

Report to the Collaborative Stakeholder Group – for Agreement and Approval

File No: 23 10 02
Date: 16 November 2015
To: Collaborative Stakeholder Group
From: Chairperson – Bill Wasley
Subject: A Resource Management Act legal matter: rights to discharge diffuse contaminants from pastoral farming
Section: **Agreement and Approval**

Disclaimer

This report has been prepared by Waikato Regional Council policy advisors for the use of Collaborative Stakeholder Group Healthy Rivers: Wai Ora Project as a reference document and as such does not constitute Council's policy.

1 Purpose

The purpose of this report is to provide information so that the Collaborative Stakeholder Group (CSG):

1. Can answer any questions about existing use rights to farm and changes in the 2016 Proposed Plan Change for Waikato and Waipa River catchments. To do this, the report sets out briefly how the Resource Management Act 1991 (RMA) deals with diffuse discharges that are either directly into water, or might eventually reach water.

Recommendations:

1. That the report [A Resource Management Act legal matter: rights to discharge diffuse contaminants from pastoral farming] (Doc #3591205 dated 16 November 2015) be received.

2 Background

Plan Change 1 (Waikato and Waipa River Catchments) must be drafted in accordance with legislation, including the Resource Management Act (RMA). During CSG discussions in the last three meetings, questions were raised by members about discharges from pastoral grazing and existing use rights.

The following text sets out some information that have been prepared by policy staff with input from WRC legal advisor Shaun Plant based around common questions about existing use rights.

3 Common questions about existing use rights

Debate about farming and diffuse discharges at a national level

An application to the Environment Court for a declaration was made recently (CIV-2015-409-000518: Royal Forest and Bird Protection Society of New Zealand Incorporated v Canterbury Regional Council). Any party can apply to the Court for interpretation of a legal matter under the RMA, and in this case, the topic was around diffuse discharges and grazing animals. In mid October, Waikato Regional Council filed a notice to join the declaration proceedings, primarily for the purpose of receiving documentation so we can assess whether we need to become more actively involved as the matter moves forwards.

As of 16 November, we understand that various parties are in negotiation about the topic at present and that it will not be heard in court.

Debate about farming and diffuse discharges in Waikato Region

As the CSG moves further into policy options that require people to change their behaviour, there will be questions about the approach proposed. Topics include:

1. Water quality limit setting, and questions around how land-based activities and land use land affect what we see and experience in water bodies
2. Changes on the land will be proposed by CSG to meet water quality limits, with associated questions around how the CSG is justifying the cost and disruption to people in the catchment.

The topic of existing land use rights falls into 2) above, and the remainder of the report briefly covers where it relates to policy options to manage diffuse discharges.

The WRC legal team hasn't had input into this report, instead, it has been written from a planners general understanding of the law. Any errors in the interpretation of the Resource Management Act in the following comments should be able to be cleared up by legal experts in the CSG and WRC. The comments have been made based on WRC legal submissions and the 2008 Environment Court interim decision for land use and discharge rules applying to farming in the Lake Taupo catchment.

Some general questions and answers that may arise during the intensive engagement period in October and November are set out below.

Question: Are all activities treated the same in the RMA?

Answer: No.

Activities on the land are treated differently from activities in the beds of lakes and rivers, and within the coastal marine area (the extent of the CMA is from Mean High Water Spring to the 200 kilometre marine territorial limit of NZ).

There are also specific restrictions or constraints where the land use has an associated discharge to air or that may enter water or the coastal marine area. Part 3 of the RMA sets out these restrictions in sections 9 through to 15. These are briefly described in Attachment 1.

Question: Is the term ‘rights’ used in the Resource Management Act?

Answer: No.

While the term ‘rights’ does not explicitly feature in the text of the RMA, it is clear that the provisions of that Act imply that people do, or do not, have the right to do certain things. The national Policy Statement for freshwater management (NPS-FM) requires councils to set limits in respect of water quality, which in turn, requires policies that will, in some circumstances, constrain people from doing certain things (i.e. that limit their rights from doing certain things). In this sense, ‘rights’ can be seen as the inverse of the constraints imposed by RMA rules.

Question: How does the Waikato Regional Plan deal with land use that discharges contaminants?

Answer: In the Waikato, some of the rules in the Regional Plan that control diffuse contaminant discharges require resource consent, but the majority are permitted activities. At the time it was publically notified in 1998, decision makers wanted the Regional Plan to be ‘enabling’¹ and chose not to enter a debate with the community about diffuse discharges from agricultural activities such as animals grazing pasture and crops.

