.
76. I propose to report back to Cabinet Legislation Committee by the end of [withheld] 2010 seeking approval for the draft EPA Bill. Consequential legislative amendments will be needed to the statutes under which the EPA would exercise functions.
77. My intention is that the EPA Bill be tabled in the House in [withheld] 2010 and for the EPA to be operational on 1 July 2011.

Consultation

78. This paper has been developed in consultation with the following departments: the Treasury, State Services Commission, Department of Building and Housing, Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of Labour, Ministry of Agriculture and Forestry, Land Information New Zealand, Ministry of Culture and Heritage, Ministry of Defence, Ministry of Economic Development, Ministry of Fisheries, Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, Ministry of Research, Science and Technology, Ministry of Transport, New Zealand Customs Service and Te Puni Kōkiri. ERMA New Zealand and the New Zealand Defence Force have also been consulted. The Department of the Prime Minister and Cabinet has also been informed of this proposal.
79. Many of the departments consulted are generally supportive of proceeding with option 2 for the development of the EPA, or are neutral on a preferred option.
80. The following departments also note that:
 - *The Ministry of Fisheries and Ministry of Transport:* as the draft EEZ policy has not yet been re-confirmed by this government, the institutional arrangement to deliver that regime should not be predetermined by this policy. This has been incorporated by reflecting that the EPA is only a possible option as the entity to perform the regulatory functions proposed in that policy.
 - *The Ministry of Justice:* the statutory office model provides a more direct relationship with the Minister for the Environment and therefore gives better effect to the Crown-Māori relationship and principles of the Treaty of Waitangi. The Māori advisory committee arrangement under the Crown agent model will also adequately protect the Crown-Māori relationship.
 - *The Ministry of Research, Science and Technology:* the Core Purpose Statements that Crown Research Institutes (CRIs) will be preparing, as a result of recent Cabinet decisions, provide a means for signalling how the CRIs will connect with and support the EPA.
 - *Te Puni Kōkiri:* supports the option of the EPA as a Crown entity. It can become increasingly difficult to give effect to the Crown-Māori relationship as decisions become more distant from Ministers. However, there are some benefits with the Crown entity model, many of which were highlighted in the regional hui and by Ngā Kaihautū. This primarily relates to the increased

independence of Crown entities from political influence which is particularly important in the context of resource management decisions. This independence can also create more confidence for Māori to engage with a national Māori body. Further, the Crown entity option provides clearer input for Māori into policy and operational decision-making and avoids the risk of resources being diverted to other issues.

- *The ERMA Authority*: from a HSNO Act perspective, the stand-alone Crown agent option is preferable because 1) implementation would be simpler and less disruptive (both in practice and in drafting the enabling legislation) and 2) the HSNO Act decision-making would remain clearly independent both in fact and in public perception.

81. Focused consultation was undertaken with iwi Māori regarding how best to ensure Māori involvement in the EPA. This was in the form of three regional hui in Auckland, Wellington and Christchurch. The Ministry also engaged with the iwi advisors group established under the New Start for Fresh Water programme and with Ngā Kaihautū Tikanga Taiao (the existing Māori advisory committee under the HSNO Act). The feedback received is incorporated into earlier sections of this paper as appropriate.
82. I have undertaken consultation with a number of Ministers on the draft EPA proposal as required [STR Min **[withheld]**]. The Minister of Māori Affairs was also consulted, as has been agreed as part of the agreements with the Māori Party over the Emissions Trading Scheme.
83. Most of the Ministers consulted support the option for the EPA to be established as a statutory office within the Ministry with an independent committee to exercise the decision-making powers under the HSNO Act. The Minister of Māori Affairs supports the establishment of the EPA as a stand-alone Crown agent as it more readily provides for independent decision-making, provides for Māori representation on the EPA board which is not provided for in the statutory office model and could increase the ability for Māori to directly engage with the Māori advisory committee outside of a government department. In relation to the Māori advisory committee, the Minister also supports the wider role for the committee in all of the EPA functions.

Financial implications

84. The costs associated with this proposal are outlined in paragraphs 48-54. These have been broken down into one-off establishment costs and the marginal increase to annual operating costs for performing the functions.
85. The cost of establishing the EPA is estimated at up to \$3.7M (depending on the preferred option). This cost will largely be incurred in the 2010/11 fiscal year and will need to be met from the Ministry's baseline funding. There is working capital on ERMA's balance sheet that could be used to meet some of the one-off establishment costs. This will be explored through the transition phase of establishment.
86. The current budgets for performing the range of functions proposed for the EPA will need to be transferred to the EPA with the transfer of responsibility for the functions. Table 4 indicates the existing fiscal appropriations.

