

MEMORANDUM**To:** Andrew Bashford**From:** Rob van Voorthuysen**Date:** 29 June 2017**Topic:** ONE PLAN –INTENSIVE FARMING LAND USE ACTIVITIES**1 Policy Framework**

Council has asked:

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)?

The initial policy framework relevant to the above question is contained in Chapter 14 *Discharges to Land and Water* of the One Plan.

Given the Environment Court's declaration¹ decision, I note that it will be necessary to refer to the NPSFM as well, however I have not undertaken that exercise here as the One Plan policy provisions are largely consistent with the NPSFM objectives and policies.

The most relevant One Plan policies that would lead a decision-maker to impose the Table 14.2 LUC based CNLMs are RPS Policies 5-8(a)(ii) and 5-8(a)(iii) and regional plan Policies 14-5(d) and 14-5(e). Those provisions are highly directive as they use the word "must". They state respectively:

- (ii) Existing intensive farming land use activities must be regulated in targeted Water Management Sub-zones to achieve the nitrogen leaching maximums specified in (i).
- (iii) New intensive farming land use activities must be regulated throughout the Region to achieve the nitrogen leaching maximums specified in (i).
- (d) Existing intensive farming land uses regulated in accordance with [Policy 14-5](b)(i) must be managed 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 Table 14.2, unless the circumstances in Policy 14-6 apply.
- (e) New intensive farming land uses regulated in accordance with [Policy 14-5](b)(ii) must be managed 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 Table 14.2.

¹ Decision [2017] NZEnvC ENV-2016-WLG-000038 paragraph 83.

The 'policy exceptions' referred to in Policy 14-5(d) are set out in Policy 14-6(b). That latter policy allows decision-makers to make an exception to the Policy 14-6(a) requirement to ensure nitrogen leaching from the land is managed in accordance with Policy 14-5 for existing intensive farming land uses² if (paraphrasing Policy 14-6(b)):

- a) the existing intensive farming land use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500 mm or greater; or
- b) where the existing intensive farming land use cannot meet [Table 14.2] year 1 cumulative nitrogen leaching maximums in year 1 but they instead meet them within 4 years.

Interestingly, the Policy 14-6(b) 'exceptions' do not apply to new intensive farming land uses regulated by Rules 14-3 and 14-4.

Table 14.1 sets out the dates when Rule 14-1 had legal effect, ranging from 1 July 2014 to 1 July 2016. Table 14.2 has five yearly time steps at which various CNLMs apply. Footnote 3 to Table 14.2 sets out when the Plan had legal effect for the various types of intensive land use activities.³ The result of these provisions is that in all catchments the Table 14.2 Year 1 CNLMs currently apply, but in some catchments⁴ the Table 14.2 Year 5 CNLMs will apply as early as 1 July 2019.

This means that the exception in Policy 14-6(b)(ii) only has a remaining "shelf life" of two years in some catchments, and in all catchments it will be redundant on 1 July 2021 as at those dates the Year 1 LUC based CNLMs will no longer apply. The exception in Policy 14-6(b)(i) will continue to apply for existing intensive farming land use activities, but not for new ones.

I have assumed as a starting point for the analysis that an existing intensive farming land use does not currently meet the Table 14.2 Year 1 LUC based CNLMs and so it does not meet the conditions of Rule 14-1 and it falls to be considered under Rule 14-2.

I note that, depending on the duration of consent sought, an applicant would also need to demonstrate future compliance with the Year 5, 10 or 20 CNLMs, presumably through the furnishing of modified⁵ Overseer files showing compliance with the relevant CNLMs.

The same analysis would hold for new intensive farming land uses and Rules 14-3 and 14-4.

I consider that for the purposes of the analysis the question to be asked and answered is:

Are there any provisions in the One Plan that would enable a decision-maker to consider granting consent for an existing intensive farming land use activity that leached nitrogen at a level exceeding the relevant Table 14.2 CNLMs, if the exception in Policy 14-6(b)(i) does not apply?