While the Waikato Regional Plan had over 80 permitted activity rules when it was notified, it was silent about some activities that result in diffuse discharges to land where they may enter water. This was also the case for other regional plans, despite the presumption in section 15(1) of the RMA that discharges to water or to land where they may enter water, either require a resource consent or need to be explicitly permitted in a plan. This situation changed when WRC notified a variation to its regional plan for the Lake Taupo Catchment, noting that *“in terms of section 15(1)(b) of the RMA all discharges of nitrogen as a contaminant from land use activities in the catchment have probably been unlawful since the passage of the RMA”* (WRC 2007 p23).

The Resource Management Act (RMA) was enacted in 1991. In terms of managing adverse effects on water, regional councils had already been regulating point source discharges, such as municipal and industrial discharges to land and water, using previous legislation. The first generation of regional plans under the RMA were developed and notified in the mid to late 1990s. The new RMA plans continued to require improvements in the quality of point source discharges through resource consent processes.

In contrast, addressing diffuse or non point source² discharges of nitrogen and phosphorus, microbes and sediment, historically focused on non regulatory tools such as providing information, extension, and financial incentives. Regulatory exceptions to managing diffuse contaminant discharges tended to focus on a handful of land management practices, for example plantation forestry harvesting, disposal of dairy shed, chicken and piggery effluent.

Question: Does the RMA give anyone existing use rights to use their land?

Answer: Yes in some circumstances for the use of land (that does not also have associated discharges to air, water or from industrial or trade premises).

¹ Issue 1 of Section 1.2.2 of the Regional Plan notes that activities are enabled by Permitted Activity rules, and that requiring resource consent for activities that have less than minor adverse effects leads to unnecessary bureaucracy and costs.

² The terms ‘diffuse discharges’ and ‘non point source discharges’ are often used interchangeably. These are discharges that cannot be traced back to a single point, such as a storm water pipe.

Existing use rights for land use are set out in section 10 of the RMA. Existing use rights for proposed regional rules are set out in Section 20A. For completeness some information is given below. However, when answering questions about presumed rights to continue to graze animals when the Plan Change 1 is notified in 2016, these sections of the RMA are not relevant when the CSG is answering questions in the next few months.

WRC legal submissions in the Lake Taupo Environment Court were that domestic farmed animals discharge contaminants which may reach water, and these discharges come under section 15 RMA. Apart from the Lake Taupo Catchment, the Waikato Regional Plan is silent on the matter. It does not require resource consent or expressly permit the discharge of contaminants from grazing animals. The authors understanding is that discharges from grazing animals becomes a discretionary activity by default under the RMA. However, WRC does not require farmers to apply for consent outside the Lake Taupo Catchment.

Section 10(1) of the RMA addresses existing use rights for land use. Under this section, land may be used in a manner that contravenes a rule in a district plan or proposed district plan if both:

- the use was lawfully established before the rule became operative or the proposed plan was notified
- the effects of the use are the same or similar in character, intensity and scale.

Section 10 of the RMA does not apply to activities that have been discontinued for a continuous period of more than 12 months after the new rule became operative or the proposed plan was notified.

Existing use rights under section 10 do not apply to:

- reconstruction, alteration of, or extension to, any building that increases the degree to which the building fails to comply with any rule in a plan or proposed plan
- use of land controlled for the purposes specified in s30(1)(c)
- restrictions of use of the coastal marine area under s12
- restrictions on uses of lake and river beds under s13.

Existing use rights in relation to proposed regional plan rules - s20A of the RMA

Section 20A of the RMA provides that any existing activity that was formerly a permitted activity, or that otherwise could have been lawfully carried out without a resource consent as a result of a rule in a proposed plan, may continue until the plan becomes operative if the factors in sections 20A(1)(a) to (c) are present.

The Waikato Regional Plan contains existing permitted activities for some activities that the CSG may decide to recommend that a resource consent will be needed. This is where section 20A will apply.

Activities that were permitted, or were lawfully carried on without a resource consent, but which become controlled, discretionary or non-complying activities as a result of a new rule in a regional plan, may be continued for a limited period in the circumstances defined in s20A(2). An application for a resource consent must be made within six months of the rule becoming operative. Where an application for resource consent has been lodged, the activity can continue until such time as the final decision on it is made.

Question: Does the Resource Management Act give anyone existing use rights to farm?

Answer: No.

In New Zealand, some people presume they have a right to continue to use land for productive uses such as pastoral farming. Since 1991 there have been special restrictions on discharges that may enter water in section 15 of the RMA. A resource consent is needed unless the permission is spelt out in a regional plan permitted activity.

Question: Is there a definitive legal ‘answer’ on this matter?

Answer: Not at a national level at the moment, but there will be once the declaration is heard and a decision issued by the Environment Court.

