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Water bottling

- Remit:** That LGNZ works with the Government to:
1. Place a moratorium on applications to take and/or use water for water bottling or bulk export;
 2. Require and enable regional councils to review inactive water bottling consents, with a view to withdrawal of the consent and discourage consent ‘banking’;
 3. Undertake an holistic assessment of the potential effects of the current industry, its future growth and the legislative settings that enable Councils to effectively manage those effects; and
 4. Initiate a comprehensive nationwide discussion on the issue of water bottling and implement any changes to legislation and policy settings as required.
- Proposed by:** Queenstown-Lakes District Council
- Supported by:** Greater Wellington Regional Council; Tauranga City Council; Thames-Coromandel District Council; Upper Hutt City Council; and Waitaki District Council.

Background information and research

1. Nature of the issue

The water-bottling industry in New Zealand is young and relatively unregulated. A comprehensive review of legislation and policy needs to be developed in order to fully understand and address its potential effects on community wellbeing and resilience.

The sustainability of water bottling and its associated implications for global plastic waste, local property rights and Māori freshwater rights need to be considered. The effects of climate change on groundwater systems are not yet well understood. Further research is required.

The implications of ‘banking’ water-bottling consents needs to be fully explored. The amount of water bottled reaches 157.8 million litres annually (as at January 2018), however there are consents available to extract 71.575 million litres of water per day for both bottled water and for mixed uses. The consequences of rapid uptake and growth in the industry are unknown, but could artificially raise land values and make access to water unaffordable.

Therefore, where water is unlikely to be bottled, consents should be available to be reviewed, or in the case of mixed-use consents, water bottling removed as a purpose of the water take.

It is timely to reconsider legislation and policy, given many catchments are nearing their allocation limits and the National Policy Statement for Freshwater Management is under development.

It is important to note that the intent of this remit is not to impact existing water-bottling operations, nor to make judgements on the merits or otherwise of the industry. The focus of this remit is on obtaining a comprehensive understanding of the industry, its potential for growth, the range of externalities such growth may cause and the policy and legislative settings required to address this.

2. Background to its being raised

The Industry

Large-scale water bottling is a relatively new industry in New Zealand. As a result, there is no clear policy governing the use of water for bottling, and the industry is not specifically regulated. Managing the effects of the industry requires the alignment of a range of interdependent policies and legislative tools that determine who can access water, for what purpose and under what conditions. A review is required to understand how best to co-ordinate these tools.

The value proposition of water bottling has resulted in the 'banking' and sale of water bottling consents, raising the value of land and effectively creating an unregulated market for water. This can lead to confusion between these outcomes and s122(1) RMA which states that a resource consent is neither real nor personal property. This issue is exacerbated by increasing demand for water, the fact that many catchments are at or approaching full allocation, and the extent to which some regional plans enable existing water consents to be varied to enable water bottling. As the future utilisation of water will become increasingly competed for, understanding what our communities' priorities for this resource are must be fully debated and understood.

Any review needs to also consider the value and reliance placed on consents by owners and operators, and the impact on established property rights, which will need to be addressed.

Overseas Interests

Since 2013, New Zealand Trade & Enterprise (NZTE) has invested in eight water bottling companies through its Focus 700 Group programme, to support the growth of water exports. Although NZTE no longer encourages the sale of NZ's water, it does facilitate the sale of land for the holders of water permits. It is worth noting that certain provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) make it unclear whether NZ drinking water suppliers can be prioritised to ensure NZ communities will always have access to affordable clean drinking water.

Under the OIA foreign investment in NZ's water cannot be managed effectively as water is not defined as a 'sensitive' asset. Treasury has confirmed that our existing free trade agreements do not allow the creation of new classes of sensitive assets.

Therefore, foreign investment in water bottling can only be limited where the water is to be extracted from sensitive land and only if the 'good character' or 'benefit to NZ' tests are not met.

In 2018 Land Information New Zealand (LINZ) Minister Eugenie Sage was unable to decline Cresswell NZ's application to purchase of sensitive land for a water bottling plant. She stated that the provisions of the Overseas Investment Act prevented her declining the application. Subsequently, the government has proposed amendments to the OIA6 that (if enacted) will allow applications involving the extraction of water for bottling to be declined if they are likely to result in a negative impact on water quality or sustainability.

Community Sentiment and Maori Cultural Values

New Zealand has demonstrated community concern in relation to water bottling in recent years, presenting petitions and participating in protests on a number occasions.

On the matter of water export and Maori cultural values, Ngati Awa has appealed the Environment Court Decision arguing that the application is "for too much water to be sold too far away" (at [35]). Their position is that in these circumstances te mauri o te wai and their tangata whenua right to act as kaitiaki of the water are lost.

Waste and Plastic

On the matter of plastic production, it is unclear under which vehicle this can be managed. In the Minority Judgement of the Environment Court against Cresswell NZ (10 December 2019), Commissioner David Kernohan found (at [346]) that "the pollution created from the production and specifically end use disposal of plastic water bottles does not meet the objectives and policies of the RMA". However, the Majority of the Court found that the end uses of the water which involved putting the water in plastic bottles were found to be "ancillary activities which are not controlled under the Regional Plan" and that there had been "no suggestion that control of such activities comes within the ambit of the functions of the regional council under s30RMA" (at[64]).

Impact on Local Government

The effects of the water bottling industry on local councils, as water suppliers and as the owners of transport networks, may be significant and there are a number of examples of this being the case. However, their ability to submit and appeal may be limited by notification provisions.