Table 4: Existing fiscal appropriations

Existing Vote appropriations	Budget
Vote Environment	\$12,170,000
Vote Climate Change	\$1,700,000
Vote Energy	\$6,906,000
Third party revenue (HSNO Act and RMA cost recovery)	\$5,435,000
Total	\$26,211,000

87. The exact budget figures for transfer to the EPA at 1 July 2011 when the EPA becomes responsible for functions are not currently known. Once determined, the Vote Ministers for Environment, Climate Change, Energy and the Minister of Finance will need to make arrangements for the transfer of the relevant appropriations.
88. The anticipated increase to annual operating costs that will also need to be met by the Ministry is estimated at up to \$2.4M (depending on the preferred option), to be incurred from the 2011/12 fiscal year onwards.
89. These costs do not include costs to the Ministry to perform associated functions such as the development of regulations and policy statements under the draft EEZ Bill. These costs, and more robust analysis of the costs associated with EEZ regulatory functions, will be canvassed in any future Cabinet decisions on the draft EEZ proposals themselves.

Human rights implications

90. The proposals contained in this Cabinet paper do not appear to be inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. The Ministry for the Environment will work with the Ministry of Justice during the drafting of legislation to ensure consistency of the proposals with the Human Rights Act and the Bill of Rights Act. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

Legislative implications

91. An Environmental Protection Authority Bill is included as Priority 4 (to be referred to Select Committee this year) in the 2010 legislative programme.
92. I propose that the legislation should bind the Crown. If the legislation is 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.
93. The implications for government departments of the EPA legislation binding the Crown will be minimal as the specific statutes under which the EPA will exercise

powers and functions already bind the Crown, and no changes are proposed in this regard. Any additional costs to the Crown are unlikely to be significant.

94. Appropriate provisions for defence activities are contained within in each statute under which the EPA will exercise functions. No changes to these provisions are proposed.

Regulatory impact analysis

Regulatory Impact Analysis requirements

95. The Regulatory Impact Analysis requirements apply to this proposal and a Regulatory Impact Statement has been prepared and is attached to this paper.

Quality of the Impact Analysis

96. The Ministry for the Environment's Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Statement (RIS) prepared by the Ministry for the Environment and associated supporting material, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.
97. Although the costs have been quantified, it is difficult to estimate the problem or benefits in monetary terms and hence make a judgement as to the precise net benefits of the proposal. The proposal as presented in this paper minimises the costs associated with an expanded EPA and will maximise the net benefits of the practical options available. Additionally, there has not yet been widespread public consultation on this proposal.

Consistency with Government Statement on Regulation

98. I have considered the analysis and advice of my officials, as summarised in the attached RIS, and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
- are required in the public interest
 - will deliver the highest net benefits of the practical options available, and
 - are consistent with our commitments in the Government statement "Better Regulation, Less Regulation."

Publicity

99. I propose a post-Cabinet press release signalling the intention for the future form and functions of the expanded EPA.
100. I also propose to release this paper, and previous policy papers following decisions on the future form and functions of the expanded EPA, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Recommendations

101. The Minister for the Environment recommends that the Committee:

Previous considerations

- 1. note that in August 2009 Cabinet Economic Growth and Infrastructure Committee [EGI Min **[withheld]**]:
 - - 1.1. agreed that the purpose for creating an 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
 - 1.2. agreed that the scope of the statutory functions of the EPA be centred on regulatory functions under the following legislation:
 - - 1.2.1. Resource Management Act 1991
 - 1.2.2. Hazardous Substances and New Organisms Act 1996
 - 1.2.3. Ozone Layer Protection Act 1996
 - 1.2.4. Imports and Exports (Restrictions) Prohibition Order (No 2) 2004 under Imports and Exports (Restrictions) Act 1988
 - 1.2.5. Climate Change Response Act 2008 with regard to administration of the Emissions Trading Scheme
 - 1.2.6. Exclusive Economic Zone legislation (if this is passed)
 - 1.3. agreed that the choice of a preferred option to meet the above purpose be guided by the extent to which:
 - - 1.3.1. greater central government direction and consistency in the management and regulation of the environment can be delivered
 - 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
 - 1.3.3. certainty of process for natural resource users and applicants can be improved through clarifying responsibilities
 - 1.3.4. organisational form is appropriate for the functions and powers to be exercised
 - 1.3.5. public perception of undue political influence over regulatory decisions by Ministers can be dispelled
 - 1.3.6. additional marginal costs to government can be minimised
 - 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
 - 1.4. agreed in principle, subject to further reporting, to proceed with the EPA as a stand-alone Crown agent that combines the functions of ERMA with other national-level consenting and administrative functions, as the preferred option for the development of the EPA
- 2. note that in November 2009 Cabinet Economic Growth and Infrastructure Committee [EGI Min **[withheld]**]:
 -

