

Planning Opinion on consenting pathways for intensive farming: Horizons One Plan



Introduction

This note responds to a request from Andrew Bashford (Horizons Regional Council) for a planning opinion, as received by email dated 22 June 2017 (attached as Appendix 1).

Horizons' Analysis

First, I agree with the Horizons' consenting team analysis that there are five consenting pathways for intensive farming activities as indicated in your wiring diagram. I also understand that Pathway 5 will likely be where the "log jam" of applications occurs and hence there is a need to very clearly understand of the nature and extent of the pathway that exists. That in turn depends, to a large extent, on an understanding of the applicable policy framework and the appropriate approach to assessment against that policy framework.

Is the Council able to grant consent to those applications that follow Pathway 5?

I believe the answer to the above question may be different depending on whether the application is for a new or existing intensive farm. Accordingly, I deal with each situation in turn.

Existing intensive farms

The first provisions to consider in an RDA application will be the matters of discretion. Matter of discretion 14-2 (b) is "*the extent of non-compliance with the cumulative nitrogen leaching maximum* specified in Table 14.2*". That very clearly indicates an expectation that consent may be granted for farms to exceed the Table 14.2 leaching rates.

The difficulty (as you know) is that the policy that would be the natural first port of call to guide how that available discretion should be exercised is Policy 14-6. That policy appears to limit the ability to grant an exception to two specific situations (those exceptions form Pathways 3 and 4 of your analysis).

However, any "standard" planning interpretation would conclude that if the Plan had intended that the *only* exceptions that could be granted were those in Policy 14-6(b) then those exceptions would be included as part of the rule framework (i.e. those activities meeting the specific exceptions criteria would be RDA and other activities would have some other consent status). That is not the case. Nor is it the case that the Table 14.2 rates are *standards or conditions* that are immutable thresholds. They are not, being merely numbers referred to in a policy. Although the pathway is, in my opinion, poorly defined, the only conclusion that can be drawn from the analysis of One Plan's structure is that Pathway 5 does exist and can (at least theoretically) be used to grant consents. The issue is, what will

be the relevant factors to consider in determining whether that pathway is real or illusory? Here other policies must be considered.

Policy 14-5 (d) says an activity must:

“Not exceed the cumulative nitrogen leaching maximum values for each year contained in Table 14.2, unless the circumstances in Policy 14-6 apply”

Importantly, I think, it does not limit the circumstances to those in Policy 14-6 (b) but refers more broadly to Policy 14-6 as a whole. That is important because Policy 14-6 (c) sets out that where an exception is made to the cumulative leaching maximum good management practices must be adopted and N losses that cannot be avoided are remedied or mitigated (including through environmental compensation).

Importantly again, reference to “where an exception is made” is not limited by any reference to “in accordance with Policy 14-6 (b)”. Rather the reference is left open and unlimited. There is an obvious argument that if Policy 14-6 (b) was intended to limit Policy 14-6 (c) specific reference to that section would have been made in Policy 14-6 (c). It is not and on that basis, there is a reasonable argument that for existing intensive farms Pathway 5 exists and that in assessing any such application regard must be had to Policy 14-6 (c).

It is also instructive to note that in referring to Policy 13-2D (now 14-6) in *Horticulture New Zealand v Manawatu-Wanganui Regional Council [2013] NZHC 2492 [24 September 2013]* Justice Kós noted:

I do not need to say anything about this Policy, other than to record that the Council stated, expressly, that they consider the exception in (c) to be a separate exception from (b). I record that submission because it too was seen as important to the appellants.

While stopping short of endorsing the interpretation of Policy 14-6 (c), the passage at least records what was clearly the Council’s own understanding at that time (which was not contradicted by the High Court). The High Court’s noting of this point appears to be aimed at highlighting that there was discretion to be exercised that would obviate the issues raised with OVERSEER (being the focus of the appeal).

In summary, although unsatisfactory in its clarity, I believe there is an avenue to consent existing intensive farms under Pathway 5 – although I concede that because of the uncertainty other parties would likely challenge that interpretation.