There are currently three appeals before the High Court. These challenge applications for consent in Belfast and Otakiri and deal with questions related to the allocation of water for water bottling including the ability to consider the effects of plastic bottle production as an end-use of water, the effects of water export on te mauri o te wai and kaitiaki rights under Te Tiriti and the correct process for changing the purpose of a water take.

A levy on water bottling is a response to perceived issues of fairness but this policy could itself have unintended consequences if implemented in isolation and without an assessment of the kind proposed by this remit.

QLDC is therefore proposing comprehensive policy and legislation based on consultation with councils and the community.

3. New or confirming existing policy

This Remit represents a new policy position for LGNZ and for central government.

4. How the issue relates to objectives in the current Work Programme

This remit could accelerate the debate on water allocation and highlight any issues within the RMA and/or the NPS-FM. This could significantly influence the existing LGNZ programme of work in relation to strategic and policy advice to Central Government.

The results may feed into Stage 2 of the reform of the RMA as well as LGNZ's Water 2050 project which could lead to changes that ensure communities are resilient in the face of climatic changes that will impact productive land and water bodies, including sources of drinking water.

The following matters may be raised in delivery of the current work programme in relation to this remit:

Resource Management Act

- Adding consideration of the effects of plastic production to the RMA as a Part 2 matter of national importance.
- Adding effects on Climate Change to the RMA as a Part 2 matter of national importance.
- Greater use of regional councils' powers under s30 RMA to allocate water amongst competing activities with a view to:
 - Zoning water and controlling its use in the same way land use is controlled.
 - Using water allocation as a tool to incentivise resilience and sustainable outcomes.
 - Protecting our deep, clean aquifer water for domestic and community supply.
- Reviewing the provisions governing the variation and transferability of water permits and the effects of those on consent holders' rights as well as the possibility for unregulated water markets.

National Policy Statement on Freshwater Management Development

- Redefining 'efficient allocation' in the draft NPS-FM and regional plans so that when councils are deciding "how to improve and maximise the efficient allocation of water" and identifying in "methods to encourage the efficient use of water"¹² within regional plans, it is clear they are seeking to not only maximise jobs and minimise 'waste', but also to maximise the wider economic, social, cultural, environmental and health benefits of water allocation.
- Re-wording Policy 4 of the draft NPS-FM and the policies for implementing integrated management of land and freshwater (at 3.4 (1) to (4))¹³. The proposed approach is one directional, considering only the effects of land use on fresh water. Rewording these policies may lead to more efficient and sustainable allocation of water.

5. What work or action on the issue has been done and what was the outcome

QLDC wrote to Minister Parker in February requesting a moratorium on new and existing water bottling consents. This was written in support of an initial proposal by Upper Hutt City Council.

6. Any existing relevant legislation, policy or practice

Existing legislation, policy and practice reflects a complex landscape where far greater alignment is required if effective regulation and understanding is to be achieved.

There is some concern that a levy implemented in isolation may not address the issues that communities and local councils will be faced with if the industry grows. Concerns have also been raised that a levy may incentivise or prioritise the grant of water bottling consents as a result of the revenue stream that would be created.

Section 30 RMA 14 provides regional councils with the power to add rules to their plans to allocate water amongst competing activities, in much the same way as district councils can zone land and prioritise, discourage, prohibit or otherwise control different land uses. This power has not been exercised to any great extent to date. Regional Councils have preferred to allocate water on a 'first complete application, first assessed' basis in line with case law, and to grant consent as long as the water 'take' is sustainable and the purpose reflects efficient use. However, in theory, regional councils could undertake a broader assessment of the effects of using water for bottling, and then either prioritise, discourage or prohibit water bottling (across whole catchments or for specified water bodies or depths).

Christchurch's ground water zones are by and large fully allocated and new applications to take water are prohibited. Consent holders have been applying to Environment Canterbury to vary existing industrial and irrigation consents to enable water bottling. There is no ability to use s127 due to the activity being outside the scope of the original applications.

The process being used to vary the consents involves the grant of a new 'use' consent. Whether this process is lawful under the RMA and the Canterbury Land and Water Regional Plan, will be determined by the Court. This highlights the difficulty for planners implementing resource management provisions that are unclear and inadequate in terms of managing the allocation of water in fully allocated catchments. Three consents have been varied in this way and a fourth is being processed.

Plan changes of this nature would come at significant cost to the ratepayer and could not be implemented quickly. Signalling such a plan change might trigger a wave of applications. Therefore, and given that this is an issue that will affect all councils (albeit in different ways), the best way forward is likely to be a moratorium on new consents followed by a review or discussion covering the matters set out below. Any significant policy changes could be required to be implemented via Schedule 1 and an amendment to the NPS-FM, but only if a clear problem is identified and only after consultation with LGNZ and Councils.

The Overseas Investment Amendment Bill (No 3) also references water bottling and this is now with the Select Committee Finance and Expenditure (submissions closing 31 August 2020). Currently the Amendment Bill reads that if overseas investment in sensitive land involves the extraction of water for bottling or other extraction in bulk for human consumption, then an additional factor of the benefit to NZ test would be whether the overseas investment is likely to result in a negative impact on water quality or sustainability. If enacted this would not apply to all investments in water bottling plants by overseas interests.

7. Outcome of any prior discussion at a Zone/Sector meeting

Not considered by a Zone or sector meeting.

8. Suggested course of action envisaged

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