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**Title of Paper:** A New Policy Framework for the Allocation of Water –  
Implications for Municipal Suppliers

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**Abstract**

New Zealand's fresh water resources are coming under increasing pressure to meet growth in demand, particularly from the agricultural sector. The Ministry for Agriculture and Forestry and the Ministry for the Environment recently projected a 202% increase in demand for irrigation water in the Waikato Region by 2010. In addition, there is an increasing demand for water for community supplies, industry and stock water supplies.

The Resource Management Act 1991 ("RMA") confers on regional councils jurisdiction to allocate the taking and use of water through provisions in regional plans. In recent times the Waikato Regional Council (Environment Waikato) has been criticised over the approach it has thus far adopted under the Waikato Regional Plan for the allocation of the Region's fresh water resources as it was perceived to be failing to adequately deal with the level demand and increasing competition for water. In response to these issues Environment Waikato notified a Variation (Variation 6) to its Regional Plan that introduces a new approach to the protection, allocation and use of the Region's fresh water resources. Variation 6 to the Proposed Waikato Regional Plan was notified in October 2006, the hearings have been completed and decisions are expected to be notified mid 2008. At the time of writing this paper no decisions have been notified.

An important feature of the Variation (as notified) is that it introduces policies designed to ensure the availability of water to meet the requirements of municipal supply authorities and rules to give priority to municipal supply, provided municipal suppliers use the water efficiently. To demonstrate that these objectives will be achieved, the Variation requires that applications for takes for municipal supply must be supported by comprehensive Water Conservation and Demand Management Plans. These plans will substantiate the volumes of water sought, set out the methods and mechanisms to minimise the use of water, and identify the applicant's specific initiatives and objectives in terms of water conservation and demand. Many regional councils around the country are watching with interest the progress of this Variation, possibly with a view to adopting similar models for their regions.

This paper will discuss:

- the background to Variation 6;
- what Water Conservation and Demand Management Plans will need to address;
- how these plans will fit within the context of the RMA and the Local Government Act 2002;
- legal issues as regards the scope of the powers of regional councils in the context of such instruments; and
- the implications of Variation 6 for municipal water suppliers.

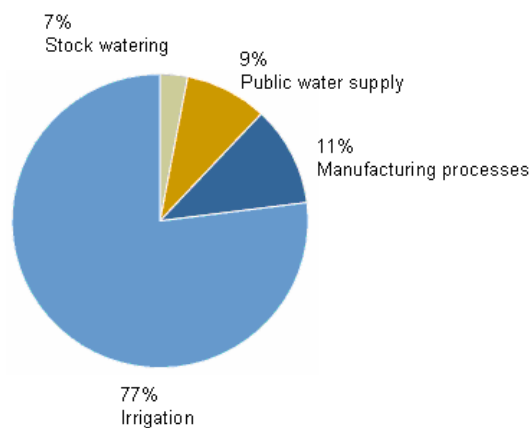
## Introduction

Past generations have grown up with the idea that New Zealand would always enjoy an abundance of freshwater. In recent times, however, it has been recognised that the resource is not infinite and needs to be managed carefully. The significant increase in recent years in the volume of water allocated in New Zealand underscores the urgency of balancing the competing needs of water users – recreational users, municipal water suppliers, hydroelectricity generators, tourist operators, and farmers – while maintaining the health of the aquatic habitat.

The perception that New Zealand is a water rich country, and that there is enough freshwater to go around for all needs, has resulted in a lack of strategic long term planning for the allocation and efficient use of water. In addition to this there is a lack of good information about how much freshwater is actually used in New Zealand.

Regional council water permits, however, provide some useful information on how much water is allocated. Across New Zealand the volume of water allocated increased by 50% between 1999 and 2006, driven mainly by an increase in land area under irrigation. Around 60% of the total volume of water allocated comes from rivers and streams, 34% from groundwater, and 6% from lakes and reservoirs. Figure 1 shows this allocation (2006 Data Source: Ministry for the Environment) and that 77% of all allocated water is allocated to irrigation, 11% to manufacturing processes and only 9% to public water (municipal) supply.

**Figure 1 - Use of Allocated Water in New Zealand**



Indications are that New Zealand's fresh water resources will continue to come under increasing pressure to meet growth in demand, particularly from the agricultural sector.

