Regulatory Implementation commentary

9 May 2016

Purpose

The regulatory implementation team have developed this document to share implementation related issues with the CSG and to advise on fine tuning policy choices and rule wording. The intention of this advice is to assist with drafting the most robust and effective plan change possible, to maximise the efficiency and effectiveness of achieving the plan objectives.

General Comments

Implementation Timeframes

The plan will be notified in 2016. The RMA requires a decision on a proposed plan to be made by Council within 2 years, which is likely to be by mid 2018. In previous plan changes, resolving appeals has been time consuming, taking a number of years. If it takes two years to resolve appeals to this plan, the plan would be operative in mid 2020.

The RMA sets out that certain types of rules become operative immediately when a plan is notified. Legal advice is being sought as to whether this situation will apply to the HRWO plan change rules. If it does, then a number of rules contain deadlines that occur prior to the form and content of the plan being finalised (i.e. once decisions are made, and appeals are finalised). We have particular concerns about the implications for compliance with rule 7 under this scenario (discussed in specific comments about rule 7 below), but the issue applies generally across all rules.

This situation poses challenges for implementation, particularly when processing consents for activities where the consented status is under appeal, or where significant expenditure is required (such as overseer modelling, farm environment plan development, or installation of mitigations) and the plan requirements compelling those actions are under appeal.

The regulatory implementation team requests that the CSG consider the due dates it adopts in its final plan, in the context of where the plan is likely to be in the first schedule process when those due dates occur.

Nitrogen controls in the interim period prior to allocation

The regulatory implementation team notes that the plan is relying on two methods relating to controlling nitrogen in the interim period until allocation, being the capping of landuse activity (rule 2 and 8), and the capping of N loss (rule 5/6, via rule 7).

Achieving the plan objectives appears predicated on achieving a high level of compliance with rules 2 and rule 5/6/7. We consider that capping N loss may have created an incentive for landowners to exaggerate current losses (to create headroom for the period of the cap) or to underestimate future losses (in order to appear to stay within the cap).

We are concerned that the current rule framework will not provide a sufficiently robust system to allow under or over reporting of N loss to be reliably detected which makes the rule unimplementable. This has the potential to impact on the achievement of plan objectives, and reduce the value of the overall nitrogen reference point data for future policy decisions.

A similar type of concern exists for rules 2 and 8, which is expanded on below.

Farm Environment Plans

The regulatory implementation team have been reflecting on the matter of whether the farm environment plans should include matters relating to the compliance with other permitted activity rules, particularly for those that regulate sources of the four key contaminants.

We consider that whether to exclude existing Waikato Regional Plan regulatory issues like effluent and earthworks and other common on-farm activities from farm environment planning may need further thought. It may not make much sense to a farmer to have significant sources of contaminants (for example dairy effluent oxidation ponds) excluded from a farm risk assessment and mitigation plan. It is conceivable that for some farms, improving an issue that is already covered by another permitted activity rule in the existing Waikato Regional Plan or by a resource consent may be the single most significant mitigation action that they could undertake for their property. We suggest that this is something that should be further considered by the property planning subgroup.

Rule Specific Comments

Rule 0 – registration

The regulatory implementation team consider that the current drafting of rule 0 appears clear, unambiguous, implementable and enforceable. The registration process will provide valuable data to help with landuse management, and will provide much more accurate data about landuse in the catchment for future policy development.

Rule 1 – Stock exclusion.

The regulatory implementation team consider that the current drafting of rule 1 appears clear, unambiguous, implementable and enforceable.

We draw attention to an apparent drafting inconsistency in the current structure of the rule. Currently the rule requires that only cattle, horses, deer and pigs must be excluded from the banks and bed of a waterbody. The regulatory implementation team questions whether it was the intention of the CSG to authorise all other forms of livestock to enter water, which is what the current rule does by exclusion.

It is suggested that CSG may wish to consider amending clause 3 of Rule 1 to exclude all livestock from waterways, but limiting clause 1 (which requires fencing) to installing fencing capable of keeping cattle, horses, deer and pigs out of water, in recognition of the fact that other livestock like goats and sheep general stay away from waterways anyway.

Rule 2 – Landuse change

The regulatory implementation team consider that the current drafting of the rule will be largely effective at regulating large scale landuse change such as forest converting into pasture, and drystock farming converting into dairying (provided that dairy companies are willing and able to advise Council of potential new suppliers).

In contrast to this, we consider the rule will not enable effective regulation of smaller scale landuse change (such as pasture to cropping, or landuse change within a particular farming activity or enterprise) unless significant additional obligations are imposed on land owners, such as gathering

more information around “benchmarking” existing landuse activities, and imposing additional annual reporting requirements on landuse activities.

However, it is also recognised that a sufficiently robust land use register that would enable the smaller scale landuse change to be effectively regulated may create a potentially onerous regulatory burden on the majority of land users who do not change landuse in any considerable way in the life of the plan.

The regulatory implementation team brings this tension to the CSGs attention to allow the CSG to make the overall judgement on the relative importance of these issues.

One of the particular issues with the current drafting is the two exclusions in rule 2. We are concerned that the exclusions create significant loopholes that undermine the enforceability of the rule.