Objectives and Policies of Chapter 5

The remaining issue is what factors/policy tests should be applied in determining whether (and to what extent) an “exception” should be made in accordance with matter of discretion 14-2 (b) and Policy 14-6 (c). There I think we do need to accept the probability that the correct approach would be to consider relevant objectives and policies of Chapter 5.

These will include Objectives 5-1 and 5-2 and Policies 5-1- 5-5. I do not include in that Policy 5-8 (a) because:

1. Policy 5-8 (a) (i) is expressly referring to the content of regional plans; and

2. Policy 5.8 (a) (ii) is to be had regard to but is clearly tempered by the provisions that exist in Chapter 14 that allow for exceptions to be made (as I argue above exists)

Hence, an applicant will need to show, and Council will need to be convinced that:

- in accordance with Objective 5-1 and Policy 5-1 –Individually and cumulatively the nitrogen discharge safeguards life supporting capacity and recognises and provides for Schedule B Values.
- in accordance with Objective 5-2 water quality will be maintained where it supports Schedule B values and enhanced where it does not support Schedule B values; accelerated eutrophication and sedimentation of lakes is prevented or minimised; groundwater water is maintained or enhanced where already degraded.
- in accordance with Policy 5-2 - the water quality targets in Schedule E inform the management of surface water quality in the manner set out in Policies 5-3, 5-4 and 5-5.
- in accordance with Policy 5-4 – where existing water quality does not meet the targets of Schedule E it is enhanced to meet either the target or the Schedule B values the target is designed to safeguard

Obviously, Policy 5-3 and 5-5 are also relevant but are unlikely to apply to existing intensive farms because by definition they are in sub-zones that are targeted because they are known to be degraded¹.

As we have previously discussed, these tests are information-intensive and would require a sophisticated application/AEE and hence it would be difficult to apply them in practice. The key is how Council applies the test of ensuring Schedule E targets "are met". Clearly, Council would have to promote an interpretation of that phrase such that it allows for the targets to be met over time and not on the basis of each individual application.

New Intensive farms

The exceptions of Policy 14-6 (i.e. parts (b) and (c) of that policy) apply only to existing farms. The policy framework for new intensive farms is significantly tighter.

Policy 14-6 (a) states simply that council must "*ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5*".

Policy 14-5 states that "*new intensive farming use regulated in accordance with (b)(i) must be regulated to ensure that the leaching of nitrogen from those land uses does not exceed the cumulative nitrogen leaching maximum values for each year contained in 14.2*" [my emphasis].

There are no exceptions or discretionary judgments provided for in the policies of Chapter 14 in respect of new farming activities.

It might be possible to argue that in applying matter of discretion 14-2 (b) (in particular, "*the extent of non-compliance with the cumulative nitrogen leaching maximum* specified in Table 14.2*") it is necessary and appropriate to go back to the policies of Chapter 5

¹ Although Policy 5-5 may applicable in some cases and may provide some greater degree of flexibility

(since there are no policies in Chapter 14 that guide how that discretion is to be exercised).

Policy 5-3 seems to provide some opportunity to consent a new intensive farm at leaching rates above Table 14.2. That would be the case where:

- (a) the application is in an area where water quality targets are met; and
- (b) there is "headroom" above current water quality meaning that a new farm could exceed the Table 14.2 leaching rates while still ensuring Schedule E targets are met.

Policy 5-8 (a) (iii), on the other hand, states that "*new intensive farming land use activities must be regulated throughout the region to achieve the nitrogen leaching maximums*". That policy might be argued to provide the foundation for Rules 14-3 and 14-4 rather than something intended to apply to resource consents. But a counter argument might be that the more specific Policy 5-8 over-rides that more general Policy 5-3. In summary there appears to be opportunity to argue the point in certain circumstances (where water quality is very good) that a new farm exceeding Table 14.2 limits is consentable but that opportunity is certainly not beyond challenge.

Other than the (slim) possibility outlined above I do not see any realistic opportunity to consent new intensive farms in accordance with Pathway 5.

In summary I consider that the Council:

- is legally able to grant consent for an existing intensive farming activity under Pathway 5. However, whether it can do so in practice is much less certain. In reality, if the Council did routinely grant consents under Pathway 5 it would likely be challenged unless it could show that good progress was being made towards water quality targets notwithstanding the granting of consents.
- would have great difficulty granting a consent for an new intensive farming activity under Pathway 5 (although there may be some opportunity to consent such an activity if it occurred in an catchment where the water quality targets were comfortably met and would continue to be met if the application was granted).