The Resource Management Act 1991 ("RMA") confers on regional councils jurisdiction to allocate the taking and use of water through provisions in regional plans. The practice of nearly all these councils to date has been to allocate water on a "first-come first-served" basis, with minimal requirements to demonstrate need or efficient use. In these times of increasing demand for freshwater, a more sophisticated approach is required, including the requirement to demonstrate need and efficient use.

### **Challenges Facing Environment Waikato**

Some regions more than others are coming under increasing pressure to meet growth in demand for freshwater resources. The Ministry for Agriculture and Forestry and the Ministry for the Environment recently projected a 202% increase in demand for irrigation water in the Waikato Region by 2010. In addition, the Region is also facing an increasing demand for water for community supplies, industry and stock water supplies.

- As demand for freshwater in the Waikato Region has grown so has the criticism of the approach Environment Waikato ("EW") has thus far adopted under the Waikato Regional Plan for the allocation of the Region's freshwater resources. The issues facing the Region include:
- demand for community water supplies is increasing and in many cases the volumes sought exceed the supply available, assume limitless resources and few applications make provision for efficiency gains;
- The increasing demands on water use for supply, industry and primary production will potentially have adverse impacts on the environment and community in areas of high demand;
- Many of the Region's surface water bodies are already reaching or exceed the allocation limits specified in the proposed Regional Plan, but there is no guidance as to EW's approach beyond that level;
- The "first-come, first-served" strategy employed for allocating water is not seen by many members in the community as fair, efficient or equitable as demand for water increases;
- There is no clear guidance to help determine who priority users are in times of drought;
- The community does not have a clear understanding of issues associated with water availability and water use efficiency. As demand for water increases, communities

appear to be becoming increasingly concerned about the possible effects of new water extraction demands on existing water users and guarantee of supply.

In response to these issues, EW notified a Variation (Variation 6) to its proposed Regional Plan in October 2006. At the time of writing this paper the hearing of submissions on the Variation have been completed, but no decisions have been notified.

### **Variation 6**

The Variation introduces a new approach to the protection, allocation and use of the Region's fresh water resources. It includes provisions designed to ensure that water is available to meet the reasonable needs of individuals and communities. It is also available for renewable energy generation and to ensure that there is sufficient water for in-stream aquatic requirements during water shortages and droughts.

Variation 6 recognises the importance of ensuring the water is available to people for their domestic and community needs either from private water supply takes or from a municipal supply. EW is seeking to protect existing takes for domestic and community purposes from competition with other less essential uses and to prioritise new applications for these purposes above all other applications. This approach recognises the need to give certainty to municipal authorities in terms of their ability to provide for the needs of future generations.

However, in order for municipal supply authorities to take advantage of the special provisions afforded to them under Variation 6, they must demonstrate a need for the water, that it is being used efficiently and that they are operating according to best practice. The key mechanism for achieving these outcomes is through the preparation and implementation of Water Conservation and Demand Management Plans.

### **Water Conservation and Demand Management Plans**

The key purposes of Water Conservation and Demand Management Plans are to achieve the effective operation of water supply systems and to efficiently manage the demand for water by users. Variation 6 requires that Water Conservation and Demand Management Plans will be filed in support of resource consent applications for water takes for municipal supply. These Plans will enable EW to assess in detail the justification for the take sought.

The scope and content of a Water Conservation and Demand Management plan will vary significantly from local authority to local authority depending on the size of the network and volume of the take, a council's knowledge of its network and how it operates, the condition of the assets and how advanced a council is in developing and implementing water demand management. The level of sophistication of Water Conservation and Demand Management Plans will depend at least in part on the length of time a council

has to develop and implement the plan before its existing consent to take water for domestic and municipal supply expires.

It is anticipated that Water Conservation and Demand Management Plans will be evolving documents subject to ongoing review. Many “First Generation” Water Conservation and Demand Management Plans will likely be focused on documenting how the water supply network operates, existing and projected water demand and restrictions to be imposed during water short conditions and will include water conservation targets and options for water demand management. These “first generation” Water Conservation and Demand Management Plans will provide the framework for a “road map” for the direction of a council’s future initiatives in water conservation and demand management.

“Second Generation” Water Conservation and Demand Management Plans should be more sophisticated documents that clearly identify current conservation and demand management initiatives adopted by the council, monitor the implementation and effectiveness of these initiatives and identify future initiatives.

Water Conservation and Demand Management Plans should also include drought management plans that will be implemented when the water short conditions apply. It is anticipated that drought management plans will set a series of trigger levels that will result in the implementation of water restrictions, along with requirements for media campaigns and community communication programmes to ensure the restrictions are understood and adhered to. These plans should also include actions relating to monitoring and enforcement.