- 2.1. noted further analysis would be undertaken on options for the National Radiation Laboratory (in terms of transferring these functions to the EPA)
- 2.2. agreed the Minister for the Environment would investigate further the option of the EPA being established within the Ministry for the Environment
- 2.3. agreed to focused consultation with iwi Māori, to seek input into how Māori can best be involved in the EPA
- 2.4. invited the Minister for the Environment to report back to Cabinet Economic Growth and Infrastructure Committee by 31 March 2010 on the costs and implications of setting up the EPA within the Ministry for the Environment, and as a stand-alone entity operating as a Crown agent
- 2.5. directed the Ministry for the Environment, in consultation with other departments and relevant science agencies as appropriate, to also report back 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

High level objectives for the EPA

- 3. agree that in addition the criteria set out in recommendation 1.3, the assessment of a preferred option for the EPA also consider:
 -
 - 3.1. the wider impact of the number of environmental entities operating at the national level
 - 3.2. career opportunities for staff of the EPA

Disestablishment of existing entities

- 4. agree that the existing Environmental Risk Management Authority (ERMA) established under the Hazardous Substances and New Organisms Act 1996 (HSNO Act), and the EPA statutory office established under the Resource Management (Simplifying and Streamlining) Amendment Act 2009 be disestablished by [withheld] 2011
- 5. note that on the disestablishment of ERMA, the appointments to Ngā Kaihautū Tikanga Taiao under the the HSNO Act and the ERMA agency chief executive will expire

Options for establishing the EPA

- 6. note that there are two options for the organisational form of the EPA:
 -
 - 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
 - 6.2. option 2: as a statutory office operating within the Ministry for the Environment, headed by a statutory officer accountable to the Secretary for the Environment, with an independent committee appointed by the Minister for the Environment to exercise the decision-making powers under the HSNO Act

Functions to be transferred to the EPA

- 7. agree that, whatever the organisational form, the EPA should perform:
 - - 7.1. the following powers, functions and duties under the Resource Management Act 1991:
 - - 7.1.1. processing proposals of national significance
 - 7.1.2. making recommendations to the Minister for the Environment on whether the proposal should be referred to a board of inquiry, Environment Court or the local authority for a decision
 - 7.1.3. determining applications for certificates of compliance in relation to proposals of national significance
 - 7.1.4. providing secretariat support to any board of inquiry established to make decisions on those applications
 - 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
 - 7.1.6. providing technical advice and input into the development of national environmental standards
 - 7.1.7. monitoring the implementation of national environmental standards by local authorities
 - 7.2. the following powers, functions and duties relating to the Emissions Trading Scheme under the Climate Change Response Act 2002:
 - - 7.2.1. administration of the Emissions Unit Register
 - 7.2.2. administering applications for allocation
 - 7.2.3. issuing units in accordance with Ministerial directions
 - 7.2.4. transferring units in accordance with chief executive or Ministerial directions
 - 7.2.5. conducting compliance and enforcement activities
 - 7.2.6. making emissions rulings
 - 7.2.7. providing technical advice and input into the development of regulation
 - 7.2.8. operating the Climate Change contact centre
 - 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:
 - - 7.3.1. processing applications for import and export permits
 - 7.3.2. deciding import and export permits
 - 7.3.3. compliance and enforcement of certain import and export permits
 - 7.3.4. maintaining registries
 - 7.3.5. technical input into development of standards
 - 7.4. the following powers functions and duties under the Imports and Exports (Living Modified Organisms) Prohibition Order 2005:
 - - 7.4.1. liaising with applicants seeking approval to export living modified organisms
 - 7.4.2. providing technical advice to the Ministry for the Environment to inform the recommendation to the Minister for the Environment as the decision-maker