What is the existing environment against which effects should be assessed?

You have asked what the "existing environment" would be when assessing effect of intensive farming activities.

I do think this issue can be over complicated. While it is important, and the proper legal principles need to be applied, to the extent there is not clear guidance from case law (which I agree there is not in this case) a common sense/pragmatic approach should be applied.

In that sense, I broadly agree with your analysis that the existing environment will be the ground and surface water (to the extent that can be known, modelled or assumed) taking into account:

- Permitted activities in the catchment/groundwater zone;

- Any consented activities in the catchment (including point source discharges, dairy shed effluent discharges and any other consented intensive farms and their discharges in the catchment/groundwater zone;
- Any residual contaminants in the environment from when intensive farms were permitted activities ("load to come") in the catchment/ groundwater zone; and
- Natural/ambient contaminant load in the catchment/ groundwater zone.

While there may be no clear legal foundation, I would also consider that the existing environment also include the effects of current intensive farming activities at least to the extent that they comply with Table 14.2. That is on the basis that the activities exist and may continue to exist at Table 14.2 discharge rates as controlled activities and are hence not "fanciful activities".

Hence, I would add to the above bulleted list "existing intensive farming at Table 14.2 nitrogen leaching levels".

I also note (as you have) that Policies 5-3 to 5-5 refer to "existing water quality". I cannot see any logical reason why that phrase should not be interpreted at face value. The policy is very clearly referring to an improvement *from the status quo* (given activities as they exist whether permitted or not) and hence for the purpose of applying those policies I believe the correct approach is to assess (to the extent it is possible to do so) the difference between water as monitored in stream by the Council (or, more practically, as converted to a load) and that modelled to occur with the activity undertaken at the intensity (and with the practices and improvements) applied for as detailed in the application.

Consenting on a catchment wide basis

You ask whether there is potential to carry out consenting on a catchment wide basis (i.e. consenting all intensive farms within a catchment at the same time) in order to provide some equitable method to deal with cumulative effects.

I understand the concern and agree there is a legitimate issue to address. However, unless I misunderstand what you are proposing, I see little potential to run a catchment consenting process as you have outlined.

My understanding is that a consent authority is obliged to consent applications on a first-in first served basis where there is a competition for fixed quantum of resource available. (You will no doubt be aware of the significant extent of caselaw on that point - see string of Synlait/Central Plains Water cases out of Canterbury²).

If you are proposing that an available "pie" be defined and divvied up fairly amongst existing users then the same logic may apply.

Certainly existing case law was developed in relation to water *take* applications not discharge/land use applications. Nevertheless, I think there is a strong likelihood that the same situation would apply here. I would think that an applicant that applies early would be aggrieved if their consent was pared back through a catchment process designed to accommodate applications received later in time. The plan certainly makes no provision for that "equalisation of burden".

² For example, CENTRAL PLAINS WATER TRUST And Anor V SYNLAIT LIMITED And Anor CA CA544/2008 [18 December 2009]

That is not to say that early applicants necessarily get "all they want". They should have to justify the nitrogen leaching sought just as an applicant for a water take has to justify their need and their efficiency of use.

There is either a fixed quantum of resource to "allocate" or there is not. If there is not then each application needs to be assessed on its merits and the fact of the case. If there is a fixed quantum then I would think that the first in first served principle applies as discussed above.

Of course, as noted, there is no case law specifically on land uses/discharges vying for a fixed quantum/load and my opinion is only that – an opinion. I should also add that it might be possible to run a catchment process as you outline if that were specifically provided for in the Plan (I understand that case law has not ruled out that possibility). Waikato Regional Council proposed such a scheme for water allocation in their Variation 6 but abandoned it during the Environment Court appeal (largely because it feared that it would run foul of *Resource Management (Discount on Administrative Charges) Regulations 2010*).

That said, I believe Tasman District may have taken such an approach to water allocation in the past (using a common catchment expiry approach) but that would require verification.

It is an interesting point and I would certainly be interested in others' opinion on the matter.