We understand it is proposed that the drafting of this rule be considered in more detail at a future property planning subgroup meeting.

Rule 3/4 - Small/low intensity blocks

The regulatory implementation team consider that the current drafting of rule 3/4 appears clear, unambiguous, and enforceable. We have remaining concerns about the practical implementation implications for properties greater than 4.1 ha, and the potential number of properties that might be excluded from this rule by the current drafting.

The current rule drafting (both of this rule 3/4 and rule 7) requires that all properties over 4.1 ha estimate their nutrient loss (in most cases using Overseer®) before they can determine whether they are permitted by rule 3/4. We have concerns about whether it is reasonable to require the approximately 2900 properties between 4.1 ha and 20 ha to undertake an Overseer® assessment in order to determine whether they are permitted. The cost of an overseer assessment for these types of properties has been estimated at up to approximately $1500 per property, or a total of nearly $4.5M. However, we also recognise the limitations of using lookup tables or similar approaches to estimating N loss.

We currently have no information about how many small blocks may exceed the N threshold of 15 kg N per ha per year, but point to anecdotal conversations among CSG members suggesting some small blocks (particularly equine blocks) may have relatively high stocking rates in comparison to other commercial farming operations.

The effect of requiring these small blocks to undertake Overseer® assessments and (if excluded from rule 3/4) develop farm environment plans will increase the number of nitrogen reference points to be calculated by around 40%, and increase the workload of developing farm environment plans by an unknown amount. We are concerned that servicing the Overseer® assessments for small blocks may impact negatively on the ability to achieve the timelines set out in the current plan for the 3 tranches.

We understand the concern of the CSG that there may be unintended consequences of allowing minimal regulatory intervention on these 4.1 to 20 ha properties, particularly with respect to the potential for unfettered intensification. The regulatory implementation team considers that it may be worthwhile exploring whether an alternative regulatory solution can reduce the risk that these properties pose, without creating the risk that the current approach may interfere with obtaining farm environment plans, and nitrogen reference points for the larger properties.

Rule 5 – Farm Environment Plans

The regulatory implementation team consider that the current drafting of rule 5 appears clear, unambiguous, implementable and enforceable.

We note that the rule leaves a wide degree of discretion to the Council regarding the nature, appropriateness, and timing of mitigation measures specified in the Farm Environment Plan. This is considered appropriate in the context of each farm plan needing to be customised to the specific farm, but we note that discretion is mainly expected to be exercised for seriously or obviously deficient plans. In most cases, it is expected a significant degree of reliance will be placed on the expert judgement of the certified farm environment planner.

The use of an independent third party to create certified Farm Environment Plans poses some risks particularly with regards to the potential for influence or bias of planners in response to meeting the needs and expectations of existing clients. This significance of issue will need to be considered further as the farm environment plan templates and certification schemes are developed.

Rule 6 – Industry Schemes

The regulatory implementation team consider that the current drafting of rule 6 appears clear, unambiguous, implementable and enforceable.

We note that the intention of the CSG has been that rule 6 would be a "mirror" rule to rule 5. The regulatory implementation team are of the view that the fact rule 5 is a consented activity, and rule 6 is a permitted activity imposes fundamentally different drafting requirements that prevents identical drafting.

We point out that the matters over which Council reserves control in rule 5 would be the same matters that an industry scheme would need to control if the industry scheme was to impose the "same requirements" as rule 5. It is unclear as of yet how that outcome would be achieved. It is expected that work on drafting the requirements for the industry scheme will help clarify how this will work in practise.

Rule 7 – Nitrogen reference point

The issue of the amount of regulatory control offered by the rule, and whether this is sufficient to allow the plan objectives to be met has been discussed in the general comments section of this document.

A further concern exists with rule 7. The regulatory implementation team raise the potential that this rule may not be implementable. If this rule was one that became immediately operative when the plan was notified (as discussed in the general comments section of this document), the RMA sets out that resource users are required to comply with the rule within a period of six months of the rule being notified. Under the current drafting of rule 7, this would mean 7000-8000 farmers may be required to comply with rule 7 and complete a nitrogen reference point assessment by early to mid 2017.

We consider it is not possible for 8000 properties to obtain a nitrogen reference point by mid 2017, as there are just not enough farm consultants and certified nutrient management advisors to deliver the service to that number of farms.

This issue needs further consideration by a sub group.

Rule 8 – Iwi Land

We understand that the Maori Land sub group is still considering the approach to this rule, and so we have not offered specific comment at this time. However, we note similar issues may exist to those raised about rule 2 above.

Rule 9 - Activities not covered by rules 1 - 8

Rule 9 is currently drafted as a discretionary activity rule. The regulatory implementation team raises the possibility that CSG may wish to consider using a restricted discretionary activity status for this rule. A discretionary status may enable a broader range of parties to claim affected party status, and would allow submissions on matters covered by any policy issue in the regional plan, rather than just matters relating to the losses of the four contaminants. It would be important to ensure the restricted discretion encompasses all matters that would be necessary to effectively regulate activities that do not fall within the existing rules 0 – 8.