- 7.4.3. notifying decisions on export approvals for living modified organisms to the Biosafety Clearing House
 - 7.5. the following non-statutory functions under the Antarctica (Environmental Protection) Act 1994, currently performed by Ministry for the Environment.
 - 7.5.1. advice to the Ministry of Foreign Affairs and Trade on environmental impact assessments for activities in Antarctica
- 8. agree that the transfer of functions in recommendation 7.2 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
- 9. agree that for the HSNO Act functions:
 - - 9.1. if option 1 is the preferred option the EPA will perform all of the functions of ERMA under the HSNO Act
 - 9.2. if option 2 is the preferred option the EPA will perform the administrative and regulatory functions under the HSNO Act, such as:
 - - 9.2.1. advising the Minister on any matter relating to the purpose of the HSNO Act
 - 9.2.2. receiving and processing applications for approvals
 - 9.2.3. preparing reports for the Minister for the Environment in relation to applications that have been called in by the Minister under the HSNO Act
 - 9.2.4. providing secretariat support to the statutory decision-maker established to make decisions on those applications
 - 9.2.5. maintaining registers relating to hazardous substances and new organisms
 - 9.2.6. monitoring and co-ordinating HSNO Act compliance and enforcement activities
 - 9.2.7. promoting public awareness of the risks of hazardous substances and new organisms
 - 9.2.8. participating in the work of international bodies dealing with hazardous substances and new organisms
 - 9.2.9. providing technical advice and carry out consultation processes, in relation to ministerial proposals for orders in council under the HSNO Act
 - 9.3. if option 2 is the preferred option an independent committee, appointed by the Minister for the Environment, will perform the decision-making functions under the HSNO Act, such as:
 - - 9.3.1. issuing, amending and revoking group standards for hazardous substances
 - 9.3.2. making decisions on applications for approvals and setting related controls
 - 9.3.3. exercising the existing delegation arrangements under the HSNO Act, including delegation of specific functions to experts for decision-making
- 10. agree that the EPA have enabling powers to be able to contract out some of its functions as appropriate
- 11. agree that there is 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-Māori relationship

- 12. note that the establishment of the EPA will not prevent Māori having a direct relationship with the Crown on policy and other strategic matters related to natural resources
- 13. note that focused consultation with iwi has been undertaken to seek input into how Māori can best be involved in the EPA, and five key themes emerged:
 - 13.1. Māori representation on decision-making board(s) should be increased to at least two members with expertise in the Treaty of Waitangi and tikanga Māori, and preferably increased to a 50/50 split
 - 13.2. support for a statutory Māori advisory committee provision
 - 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
 - 13.4. the committee should not be seen as a substitute for local iwi engagement
 - 13.5. preference for the EPA to be established as a stand-alone Crown agent
- 14. note 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 Māori” [sections 16(1) and 16(2)]
- 15. agree that the membership provisions of the new board to exercise decision-making powers under the HSNO Act (dependent on the agreed option) require at least one member to have knowledge and experience in matters relating to the Treaty of Waitangi and tikanga Māori
- 16. note there are two options for establishing a statutory Māori advisory committee to the EPA:
 - 16.1. maintaining the existing scope of providing advice on the HSNO Act functions
 - 16.2. expanding the scope to include functions under both the HSNO Act and RMA
- 17. agree to establish the statutory Māori advisory committee as set out in recommendation 16.1, to the EPA, with the following conditions:
 - 17.1. the committee has no fewer than 4, and no more than 8 members
 - 17.2. the committee provides advice and assistance on policy, process, and applications from the Māori perspective, to those performing functions under HSNO Act
 - 17.3. the committee operates within a terms of reference that is reviewed every three years
- 18. note that the Minister of Māori Affairs supports the establishment of the statutory Māori advisory committee as set out in recommendation 16.2

Comparison of options

- 19. note that both options outlined in recommendation 6:
 - 19.1. provide efficiency and performance gains from grouping similar activities and skills and reducing unnecessary duplication
 - 19.2. create certainty through having one organisation responsible for national-level regulation
 - 19.3. can have the government direct it to give effect to policy related to its statutory objectives
 - 19.4. do not enable government to intervene in individual applications (other than where Ministerial powers are provided for in statute)