## **Regulatory Context**

The regulatory context in which the Variation has been promulgated primarily comprises the RMA and, to a lesser extent, Local Government Act 2002 (“LGA”). In that regard, the LGA requires local authorities inter alia (at section 14) to:

- *“...ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region”*
- *take into account “the social, economic, and cultural well-being of people and communities,... the need to maintain and enhance the quality of the environment; and the reasonably foreseeable needs of future generation.”*

Section 65(1) of the RMA confers power on regional councils to prepare regional plans “for the whole or part of its region for any function specified in section 30(1)(c)”. The relevant functions of regional councils include:

- *“The establishment, implementation and review of objectives, policies and methods to achieve integrated management of natural and physical resources” (section 30(a))*
- *“the control of the taking, use, damming, and diversion of water, and the control of the quantity, level and flow of water in any water body including .....if appropriate, the establishment of rules in a regional plan to allocate ..... the taking or use of water” (section 30(e))*

Section 65(3) provides guidance as to the circumstances in which regional plans should be developed. It states that regional councils must consider the desirability of preparing a regional plan where the following relevant circumstances arise (or are likely to arise):

- *“Any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict” (section 65(3)(a)).*
- *“Any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance” (section 65(3)(b)).*
- *“Any foreseeable demand for or on natural and physical resources” (section 65(3)(d)).*
- *“Any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality” (section 65(3)(h)).*

Not only do regional plan measures need to fall within the scope of the functions and powers of regional councils to be valid, they need to undergo a rigorous evaluation under section 32 of the RMA. In that regard, section 32 requires that an evaluation examine:

- *“the extent to which each objective is the most appropriate way to achieve the purpose of this Act”; and*
- *“whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.”*
- *An evaluation must take into account:*
- *“the benefits and costs of policies, rules, or other methods”; and*
- *“the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.”*

Ultimately, a regional plan must promote the sustainable management of natural and physical resources, as informed by the other important provisions in Part 2 of the Act. “Sustainable management” is defined as:

*“(2) ... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —*

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

The other relevant provisions of Part 2 include the matters set out in sections 6 and 7. Of particular relevance in this context is section 7(b), which requires the regional council to have regard to “the efficient use and development of natural and physical resources”.

Variation 6 was promulgated within that regulatory context and, in particular, the requirement for Water Conservation and Demand Management Plans to accompany resource consent applications for municipal supply will ensure the efficient and effective use of water is consistent with section 7(b) and the sustainable management of resources in terms of section 5 of the RMA and the key objectives of the Local Government Act 2002 (“LGA”).

In late July of this year (2008) the Ministry for the Environment (“MfE”) notified the Proposed National Policy Statement for Freshwater Management. In order to achieve the purpose of the RMA, the Crown has recognised that there is a particular need for clear central government policy to achieve the sustainable management of freshwater.

The proposed National Policy Statement includes objectives relating to the well being of people and communities, managing demand and efficient use. It also includes policies relating to prioritisation of allocation for takes of fresh water and priority for reasonably foreseeable domestic water supply.

Although Variation 6 was notified nearly two years before the National Policy Statement, in terms of efficient use and domestic supply there appears to be a high level of consistency between the two documents.

MfE has also issued proposed National Environmental Standards for Water Measuring Devices and for Ecological Flows and Water Levels. The issuing of these national

policies and standards are part of the Government's package of instruments to better manage freshwater and that are being developed under MfE's and the Ministry of Agriculture and Forestry's Sustainable Water Programme of Action.

## **Legal Issues**

A range of legal issues were raised in the context of Variation 6, the most important of which related to the extent to which it is appropriate to adopt methods of allocation inconsistent with the "first-come, first-served" principle. A decision is still awaited and it is therefore not appropriate to address the issue in detail. This commentary will be restricted to setting out the arguments promoted in relation to that issue.