Existing intensive farming land use activities which do not comply with Rule 14-1 require consent as a restricted discretionary activity. When making a decision on such an application, the Council must consider only those matters over which it has restricted the exercise of its discretion.⁶ It should also

² Intensive farming land uses are dairy farming, commercial vegetable growing, cropping and intensive sheep and beef (Policy 14-5(a)).

³ 24 August 2010 for dairy farming and 9 May 2013 for commercial vegetable growing, cropping and intensive sheep and beef.

⁴ Mangapapa, Waikawa and Other south-west catchments (Papaitonga).

⁵ Modified from current farming practice.

⁶ Section 104C RMA

consider relevant objectives and policies which inform the matters over which discretion is restricted.

I consider that the relevant One Plan provisions are:

- Objective 14-1 as far as it relates to land uses affecting groundwater and surface water;
- Chapter 5 objectives and policies (cross-referred to in Objective 14-1(b)) these being:
 - Objective 5-1;
 - Objective 5-2;
 - Policy 5-1 and Table 5.2;
 - Policy 5-3;
 - Policy 5-4;
 - Policy 5-5;
 - Policy 5-6(a);
 - Policy 5-7(c);
 - Policy 5-8(a)(ii);
 - Policy 5-8(a)(iii);
- Policy 14-2(c);
- Policy 14-2(d);
- Policy 14-2(e);
- The objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the discharge (as set out in policy 14-2(f)), these being:
 - Objective 2-1(a);
 - Policy 2-2(a);
 - Policy 6-2;
 - Policy 9-2;
 - Objective 12-1(a);
- Policy 14-5(d);
- Policy 14-5(e);
- Policy 14-9(b);
- Policy 14-9(c)

I acknowledge that the above list of provisions is more extensive than that agreed by the planners in the Environment Court declaration proceedings, however in my opinion that more extensive list is appropriate.

Rules 14-1 to 14-4 are section 9(2) land use rules and this raises the question of whether Policy 14-1, Objectives 5-1 and 5-2 and Policies 5-1, 5-3, 5-4, 5-5 and 5-6 are relevant because Rule 14-1 manages land use as opposed to managing water quality directly. However, I have considered those provisions because management of the land is being undertaken solely for the purpose of managing effects on water quality. The cause of the effects on water quality is the diffuse discharge of contaminants to land. For that same reason, I have assumed Policy 14-2 to be relevant.⁷

I have examined the above listed One Plan provisions. In my view, the ones that might enable a decision-maker to consider allowing an existing intensive farming land use activity to leach nitrogen in excess of the Table 14.2 CNLMs are:

- Objective 14-1(c) if the intensive farming land use activity remedied or mitigated its adverse effects on surface water or groundwater. However, in reality that would be very difficult to do as it would be almost impossible to determine the effects of a single intensive farming land use

⁷ I note that the planners in the EC declaration agreed that Policies 14-1, 14-2, 14-5, 14-6 and 14-9 were relevant. Decision [2017] NZEnvC ENV-2016-WLG-000038, paragraph 83.

activity on water quality and to then remedy or mitigate those effects in the receiving water body. I have therefore discounted this policy avenue.

- Objectives 5-2(a)(i) and 5-2(b) if the nitrogen loss from the intensive farming land use activity could be demonstrated to be at a level that maintains existing water quality and, in the case of surface water, that existing water quality is at a level sufficient to support the relevant Schedule B Values. That could only be the case if the level of nitrogen loss did not increase beyond historical levels and there was no lag effect (namely the nitrogen lost from the farm was already fully manifesting in the receiving water body). Proving there was no lag effect would be problematic but possible.
- Policy 5-1 if the nitrogen loss from the intensive farming land use activity could be demonstrated to be at a level that safeguards the life supporting capacity of the receiving surface water (the relevant river) and provides for the relevant Schedule B Values. In the unlikely event that those outcomes are being achieved the policy would only support granting consent if the level of nitrogen loss did not increase beyond historical levels and there was no lag effect.
- Policy 5-3(a) if the nitrogen loss from the intensive farming land use activity could be demonstrated to be at a level that enables relevant Schedule E water quality targets to continue to be met. The same caveats as apply to Policy 5-1 would apply here.
- Policy 5-5(a)(i) if the nitrogen loss from the intensive farming land use activity could be demonstrated to be at a level that maintains existing water quality. The same caveats as apply to Policy 5-1 would apply here.
- Policy 5-6(a) if the nitrogen loss from the intensive farming land use activity could be demonstrated to be at a level that maintains existing groundwater quality. The same caveats as apply to Policy 5-1 would apply here.
- Policy 14-2(d)(i). The discussion above indicates that it is difficult to establish discharge parameters that would give effect to the management approaches for water quality and discharges set out in Chapter 5. On that basis, the adoption of the best practicable option might be appropriate.
- Policy 14-2(d)(ii) because for an individual farm the potential adverse effects on water quality are likely to be minor, and the costs associated with adopting the best practicable option are likely to be small in comparison to the costs of investigating the likely effects of the farm's nitrogen leaching on land and water.
- Objective 12-1(a) because imposing the Table 14.2 LUC based CNLMs is likely to have either unknown or less than minor positive effects on water quality and so requiring them to be met could impose an unnecessary cost on the farmer (i.e. the resource user).