- 19.5. do not propose any significant changes to Ministerial decision-making powers on regulatory matters
 - 19.6. provide for statutory decision-making independent of Ministerial influence
 - 19.7. provide for the same statutory provision for Māori involvement
 - 19.8. would require legislative amendment to change the scope or range of functions and powers of the EPA in the future
- 20. note that the specific advantages and disadvantages of option 1 in recommendation 6.1 (stand-alone Crown agent) are it:
 - 20.1. creates a clear split between the policy functions of the Ministry for the Environment and implementation and technical functions
 - 20.2. increases the risk of duplicating policy resources in the EPA and at the Ministry for the Environment
 - 20.3. has less perception of Ministerial influence over decisions compared to option 2
 - 20.4. is the preferred option amongst participants in the consultation with Māori, due to increased perception of independence from political influence
 - 20.5. has lower one-off establishment costs, though this is offset by a greater ongoing operating cost
 - 20.6. is flexible to add further functions to, though harder to move functions back into a department
- 21. note that the specific advantages and disadvantages of option 2 in recommendation 6.2 (statutory office within the Ministry for the Environment) are it:
 - 21.1. provides the opportunity for more direct feedback between implementation and policy
 - 21.2. reduces the potential for duplicating policy resources in the EPA and the Ministry for the Environment
 - 21.3. will need to more actively manage the perception of independence the EPA statutory office will have from the Ministry's core business, through clear delineation from the Ministry's core business and through independent Ministerial-appointed decision-makers
 - 21.4. more directly gives effect to the Crown-Māori relationship and principles of the Treaty of Waitangi through the closer relationship with Ministers and the Crown
 - 21.5. reduces whole of government reduction in transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning and reporting
 - 21.6. corporate savings associated with combining the corporate services of the Ministry for the Environment and ERMA
 - 21.7. has higher one-off establishment costs though 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 the Ministry and ERMA
 - 21.8. is flexible and more easily transferable to another entity (eg department or Crown entity)
- 22. note the estimated fiscal costs of each option outlined in recommendation 6:
 - 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
 - 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 an option

- 23. either
 - 23.1. agree to proceed with option 1 that:
 -
 - 23.1.1. 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
 - 23.1.2. requires the membership of the EPA board consist of no less than 6 members and no more than 8 members (including the Chair and at least one member with knowledge and experience in the Treaty of Waitangi and tikanga Māori)
 - 23.1.3. provides for members of the EPA board to hold office for a period of up to three years with renewals of term possible
 - 23.1.4. provides for the EPA board to exercise the powers and perform its functions, as specified in recommendations 7 and 9.1, for provisions for delegation powers for these and other functions, as appropriate, and for provisions of the Crown Entities Act 2004 applying to it
 - 23.1.5. requires the EPA board appoint the statutory Māori advisory committee and agree the terms of reference
 - 23.1.6. provides for the EPA to support the decision-making committee and the Māori advisory committee

or

- 23.2. agree to proceed with option 2 that:
 - 23.2.1. establishes the EPA as a statutory office that operates within the Ministry for the Environment, headed by a statutory officer appointed by, and accountable to the Secretary for the Environment
 - 23.2.2. provides for the EPA to perform the advisory, investigatory and administration functions and powers, as specified in recommendations 7 and 9.2
 - 23.2.3. requires the Minister for the Environment to appoint an independent committee to exercise the decision-making powers under the HSNO Act as specified in recommendation 9.3, serviced by the EPA statutory office
 - 23.2.4. provides for the decision-making committee to consist of no less than 6 and no more than 8 members (including the Chair and at least one member with knowledge and experience in the Treaty of Waitangi and tikanga Māori)

- 23.2.5. requires the decision-making committee to have members experienced in hazardous substance and new organism matters to reflect the depth and breadth of matters likely to come before it, and have access to the delegation provisions established under the HSNO Act, as it is appropriate that these be maintained
- 23.2.6. requires the EPA, in consultation with the decision-making committee, to appoint a statutory Māori advisory committee, and agree its terms of reference
- 23.2.7. provides for the EPA to support the decision-making committee and the Māori advisory committee

