

in the matter of

the Resource Management Act 1991

and in the matter

An inquiry pursuant to Schedule 1 RMA into the provisions of the proposed One Plan notified by Horizons Regional Council.

RESPONSE TO QUESTIONS ON RULE 13-1 AND RELATED POLICIES AND TABLES

Dated 29 January 2010

Introduction

1. This statement deals with the Chairperson's questions relating to Rule 13-1 and associated tables and policies. Because of other questions that have arisen it is desirable to address the following topics:
 - (a) The reasons for Rule 13-1.
 - (b) How Rule 13-1 is intended to work.
 - (c) Why changes to Rule 13-1 were made from the notified version.
 - (d) Answers to the Chairpersons questions.
2. On the question of scope, there are many submissions that authorise refinements to Rule 13-1 and associated tables and policies. By way of example, Federated Farmers (sub ID 426) seeks a rule or other method that reflects the factors listed on page 34 of the submissions including: efficiency, clarity and capacity, effects based.

Reasons for Rule 13-1

3. As the evidence of Dr Roygard emphasised, the One Plan uses a variety of approaches that collectively deliver improvement in water quality. This comprises controls on:
 - (a) Level of sediment.
 - (b) Physio-chemical characteristics.
 - (c) Bacterial and/or faecal contamination.
 - (d) Nutrient enrichment.
4. The technical evidence demonstrates that in the specified catchments there is poor water quality based on a series of measures including physiochemical measures, biological measures and functional measures of ecosystemic health. The technical evidence demonstrates a clear relationship between the water quality and the land use activities as well as the relative contributions of nutrients to river systems from specified land uses.

5. The evidence also demonstrates that land use activities operate in conjunction with other activities on farm such as discharges. The RMA makes distinctions between the various activities but from the business enterprise perspective, they are part of a single operation and all the activities collectively have the ability to contribute to poor water quality. It is important to look at these activities holistically and it is the integrated management of farming operations that is required to achieve the outcomes anticipated in the plan.
6. The intention of Rule 13-1 is to capture all intensive land uses specified by the rule that are existing or new in the specified catchments. This comprises nine water management zones and 34 water management sub zones. The rule also applies to all intensive land uses within all catchments that are new from the date the plan becomes operative.
7. The integrated approach to management of intensive land uses including associated discharges requires practical implementation at the HRC/Farmer interface. This has resulted in the FARM strategy module of work that introduces the conceptual framework of the rule suite in a farmer friendly form. The evidence demonstrates that the 2009 FARM strategy is superior in terms of usability and is a useful tool for farmers to understand the linkages between on farm activities and the environmental effects of those activities.
8. Rule 13-1 as notified proposes nitrogen limits over the life of the plan (20 years) with the year one levels more or less reflecting existing farming operations. Over the life of the plan at the specified dates, the limits decline to final levels at year 20. These will achieve estimated reductions in total nitrogen loading as stated in the technical evidence of Dr Roygard. Further information on the consequential ecosystem benefits will be produced in response to the Hearing Panel's questions.
9. The nitrogen limits are based on LUC class which reflects the productive capacity of the land and the potential leeching arising from intensive land use activities on different soils as outlined in the evidence of Dr McKay.
10. Rule 13-1 as notified specified the completion of the FARM strategy as a performance condition. The 2007 FARM strategy was designed to ensure compliance with BMP's and the requirements of the Clean Streams Accord. Therefore to qualify as a controlled activity, activities had to demonstrate there was compliance with requirements of the FARM strategy. Compliance with bridging and culverting were therefore non-contestable items for controlled activity classification. The FARM strategy therefore was a key element of Rule 13-1 as notified. The 2007 FARM strategy incorporated both the calculation of N values based on Overseer and use of LUC classes to calculate allowable N leaching values.
11. The FARM strategy required demonstration of compliance with Table 13.2. The stepped approach enables progressive improvement in farming practices over a reasonable timeframe. Any activity for which consent is sought that was not

intended to meet the 13.2 standards would default to discretionary assessment under Rule 13-27.