So, despite the directive nature of RPS Policies 5-8(a)(ii) and (iii) and regional plan Policies 14-5(d) and 14-5(e) I consider that a decision-maker could consider granting an application lodged under Rule 14-2 by an individual farm to exceed the Table 14.2 CNLMs in a limited situation where:

- a) Council acknowledged that there is no link between the Table 14.2 LUC based CNLMs and the Schedule B values and Schedule E water quality targets⁸ and so imposing the CNLMs could impose unnecessary costs on the applicant;⁹ and

⁸ Namely requiring the Table 14.2 CNLMs to be met will not ensure that Schedule B values are provided for and Schedule E water quality targets are met.

⁹ Objective 12-1(a).

- b) Throughout the duration of any consent granted the proposed loss of nitrogen from the intensive farming land use activity did not increase above historical levels¹⁰ and there was no lag effect (or load to come) from the historical land use; and
- c) The relevant surface water body that eventually receives the nitrogen leached from the intensive farming land use activity has existing water quality that both safeguards its life supporting capacity and provides for the relevant Schedule B Values;¹¹ or
- d) The relevant water body that eventually receives the nitrogen leached from the intensive farming land use activity currently meets the Schedule E water quality targets;¹² and
- e) Consent conditions are imposed to require the best practicable option to be implemented on-farm to manage the leaching of nitrogen.¹³ The best practicable option could be equated to requiring good or best nutrient management practices to be adopted.

I have underlined the words individual farm above because for a single farm it is likely that the potential adverse effects of exceeding the Table 14.2 LUC based CNLMs will be minor and the costs of investigating the effects of a single farm's nitrogen losses on land and water¹⁴ could be higher than the cost of implementing best or good management practices on that farm. That might not be the case if all consent applications within a catchment were processed simultaneously.

2 Existing Environment

Council has asked:

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

The nature of the 'existing environment' is largely a legal matter, however my planning opinion on this is set out below.

The relevant context is that Rules 14-1 to 14-4 regulating 'intensive farming' are section 9(2) land use rules. While the rules also deal with several discrete discharges (fertilisers, biosolids, farm dairy effluent, etc) associated with intensive farming, those discharges are authorised by separate discharge rules.¹⁵ The effect of cross-referring to the discrete discharges in Rules 14-1 to 14-4 merely serves to make the consent category of those discrete discharges either controlled or restricted discretionary instead of permitted.

Table 14-1 sets out dates when Rule 14-1 has legal effect¹⁶ in various catchments and water management sub-zones. All of those dates have now passed with the most recent date (1 July 2016) having occurred eleven months ago.

Existing use rights for land use activities regulated by regional rules are set out in section 20A of the RMA. Prior to Rule 14-1 having legal effect the intensive farming land use activities could have been

¹⁰ The relevant historical time period would have to be defined. Presumably it would have to exceed the lag effect time period.

¹¹ Policy 5-1.

¹² Policy 5-3(a).

¹³ Policies 14-2(d)(i) and (ii).