Implementation considerations

- 24. agree that the functions listed in recommendations 7.1,7.3,7.4,7.5 and 9 be transferred to the EPA from **[withheld]** 2011
- 25. note that there is a risk with the transferring of the Emissions Unit Registry and other Climate Change Response Act 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
- 26. agree that the transfer of functions in recommendation 7.2 (excluding those functions referred to in recommendation 8) to the EPA be delayed until **[withheld]** 2011
- 27. note that I intend to present the Exclusive Economic Zone policy in late 2010 to Cabinet for consideration, with analysis of the appropriate institutional arrangements of the functions proposed, including that the EPA could potentially perform the proposed regulatory consenting functions

Transitional considerations

- 28. agree that the existing staff from the ERMA agency (other than the expired appointments), the existing EPA and any others that are involved in performing the transferring functions be transferred to the new EPA by **[withheld]** 2011
- 29. agree that the existing staff undertaking related emissions trading or emissions unit registry functions be transferred to the new Environmental Protection Authority by **[withheld]** 2011 (excluding staff from the Ministry of Agriculture and Forestry as mentioned in recommendation 8)
- 30. note that at the time of transfer rationalisation and reorganisation could occur to avoid duplication of roles
- 31. note that provisions for the final ERMA annual report may be needed and the implications for final decisions made by ERMA being appealed will be addressed in the transitional arrangements
- 32. note that the Ministry for the Environment 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

- 33. note 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 [EGI Min **[withheld]**]
- 34. agree 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
- 35. note that this provision is not intended to limit the Ministry for the Environment from seeking other advice or consultation on these processes as necessary

Suitability for future expansion of functions

- 36. agree that any activities proposed to be transferred to the EPA in the future be assessed against the following principles:
 - 36.1. is best performed at the national level under the organisational form of the EPA
 - 36.2. is of a regulatory nature (including standard-setting, licensing and enforcement) rather than of policy targeted at complex environmental problems
 - 36.3. is of a technical nature with low level of discretion to be applied by the EPA
 - 36.4. is able to maintain or enhance certainty of process for resource users and applicants
 - 36.5. is of a similar nature to existing functions to enable efficiency gains
 - 36.6. will result in greater concentration of technical and expert skills and not a duplication of skills and expertise
 - 36.7. is able to maintain or enhance the role of Māori in the regulation of New Zealand's environment and natural resource
- 37. direct the Ministry for the Environment to initiate a review of the effectiveness of the EPA at 3 years after the EPA becomes operational
- 38. agree that on completion of the review in recommendation 37, the Ministry for the Environment will prepare and publish a report

Financial implications

- 39. agree that the fiscal appropriations relevant to the powers, functions and duties of the EPA be transferred to Vote Environment at the time it becomes responsible for the corresponding powers, functions and duties
- 40. delegate to the Vote Ministers of Environment, Climate Change, Energy and the Minister of Finance the authority to agree the details of recommendation 39 including appropriate increase in the net assets schedule

of the Ministry for the Environment (offset by the return of ERMA capital)

- 41. note that transitional one-off costs of establishing the EPA will be met by the Ministry for the Environment's baseline funding and potentially from working capital on ERMA's balance sheet

Legislative implications

- 42. note that an Environmental Protection Authority Bill is included as Priority 4 (to be referred to Select Committee this year) in the 2010 legislative programme
- 43. note 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
- 44. agree that the EPA legislation should include a provision stating that the Act will bind the Crown

Next steps

- 45. agree that the Minister for the Environment issue drafting instructions to the Parliamentary Counsel Office to draft an Environmental Protection Authority Bill to implement the proposal set out in these recommendations
- 46. agree that the Minister for the Environment, in consultation with the Ministers of Finance and State Services, be given Power to Act to approve any further technical matters as may be required to be included in the EPA Bill to be submitted for approval by the Cabinet Legislation Committee
- 47. invite the Minister for the Environment to report back to the Cabinet Legislative Committee by end of [withheld] 2010 with a draft Bill for approval for introduction
- 48. note that the Minister for the Environment intends to introduce the Bill into the House before the end

of [withheld] 2010, and to have the EPA operational by 1 July 2011

- 49. agree that the Minister for the Environment give a post-Cabinet press release signalling the intention for the future form and functions of the expanded EPA
- 50. note that the Minister for the Environment intends to release this paper, and previous policy papers following decisions on the future form and functions of the expanded EPA, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982

Signed by
Hon Dr Nick Smith
Minister for the Environment
28/4/2010

Appendix 1: Comparison of the options against the selection criteria

The table below provides an assessment of the two options presented in this paper against selection criteria