Why Changes Were Made to the Notified Version of Rule 13-1

12. The major change to Rule 13-1 was to the performance conditions and in particular the role of the FARM strategy. HRC's legal advice was that while information could be required as a performance condition, the completion of the FARM strategy was not fit for purpose even in its modified form as a performance condition. Consequently the FARM strategy was relegated to a information requirement. The reason the FARM strategy was retained is that it is desirable to recognise explicitly the FARM strategy as an information tool. The evidence of Mr John Barrow is that it is an excellent tool particularly in its 2009 form. Further commentary on the FARM strategy is provided in answer to the Chairperson's questions later. Removal of the FARM strategy also had the consequence that compliance with its components ceased to be a mandatory requirement to meet the controlled activity classification. The result is that big ticket items can be contested where a farmer considers that there is a disproportionate cost relative to the environmental benefit. This approach was supported by some of the expert witnesses.
13. If this method is adopted by the panel, then some further changes to the rule will be required to provide for consideration of BMP's that address phosphorus loss, faecal contamination and sediment inputs into waterbodies in the performance conditions and/or matters of control. The importance of these BMP's to improved water quality outcomes has been outlined in the technical evidence and should be included in the regulation.
14. In substitution for the existing performance conditions was the requirement that the activity not result in the cumulative nitrogen leaching maxima set out in table 13.2. This incorporated an element formally in the FARM strategy but as a stand alone performance condition. Compliance with these limits is ascertainable but for practical purposes compliance will not be demonstrated by actual leaching but modelled leaching based on Overseer. The rule has never referred directly to the Overseer model and therefore the version issue has not arisen. In addition, these performance conditions require further refinement for the reasons identified in the Chairperson's questions which are dealt with later.
15. The activity descriptions were also changed to distinguish between the application of the rule in specified catchments and the application of the rule to new uses alone in all water management zones. This wording warrants further refinement as outlined in the answers to the Chairperson's questions.
16. Policy 13-10 was introduced as a means of providing a pathway through the plan for those 20% of farms that because of the specified limitations i.e. high rainfall

and low LUC will have difficulty meeting the nitrogen limits using cost effective measures. This was directly in response to Fonterra's submission.

Answers to Chairpersons Questions

17. The following is a list of questions from the Chairperson relating to Rule 13-1. The answers are in italics.

34. Second Policy 13-8/Policy 13-10:

- a. Is use of the term property as defined in the POP problematic for incorporating into one Farm Strategy blocks that are separated?

We need to consider this question in more detail as noted in the answer to question 38(f.).

- b. Is the meaning of the land use "existing at the time the rule becomes operative" sufficiently clear, especially where there may be rotational or seasonal planting, e.g. in relation to cropping or commercial vegetable growing?

Cropping and horticultural activities are unlikely to occur in areas with land use class 4-8 and high rainfall. For the land uses that this policy is likely to apply to i.e. dairy farming, the issue of rotational or seasonal land use is unlikely to arise. Therefore the recommended wording would be sufficiently precise.

- c. Why is "operative" the time referred to in (a)(ii) and how does that relate to "since notification of this plan" in Rule 13-1?

This reference should be changed to "at the time the rule comes into force" to be more consistent with wording elsewhere in the plan.

- d. Is determining the average loss of N/ha/year over the period 1 Jan 2006 to 31 December 2009 straightforward and beyond dispute?

This method of determining a average loss of nitrogen over a period of time is used in the Taupo catchment by Environment Waikato. In that example records of activities that may result in nitrogen leaching eg fertiliser applications or stock numbers are required to ensure the historically modelled nitrogen leaching is accurate. The method is information and time intensive however, for the small number of farms that this policy applies to it is considered achievable and reasonable.

- e. Why are annum and year used? Should the POP generally use year, rather than annum?

Changing this reference to "per year" would be more consistent with the rest of the plan.

- f. Should Roman or Arabic numerals be used for the LUC classes?

We recommend that the LUC classes use either Arabic numerals or both Arabic and Roman numerals. The present definition of LUC refers to the NZ Land Resource Inventory or calculation by an appropriately qualified LUC surveyor. The NZ Land Resource Inventory is a 1-50000 scale and is based on the second edition and in most cases would be regarded as sufficient for the purpose of assessing N leaching values. A suitably qualified expert may use either the second edition or third edition and either alternative is acceptable. Reference to the Arabic numeral makes it plain that that option exists if a suitably qualified LUC surveyor is used. There is scope in our opinion to make the change to include Arabic numerals because a number of submissions identify that the LUC (second edition) approach does not sufficiently address some erosion prone land and their classification and also inadequately deals with irrigation. The evidence of Dr Grant Douglas confirms that the third edition deals with this. Where the third edition applies more harshly (which on the evidence is very limited) the reference to the Roman numerals indicates that the more favourable classification under the second edition may be used.