Appendix 1

Hi Gerard,

In addition to the work you are already doing for the Horizons' Policy Team, we have some issues in Consents that we would like your opinion on as follows:

At this stage we consider that there are five consenting pathways available for existing intensive farming land uses as set out in the following diagram.

Are you able to provide a 'planning opinion' on the following matters?

A Is the Council able to grant consent to those applications that follow 'Pathway 5' as set out in the above diagram (i.e. those applications that do not, and will not, meet the cumulative nitrogen leaching maximums (CNLMs) set out in Table 14.2 and for which no policy exceptions apply)?

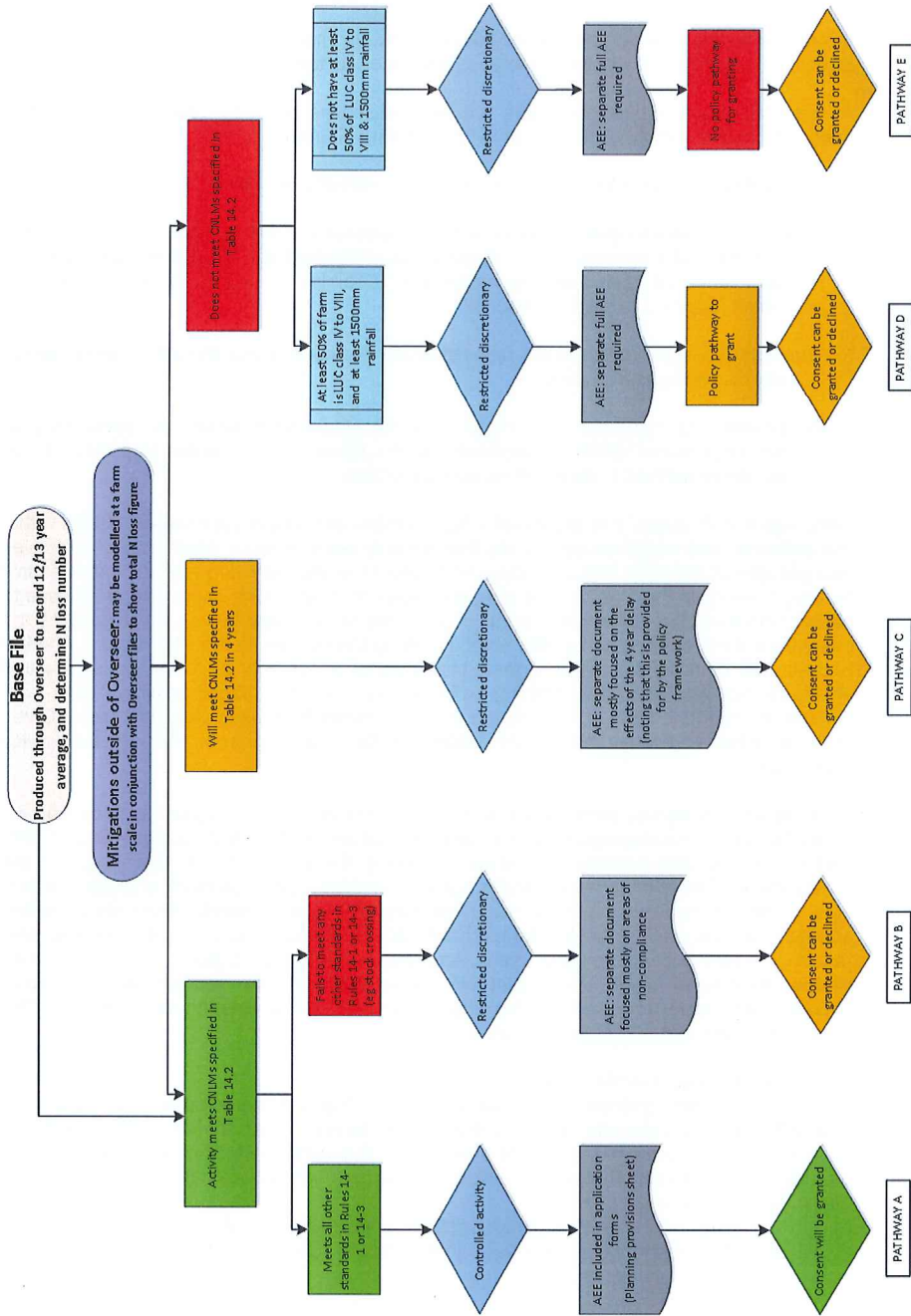
B What is the "existing environment" against which we must assess the actual and potential effects on the environment?