Criteria	Stand-alone Crown agent	Statutory office and statutory decision-making committee
Greater central government direction	Potential gains in ability to deliver functions from clear separation of policy and regulatory functions. Govt can direct to give effect to policy.	Provides a specific point of responsibility for the set of functions within a central government department. Govt can direct to give effect to policy.
Concentration of skills and similar functions	Concentration of skills and regulatory functions in external agency could create efficiencies within EPA. Some skill areas may need to be duplicated in the EPA and the Ministry.	Concentration of skills and regulatory functions within the Ministry could create efficiencies within EPA. Reduces the potential for duplicating policy resources as the EPA could access this within the Ministry. Provides for strong feedback loops between policy

		<p>and operations.</p> <p>Need to clearly and transparently demarcate roles of the Ministry and statutory office.</p>
Improved certainty of process for resource users and applicants through clarifying responsibilities	<p>More certainty for users and applicants, with clearer responsibility and accountability lines.</p> <p>Has the board undertaking decision-making and governance role.</p>	<p>Statutory committee has clear decision-making role.</p> <p>Need to actively manage the perception that the statutory office functions are performed independent from the Ministry's core business.</p> <p>May cause confusion about what a statutory office(r) is and how it relates to the department and Minister.</p>
Appropriate organisational form for the functions and powers	The advisory and administrative functions do not require Ministerial direction and so could operate outside of government department.	<p>The advisory and administrative functions are appropriate to be within a government department.</p> <p>Need to clearly and transparently demarcate roles of department and statutory office.</p>
Dispels perception of undue Ministerial influence	<p>Independence of decision-making powers ensured through Crown entity model.</p> <p>Perception of level of Ministerial influence likely to be similar to that which currently exists for ERMA.</p>	<p>Independence of decision-making powers maintained with statutory Minister-appointed committees.</p> <p>Risk that having a statutory office service the committee could reduce the perception of independence.</p> <p>Need to manage this perception to ensure functions will be statutorily independent from the Ministry's core business.</p>
Flexible to meet future demands with minimal disruption	<p>Would require amendment to statute to change scope and range of functions.</p> <p>May be less flexible to move functions under the Crown entity model.</p>	<p>Would require amendment to statute to change scope and range of functions.</p> <p>Legislation will provide clear delineation from the Ministry's core business.</p> <p>More flexible to transfer functions to another entity (department or Crown entity).</p>
Marginal costs can be minimised	The one-off capital costs are estimated to be the	The one-off capital costs are estimated to be the same for both

	<p>same for both options.</p> <p>The establishment costs are estimated at \$900,000 - \$2.2M, depending on accommodation options.</p> <p>The marginal increase to ongoing annual operating costs is estimated up to \$1.6M to perform as self-sufficient agency.</p>	<p>options.</p> <p>The establishment costs are estimated at \$1.5M - \$2.5M, depending on accommodation options.</p> <p>The marginal increase in ongoing annual operating costs is estimated at up to \$0.9M to maintain some independence from the Ministry's core business.</p> <p>About \$700,000 less per annum than the stand-alone option as a result of corporate savings associated with the combining of corporate services.</p>
Ability to give effect to the Crown-Māori relationship	<p>The statutory provisions for Māori involvement are the same for both options.</p> <p>Preferred option amongst participants in the consultation with Māori, due to increased independence of the Māori advisory committee from political influence.</p> <p>The members of the Māori advisory committee would be appointed by the board of the Crown agent.</p>	<p>The statutory provisions for Māori involvement are the same for both options.</p> <p>Closer relationship with the Minister for the Environment and so better able to give effect to the Crown- Māori relationship and principles of the Treaty of Waitangi.</p> <p>Higher perception of Māori advisory committee being subject to political influence. The members of the committee would be appointed by the statutory officer in consultation with the statutory HSNO Act decision-making committee to help increase the real and perceived independence.</p>
Wider impact on the number of environmental entities operating at the national level	<p>No change in number of environmental entities, with ERMA subsumed into EPA as a separate entity to the Ministry.</p>	<p>Reduces number of environmental entities at the national level.</p> <p>Could be a whole of government reduction in transaction costs (though hard to quantify) through reduced Crown entity monitoring, planning and reporting.</p>
Career opportunities for EPA staff	<p>Career development options limited to the range of operational functions.</p>	<p>Potential for internal career development options within the Ministry, from policy</p>

		development through to operational.
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Appendix 2: Detailed financial considerations

[withheld]