35. Second Policy 13-9/Policy 13-11:

- a. Is this intending to deal with blocks that are separated if they are wanted to be incorporated into one farm or is it intending to deal with blocks that are not part of the farm?

We need to consider this question in more detail as noted in the answer to question 38(f.).

- b. Should "avoided" be "the extent to which Nitrogen leaching avoided or reduced" or something similar to convey that N leaching does not need to be completely avoided?

Yes.

- c. Should (a) and (b) be run together?

Yes.

- d. Should volume/rate be "volume or rate"?

Yes.

- e. Do FARM Strategy and FARM strategy workbook need to be more clearly defined, if their use is to have such effect?

The reference should always be to the full document included by reference.

36. 13.2 Rules and Table 13.1

- a. Why is it recommended to change "target" to "specified" when Policy 13-10(a) refers to "targeted" WMSZs?

This was John Maassen's idea. The connotation of 'targeted' is less favourable than specified and terminology should be as neutral as possible. Throughout the policy development and scientific work HRC has used the term 'targeted catchments'. Whatever term you prefer, there should be consistent terminology.

- b. The wording "intensive farming land use activities" in the first sentence does not seem very precise. Should it refer to the activities actually being regulated or perhaps cross-reference Rule 13-1?

Yes.

- c. Why is it recommended to change "land use activities" to "land uses"? Given that a number of associated activities are regulated in Rule 13-1, is reference to either sufficiently wide?

Use of the term 'land use activities' would be broader and more consistent with the word 'individual'.

- d. Should "after which" in the second sentence of 13.2 be "on which" to be consistent with Table 13.1?

Yes.

- e. Isn't the wording of the second sentence in 13.2 and the third column of Table 13.1 inaccurate? Don't these relate only to some of the activities in Rule 13-1 as opposed to all the rules in the Plan or even all the activities regulated by Rule 13-1?

Yes. The reference to rules should only be to Rule 13-1.

- f. Why have "All other catchments" been included in Table 13.1? If it is to cover the part of Rule 13-1 that deals with new land uses, might it not be less confusing to omit it from Table 13.1 and split Rule 13-1 into two rules – one that deals with existing activities and another that deals with new activities?

Splitting Rule 13-1 into two rules is not recommended as it would lead to unnecessary repetition. The changes to the last row in table 13.1 as outlined in the answer to question 38(c) should clarify the application of the table to land uses.

37. Table 13.2:

- a. Heading - would "Rate" be a better term than "Values" in light of "rate" being used in the preceding paragraph and Values (or values) being used in a different way in the POP?

Use of the word 'rate' may be preferable to avoid confusion.

- b. Isn't the addition of the heading "Year rule comes into force" misleading, as isn't it only Year 1 when the rule comes into force and isn't that only in relation to existing activities?

A more appropriate heading for this column might be "Year when specified N leaching rates apply"

- c. In the text preceding the table and in Rule 13-1, should run-off be referred to each time leaching is referred to?

Overseer models route zone leaching, so all references throughout the plan should be to leaching rather than runoff or any other combination.

38. Rule 13-1:

- a. Why are there so many dates – the date the rules come into force (Table 13.1), the "notification of this plan" and the "date the rule becomes operative"?

All of those references could be changed to the date the rule comes into force or similar.

- b. The distinction between existing and new land uses does not yet seem to be clear enough. In terms of existing, is it to have occurred on the land at any time since notification or continuously since notification? What if the area of the use is expanded – is that new or existing? What if the area of use has stayed roughly the same size, but the location has changed? What about intermittent or rotational activities? What if there is a full or partial change of use from one regulated activity to another e.g. from intensive sheep and beef to intensive dairy – is that a new use? What if parts of a property are used for different purposes but the areas used for those different purposes change over time? What other potential issues may arise in distinguishing between existing and new uses that the wording of the rule needs to anticipate?