C The potential to carry out consenting on a catchment wide basis (i.e. consenting all intensive farms within a catchment at the same time) in order to provide some equitable method to deal with cumulative effects.

With regard to A above, it is likely that a high number of consent applications will fall within this pathway, and whilst we appreciate that we only need to have regard to the objectives and policies of the One Plan, Policies 14-5 and 14-6 are very directive in that intensive farming must meet the CNLMs. If it were an exception to the norm, there may be a case to depart from the policies; however, if this is occurring on a regular basis (as will likely be the case) then there appears to be little point in having the policies in the Plan at all. Another issue is that there could well be a fairly high level of uncertainty as to the scale of actual effects (particularly cumulative effects) on the environment from these activities, or at least uncertainty as to the level of contribution to those effects from each individual farm. Given such uncertainty, it does not seem prudent to be departing from the directive policy framework.

With regard to B above, most case law in respect of existing discharges has been built up around point source discharges and essentially dictates that such discharges do not form part of the existing environment when assessing the effect of that discharge on the environment. This makes sense and is easily managed using upstream and downstream data. I am not aware of case law that addresses the issue of when previously permitted activities (in this case intensive farming activities and their associated discharges) now require consent under a regional plan. Applying the same principles that apply to point source discharges would mean that we cannot consider the subject farm (or other unconsented farms and their discharges) to be part of the existing environment. The existing environment would, in my view, consist of:

- a) Any permitted activities in the catchment;
- b) Any consented activities in the catchment (including point source discharges, dairy shed effluent discharges and any other consented intensive farms and their discharges);
- c) Any residual contaminants in the environment from when intensive farms were a permitted activity (noting that these would decrease over time at a rate that depends on attenuation rates and lag time);
- d) The natural environment as it exists (streams/wetlands/forested areas etc); and
- e) The built environment, insofar as such activities are permitted or consented.



Excluding the existing farming practice from the existing environment raises an issue as to what takes its place? The land still exists and is physically used for that purpose and a number of activities are often already consented (e.g. effluent disposal/irrigation). We could assume a baseline aligning with the Table 14.2 CNLMs as the existing environment (which aligns with our discretion to examine the extent of non-compliance with the CNLMs), or we could consider a permitted activity land use that could be typical for the area (i.e. sheep and beef farming). However, such a land use would need to be modelled in Overseer for each farm.

It is also noted that Policies 5-3 to 5-5 (Policy 5-4 in particular) from the RPS appear to have been written under the premise that the intensive farming activities are actually taking place. To assume that they are not, in a resource consent process, would appear to make it difficult to enhance water quality if the activities which potentially degrade it do not exist. Perhaps, I am overthinking this issue so your opinion on this matter would be appreciated.

With regard to C above, as you will be aware one of the issues with cumulative effects is that the first few applications usually have very little effect, with a tipping point reached after which consents will be notified and have a much more difficult time to obtain a consent. For intensive farming we could have a situation where some of the highest nutrient leaching farms apply first, and some of the lower nutrient leaching farms (with better practices) apply later on. Assuming we can grant consents that do not meet the CNLMs this will likely result in a situation where the worse performers have a relatively easy time obtaining a consent and better performers a more difficult process or face the prospect of potential decline. One method to overcome this issue may be to consent the entire catchment through a single hearing process where the cumulative effects can be addressed at the same time. We have limited experience or knowledge in the implementation of such a process, particularly where we do not have a fixed allocable volume of resource (in this instance, nitrogen) to allocate. Any advice you can provide on how such a process might look and work would be appreciated.

Please note that we have also requested that Rob van Voorthuysen provide an opinion on the above questions. We are happy for you to discuss the above with Rob and with Paul Beverley/Thad Ryan ; however we are ideally looking for your independent opinion on these matters (particularly A and B). if you have any questions regarding the above, please feel free to give me a call.

Regards,
Andrew

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