¹⁴ Policy 14-2(d)(ii)

¹⁵ Rule 14-5 for fertiliser, Rule 14-6 for stock feed and feed pads, Rule 14-7 for biosolids and compost, Rule 14-9 for poultry litter and Rule 14-11 for farm animal effluent.

¹⁶ Or become operative in other words.

lawfully undertaken without a resource consent.¹⁷ Assuming that they did not alter their character, scale or intensity of effects, those intensive farming activities could continue if consent was sought within six months of the rule becoming operative.

Rule 14-1 is a controlled activity and compliant applications lodged under it must be granted. A compliant application is one that meets the conditions of Rule 14-1. Condition (a) mandates the production of a nutrient management plan.¹⁸ Condition (c) then states:

The *nutrient management plan** prepared under (a) must demonstrate that the nitrogen leaching loss from the activity will not exceed the *cumulative nitrogen leaching maximum** specified in Table 14.2.

Consequently, in order to be a controlled activity, the intensive farming activity must not exceed the CNLMs specified in Table 14.2. The fact that this requirement is achieved via a mandatory nutrient management plan does not in my view derogate from the absolute nature of the requirement. Table 14.2 has time periods by which the CNLMs must be met.

So, the relevant current existing environment for intensive farming land use activities comprises:

- Land uses not regulated by Rule 14-1;
- Land uses that do not exceed the Table 14.2 Year 1 CNLMs,¹⁹ including compliant applications made under Rule 14-1 but not yet decided; and
- Land uses that have already gained consent under Rules 14-1, 14-2, 14-3 or 14-4.

However, this 'land use' existing environment is not particularly useful for decision-makers as the One Plan policy framework is directed towards managing effects on water quality. Ideally then one would determine the effects on 'natural' water quality arising from the relevant existing environment land uses. That would translate to respectively:

- the effects of non-intensive farming activity land uses on water quality, including urban land uses;
- the effects of intensive farming activity land uses on water quality that have sought consent under Rule 14-1 in compliance with section 20A(2) of the RMA and which do not exceed the Year 1 Table 14.2 CNLMs; and
- the effects of intensive farming activity land uses on water quality that have already gained consent under Rules 14-1, 14-2, 14-3 or 14-4.

However, actual water quality can only be determined by water quality monitoring. Water quality is affected by land use activities, point source discharges and diffuse discharges, both authorised (i.e. permitted or consented) or unauthorised.

This raises an argument that in theoretical terms, and disregarding the fact that Rules 14-1 to 14-4 are section 9(2) land use rules, the relevant 'existing environment' is the monitored water quality status minus the effects of any unauthorised land use activities and unauthorised discharges. As noted at the outset of this section, this is more of a legal question than a planning one in my view. However, in reality it would be difficult to quantify the effects of the unauthorised activities because presumably Council would not have any knowledge of them.

¹⁷ RMA section 20A(2)(ii).

¹⁸ Condition (a).

¹⁹ Note that in July 2019 the Year 5 CNLMs will apply in some catchments.

Assuming for now that it is correct to limit the analysis to land use activities, it may be possible to model the effects of the relevant existing environment land uses as distinct from other land uses and discharges. If that can be achieved it would provide an estimate of the relevant existing environment in terms of water quality. However, that estimate would vary in spatial and temporal terms and so the practicality and utility of such a modelling exercise would be limited.

My analysis leads me to conclude that an assessment of applications against an 'existing environment' is problematic. It may be more useful to try and determine the effects on the ultimate receiving environment (i.e. groundwater and surface water quality) of any proposed exceedence of the Table 14.2 CNLMs. That would require catchment modelling to translate Overseer (or some other model) predicted farm scale nutrient leaching losses into predicted effects on receiving water quality (groundwater and thereafter surface water). Further modelling would then be required to translate those predicted water quality effects (nutrient concentrations) into predicted effects on the relevant Schedule B surface water management values and objectives and the Schedule E water quality targets.

It is very difficult to envisage how an individual farmer could competently undertake such an analysis.

3 Catchment Wide Consenting

Council has asked for advice on:

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

As noted above, it is very difficult to envisage how an individual farmer could competently undertake the type of analysis required to determine the relevant existing environment and the effects of their proposed intensive farming activity land use on that environment.