References to new use of land can be changed to wholly new use (including conversion). This will cover whole changes of use in land but will not cover changes in intensity on existing uses of land. This was the intention of the plan as proposed.

- c. In the POP as notified, what leaching/run-off rates apply when for a new use? Is Year 1 the date the rule becomes operative and then years 5, 10, etc are after that? Or does Year 20 apply immediately and, if that is what is being suggested, where was that intention conveyed in the POP as notified? Page 77 of the FARM Strategy document attached to Dr Manderson's report says at 4.2 that first time FARMS consent applicants should use Year 1 values, seemingly whenever they first apply.

The leaching/ runoff rates that apply to new uses of land were unclear in the plan as notified. The inclusion of a new row in table 13.1 was intended to clarify which leaching rates apply when by inserting a year one date for new uses outside of the specified catchments. Clarity could be added to this row by changing the words in the first column to read: "wholly new uses of land including conversion in all water management zones not specified above". A

new use of land which commenced in a catchment outside of the specified catchments in 2016 would use the year 5 leaching values from table 13.2.

- d. Should the wording of discharges i.e. iii. and iv. "onto" land, v. "onto or into" land, vii. "to" land all become "onto or into"?

As currently written, the references "onto" or "into" refer to the most common method of undertaking of those activities. All of these references could become "onto or into".

- e. Why does the wording of vii (contaminants from farm animals associated with the land) not line up better with the wording of Rule 13-6 (animal effluent)?

The wording of vii should be changed to be consistent with the wording in Rule 13-6.

- f. In terms of the definition of "cumulative nitrogen leaching maximum", how does the "land on which the use occurs" relate to land that is being used as part of the farm (either as part of the property or a remote block) to calculate the nitrogen leaching allowed but which may not actually be used as e.g. intensive sheep and beef farming? Same issue applies in relation to information requirement (b) and "all land on which the activity to which this rule relates occurs", which infers that one only includes the land on which the activity occurs.

The intention is that the cumulative nitrogen leaching maximum and the actual nitrogen leaching should both be calculated using the whole farm area. This may be the same as the 'property' as defined in the plan, or it may be a part of the property. More thought is needed in how this can be accurately worded in the rule.

- g. What happens if a property straddles more than one catchment (cf. page 47 of the FARM Strategy document attached to Dr Manderson's report)?

Insertion of the following phrase into rule 13-1 should clarify what occurs when a property straddles more than one water management zone: "This rule applies where more than 50% of the property on which the land use occurs is within a specified water management sub zone".

39. Rule 13-1 FARMS Strategy –The 2009 document attached to Dr Manderson's report (which has a different name from that set out in Rule 13-1) seems to have a number of significant changes from the 2007 document and a number of troubling legal and other issues. The jurisdiction for these changes is not clear. Some of the issues (including questions) are set out below. The officers and submitters are welcome to respond to some or all of these issues, but there is no need to do that unless, from a legal perspective, the Panel has jurisdiction to fix the wording problems. The issues are matters such as:
- a. Page 44 (the front page) – on what basis is it legally valid for this document to state that the person should be working with the most up to date FARM Strategy material, which anticipates that this document could change over time without a Plan change process?
 - b. There is no such thing as a "FARM Strategy resource consent" (eg pages 46, 51, 62, 76) and this may perpetuate the "one farm, one consent" misconception