Some submitters on Variation 6 raised challenges to the legality of the policy setting the order of priority for consideration of competing resource consent applications, by which applications for domestic and municipal water supply were given the highest priority. The policy was challenged on the basis that it seeks to override the principle that applications should be assessed on a "first-come, first-served" basis. The parties that raised that argument relied upon the principle set out in *Fleetwing Farms Limited v Marlborough District Council* ([1997] 3 NZRMA 385). In that case, the Court of Appeal considered the legal test for determining priorities for hearing competing appeals in the Environment Court and stated (*Fleetwing*, page 391):

*"On our reading of the Resource Management Act is that Parliament has used the ... approach of first come first served."*

In response, it was argued that the effect of Court's decision in *Fleetwing* relates to procedural priority and had been overstated. Those parties argued that, importantly, there was no regional planning instrument which determined priority for competing applications in the context of the *Fleetwing* case and had there been one which guided the consent authority in dealing with competing applications in those circumstances, the case may never have had to be decided. The argument was that there is nothing in *Fleetwing* which makes the "first come, first served" principle sacrosanct or which precludes the possibility of a regional plan prioritising applications in some other way and, on that basis, the policy setting the order of priority for consideration of resource consent applications for water takes was lawful.

## **Implications for Municipal Water Suppliers**

Although Variation 6 only applies to the Waikato Region, other regional councils in New Zealand are watching with keen interest the progress of the Variation through the statutory process. If the key components of the Variation remain in place, there could be a high probability that similar approaches are adopted in the regional plans in other regions. Therefore, municipal suppliers in other parts of the country may in the future be



required to prepare Water Conservation and Demand Management Plans in support of their applications to take water for municipal supply..

The implications for municipal water suppliers in the Waikato Region (district and city councils) of having to prepare Water Conservation and Demand Management Plans to support resource consent applications for water takes for municipal supply could well be significant. This will be particularly so for those councils that have a limited knowledge of their network and who have yet to develop strategies or approaches to water demand management.

Councils will need to:

- have a comprehensive understanding of the networks operation including levels of service, water use measurement and maintenance and asset management procedures;
- undertake an assessment of existing and future demand for water for a planning horizon of at least the consent duration sought;
- established existing or proposed water pricing procedures and any linkages with wastewater pricing or management;
- establish planning and management procedures to minimise water losses
- understand distribution patterns of water use practices and behaviours so as to maximise water use efficiency and reduce use;
- ensure appropriate measurement of their water takes;
- establish water saving targets for the full range of demand conditions along with key performance indicators for each target;
- adopt external auditing and benchmark procedures;
- prepare drought management plans;
- determine actions to maximise water use efficiency and reduce use, performance measures and a timeline for implementing the actions;
- determine a Water Conservation and Demand Management Plan review process.

Councils will also have to determine what demand management measures and approaches to be adopted and a timeline for doing so. These measures can be controversial such as the introduction of water metering and usage charging for communities, wastewater volume charging, greywater reuse, requirements for rainwater tanks and water pressure controls.

Water Conservation and Demand Management Plans will need to have strong linkages with councils' Long Term Council Community Plans ("LTCCP") and Annual Plans prepared under the LGA. This is because Water Conservation and Demand Management Plans will include policies and initiatives that will need to have gained community support and will generally require funding to implement. Examples of this could include significant upgrades to infrastructure to minimise network leakages or changes to policy to promote the use of non potable water supply to reduce reliance on reticulated water supply.

Councils will need to prepare Water Conservation and Demand Management Plans in advance of any assessment of effects on the environment ("AEE") required to support resource consent applications for water takes for municipal supply. This is because an AEE will need to include information from the Water Conservation and Demand Management Plan. This information will assist in justifying the take volumes required, demonstrating the need for such volumes and that the water will be used efficiently and effectively.