In an ideal world it would be preferable for Council to determine, on a catchment by catchment basis using the catchments set out in Table 14.1 of the One Plan:

- Existing water quality;
- The water quality necessary to safeguard the life supporting capacity of water and provide for the values and management objectives in Schedule B and meet the Schedule E water quality targets;²⁰
- The scale of water quality improvement (presumably concentrations of nitrogen and phosphorus and arguably also sediment and faecal bacteria) necessary to achieve the above outcomes if the life supporting capacity of water is not being safeguarded, or the values and management objectives in Schedule B are not being provided for, or the Schedule E water quality targets are not being met;
- The scale of water quality improvements required (nitrogen and phosphorus concentrations²¹) would then be translated into catchment load reductions. The catchment load reductions could then be apportioned amongst the intensive farming activity land uses within the catchment, thereby determining allowable on-farm leaching rates.

²⁰ Objective 14-1(a) of the One Plan.

²¹ It would be very difficult if not impossible to translated sediment and faecal bacteria load reductions across land use activities, as I am not aware of any proven way of accurately modelling those losses at a farm scale.

It is telling that the suggested approach does not relate directly to the Table 14.2 LUC based CNLMs. The reason for that is the CNLMs have no direct relationship with desired catchment water quality. Instead they are based on one assessment of the 'natural capital' of the land, namely what levels of nitrogen a 'sustainable' pastoral sheep grazing regime is likely leach. The actual on-farm leaching rates necessary to achieve Objective 14-1(a) and the other One Plan water quality outcomes may be more or less than the Table 14.2 LUC based CNLMs.

Returning to the question posed by Council, the above discussion suggests that it is highly desirable for Council to carry out consenting under Rules 14-1 to 14-4 on a catchment-wide basis. However, that could only be achieved with the co-operation of all intensive farming activity land uses within each catchment. The reason for that is that case law²² has determined that applications for consent must be processed to completion in the sequential order that the Council receives them.²³

Given that the dates set out in Table 14.1 all passed more than six months ago it is assumed that all existing intensive farming activity land uses within the region requiring consent have now lodged consent applications. Council could therefore approach all of the applicants on a catchment by catchment basis and seek their written approval to either suspend²⁴ the processing of their applications, or to agree to the Council commissioning a cumulative effects assessment report,²⁵ so that all applications can be processed together. That would allow a cumulative effects assessment to be undertaken by the Council, along the lines outlined above.

Factors to consider as part of any catchment wide process would include:

- Dealing with individual intensive farming activity land uses that have already gained consent, as these could not have their consented nitrogen leaching rates changed unless they are able to be reviewed by Council under section 128 of the RMA;
- Dealing with applicants who do not agree to having their applications delayed. It may be necessary to request²⁶ these applicants to assess the effects on their activity on the life supporting capacity of water and the values management objectives in Schedule B and the water quality targets in Schedule E and then offer to have Council do that on their behalf once the applicants realise the difficulty of that task;
- Apportioning consent processing costs (including any catchment modelling) amongst the applicants. This could be by way of equal shares or some apportionment of costs based on relative farm area or farm leaching rates;
- Dealing with any appeals of the farm scale nitrogen leaching rates assigned to individual intensive farming activity land uses. Any wide spread amendment of the assigned leaching rates as part of an appeal process could affect the catchment wide achievement of Objective 14-1(a).

It is beyond the scope of this planning advice to definitively recommend how these factors should be addressed.

²² Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257 and Central Plains Water Trust v Synlait Ltd [2010] 2 NZLR 363.

²³ Provided the applications are complete and are not rejected under section 88 of the RMA.

²⁴ Section 91A of the RMA

²⁵ The Report would be commissioned under section 92(2) of the RMA and once the applicant agreed under section 92B, sections 88C(3) and (4) apply.

²⁶ Under section 92(1) of the RMA.

So, to conclude, the answer to the third question posed by Council is 'yes'. There is both potential and merit in consenting all intensive farms within a catchment at the same time, but doing so would not be a straight forward process.