- c. The bottom of page 46 states that the requirements of Rule 13-1 have been "interpreted in some cases to provide context" but a number of the interpretations, noted below, seem to be incorrect.
- d. Are the first two bullet points on page 47 an accurate reflection of Rule 13-1?
- e. Page 47 - where in the POP is it made clear what happens if a farm straddles more than one catchment? If it is not clear in the POP, on what legal basis is it acceptable to provide this detail in this document? On what legal basis is it appropriate to state that the Council "reserves discretion as to whether a FARMS is required" in the third bullet point on that topic?
- f. Page 47 support blocks – are the statements about support blocks legally accurate in light of the wording of the POP?
- g. In terms of this being a document ready to be incorporated into the POP, there seems to be a problem with the Figures (e.g. there is no Figure 1, page 48 is labelled Figure 2 and Figure 3, page 51 text refers to Figure 3 but the figure is labelled Figure 4).
- h. Page 49 - the wording of the application information does not line up very well with Form 9 of the RMA regulations. For example, the form requires the location of the proposed activity. In relation to blocks remote from the farm (assuming they can be included) the wording of 2.1, seeking a physical address for the farm, does not seem to convey clearly enough that the physical location should describe all the relevant properties included.
- i. How does "total farm area" in 2.6 on page 50 mesh with the wording in the POP, including the definition of property?
- j. Page 50 2.8 and Table 1 – the wording seems misleading (and the dates are not consistent with the tracked changes version). Doesn't Rule 13-1 take effect from certain dates for existing identified activities but as soon as the rule is operative for new identified activities? (Table 13.1 of the POP refers to the date the rules "come into force" and Table 1 refers to "comes into effect". Consistent use of terminology would be helpful – from a legal perspective, presumably the POP wording is appropriate?)
- k. Figure 4 – wouldn't it be more helpful and accurate if the heading also included Section 8?
- l. Figure 4 – is the meaning of "farm boundary" ambiguous in relation to blocks separated from the farm (assuming the POP is worded in such a manner that they can be included in calculating N from the farm)?
- m. Page 52 "Public areas" – where does Rule 13-1 specifically recognise marae, schools, public buildings and public recreation areas?
- n. Page 52 – "Ecological areas" – what does the first sentence mean?
- o. Page 52 – on what legal basis are the terms "waterways" and "waterbodies" appropriate, especially in light of their use in the Section 8 "Compliance status checklist"? Those definitions are not relevant to compliance under the RMA. They weren't in the original FARM Strategy document, were they? The term waterway is unlikely to be used in the One Plan and the definition of water body is different from that in the RMA and the POP. In addition, how is it legally valid for the definitions to purport to require fencing when that was not part of the original document and is not, at least currently, required in the POP?
- p. Page 52 Archaeological sites – where does Rule 13-1 specifically recognise the items referred to?

- q. Page 52 The coastal marine area definition is not accurate (but is perhaps close enough) but Schedule H may be a different schedule when the Plan is operative, so how will this document work in that context?
- r. Page 52 – this is a minor point in light of Table 2 providing the relevant detail, but the statement in 4.2 that N-caps become successively tighter with each implementation period is only accurate for three of the eight LUC classes.
- s. Pages 56-64 Section 8 – What of this material was included in the original document? On what legal basis is this section included? On what legal basis is compliance to be checked against the various restrictions or assertions included in this document, many of which seem not legally required?
- t. Various provisions in Sections 8, 9, 10, and 11 set out what is permitted or restricted by the POP (whether it is accurately conveyed has not been considered). Assuming they have been correctly conveyed, if the Panel's decisions change the provisions, how is it expected that changes will occur to the document to be incorporated by reference?
- u. Page 70 – what law provides that "it is illegal to intentionally provide false or misleading information" in this context?
- v. Pages 76-87 raise a number of the issues already addressed.
- w. Page 77 – is it correct as stated in 4.2 that first time FARMS consent applications should use Year 1 values? For example, is it intended that in May 2016 a first time applicant only needs to meet Year 1 values and not Year 5?

The 2009 document is a simplified version of the 2007 document in direct response to submission seeking simplification as outlined in the scope memorandum by John Maassen. A central question for the Hearing Panel to determine is the role of the FARM strategy in the rule suite and whether it is mentioned at all. One approach is to not refer to the document at all but have far more detailed information requirements specified in the rule both in relation to the information to be supplied with the application and ongoing supply of information. These may be specified as performance conditions as the RMA makes plain that performance conditions can include anything that may be required under section 108 (see section 77(a)(1)(c) and that includes information requirements. In such a case the FARM strategy is a document that enables practical implementation of the rule at the HRC/farmer interface. If the FARM strategy is referred to in the rule then the components that are in effect guidelines should be deleted. We will not answer each of the specific questions in relation to the FARM strategy document at this stage until the Hearing Panel has reached a preliminary view of the approach it wishes to take. If the Hearing Panel chooses to impose Rule 13-1 if that includes provision of a revised FARM strategy to address the issues identified in the question then this will be supplied.

Conclusion

18. As will be seen above, some further refinement of Rule 13-1 is required. It is a critical rule in section 13. We will continue to provide updated recommended versions as required.

Helen Marr/Clare Barton

John Maassen