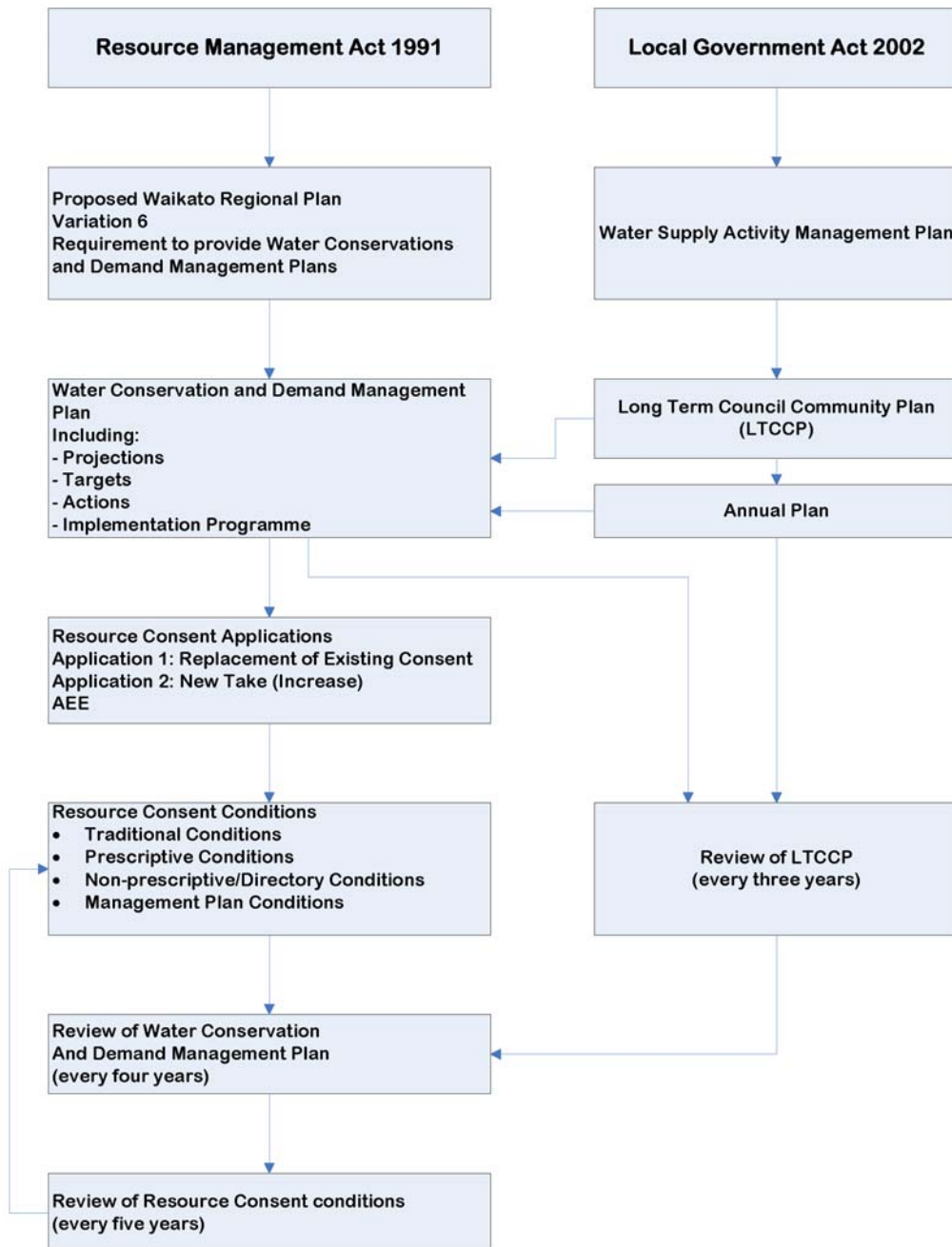
However, a Water Conservation and Demand Management Plans is not a substitute for an AEE and should not be an AEE. Water Conservation and Demand Management Plans and AEEs have different functions and a Water Conservation and Demand Management Plan is a living document that must have the flexibility to be reviewed and changed. Water conservation and demand management is a journey that does not have a final end point; it is an ongoing journey of continuous improvement.

Council's should also be proactive in offering up consent conditions to demonstrate to EW that as municipal suppliers they are willing to commit to undertaking the necessary measures to conserve and efficiently use water and continue to advance on the journey of water conservation and demand management. If used appropriately, review conditions can also achieve ongoing and continuous improvement in water conservation and efficient use by local authorities and their communities.

The "wiring diagram" of the Water Conservation and Demand Management Plans and water permits consent process attached in Figure 2 illustrates the inter-relationship between the RMA process and the LGA process and how the LTCCP and Annual Plan provide input for the Water Conservation and Demand Management Plans. It also illustrates the relationship between Water Conservation and Demand Management Plans and AEEs and the effective use of consent conditions.

It should be noted that councils only have to prepare Water Conservation and Demand Management Plans if they wish to take advantage of the priorities afforded to municipal supply water takes over other takes by Variation 6. If councils chose not to prepare and submit these plans with their take applications they can still apply for consents, however their applications will have to compete with all other applications.

**Figure 2 - Water Conservation and Demand Management plan and Water Permits Resource Consent Process**



## **Conclusions**

The outcome of Variation 6 will be keenly awaited by regional councils, municipal supply authorities and major water users throughout New Zealand. Further hearings, this time before the Environment Court, seem inevitable. One thing that does seem clear, is that if the municipal supply authorities are to be allocated any kind of priority over other users of freshwater, a new and sophisticated type of Water Conservation and Demand Management Plan will be an inevitable consequence of that privilege.

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