The matter was considered in the Lake Taupo catchment in 2008, but the Environment Court declined to make a ruling that applied outside the catchment. At the Environment Court hearing, Waikato Regional Council’s legal submissions were that grazing animals on a farm required rules to manage nitrogen to encompass both section 9 (use of land) and section 15(1) (discharges to water or land where they may enter water). The Court agreed with this and other party’s similar legal submissions. Chapter 3.10 of the Waikato Regional Plan contains rules³ that are headed up “the use of land for farming..” and rules that are headed up “ the discharge of [contaminants] into or onto land which may result in the contaminants entering water, where the discharge would otherwise contravene section 15(1) of the RMA.”

4 Summary

This report sets out briefly how the Resource Management Act 1991 (RMA) deals with diffuse discharges that are either directly into water, or might eventually reach water. The report then outlines some common questions asked and some general advice for the CSG if they are asked these or similar questions about existing use rights under the RMA.

Diffuse discharges from pastoral farming are covered under section 15(1) of the RMA. Not all activities are treated the same in the RMA. Whilst the term rights is not used in the RMA it is clear that the provisions of that Act imply that people do, or do not, have the right to do certain things.

Attachment 1 RMA brief descriptions and full text of sections 9, 13, 14 and 15.

³ See rules 3.10.5.1-9 and Rule 3.10.5.10 (Permitted Rule – Nitrogen, effluent, and fertiliser discharges associated with Land Uses authorised under rules 3.10.5.1 to 3.10.5.9).

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5 References

Resource Management Act 1991. Downloaded from www.NZ Legislation 21 October 2015.

Waikato Regional Council 2014. Report to CSG workshop 2 Case Study I: Lake Taupo catchment property-level nitrogen discharge limits document number 3034258.

Waikato Regional Council 2014. Report to CSG workshop 5. Regional Council approaches to diffuse discharges and water quality. Dated 20 March 2014. Document number 2325986.

Waikato Regional Council 2007. Proposed Waikato Regional Plan Variation 5 – Lake Taupo Catchment (Committee recommendations). Hearings Committee report to Council Volume One. February 2007. Document number 1133327.

Attachment 1

Brief description of RMA sections 9, 13 and 15

Section 9

Under s9(2) of the RMA no person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is allowed by a resource consent granted by a regional council or allowed by s20A (certain existing lawful uses allowed).

Section 13

Explicit provisions relating to the management of river and lake beds are found within s13 of the RMA. Section 13(1) relates to structures, disturbances, planting and deposits on river and lake beds, while s13(2) relates to passage through and removal of plants on river and lake beds. The presumption within s13(1) is that activities cannot be carried out unless they are allowed through a resource consent, or a rule in a regional plan or any proposed regional plan. Section 13(2) has the opposite presumption, with activities allowed unless they contravene a rule or rules in a regional plan or proposed regional plan.

Section 15

Section 15(1)(a) of the RMA states that no person may discharge any contaminant or water into water unless allowed by a rule in a regional plan, resource consents or regulations.

Section 15 of the RMA outlines the duties and restrictions under the RMA for persons discharging contaminants into the environment. Under s15 (1) (b) of the RMA, no person may discharge contaminants to land in circumstances that may result in contaminants entering water unless allowed by a national environmental standard or other regulation, a rule in a regional plan or proposed regional plan, resource consent. Section 15(1)(d) prohibits discharges to land or from any industrial or trade premises unless allowed by a rule in a regional plan, proposed regional plan, resource consent or regulations.

Full text of RMA sections 9, 13, 14 and 15

Part 3 Duties and restrictions under this Act

Section 9 Restrictions on use of land

(1) No person may use land in a manner that contravenes a national environmental standard unless the use—

- (a) is expressly allowed by a resource consent; or
- (b) is allowed by section 10; or
- (c) is an activity allowed by section 10A; or
- (d) is an activity allowed by section 20A.

(2) No person may use land in a manner that contravenes a regional rule unless the use—

- (a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(3) No person may use land in a manner that contravenes a district rule unless the use—

(a) is expressly allowed by a resource consent; or

(b) is allowed by section 10; or

(c) is an activity allowed by section 10A.

(4) No person may contravene section 176, 178, 193, or 194 unless the person obtains the prior written consent of the requiring authority or the heritage protection authority.

(5) This section applies to overflying by aircraft only to the extent to which noise emission controls for airports have been prescribed by a national environmental standard or set by a territorial authority.

(6) This section does not apply to use of the coastal marine area.

Section 9: replaced, on 1 October 2009, by section 7 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 13 Restriction on certain uses of beds of lakes and rivers

(1) No person may, in relation to the bed of any lake or river,—

(a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) excavate, drill, tunnel, or otherwise disturb the bed; or

(c) introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) deposit any substance in, on, or under the bed; or

(e) reclaim or drain the bed—

unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—

(a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2A) The activities are—

(a) to enter onto or pass across the bed of a lake or river:

(b) to damage, destroy, disturb, or remove a plant or a part of a plant, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(c) to damage, destroy, disturb, or remove the habitats of plants or parts of plants, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(d) to damage, destroy, disturb, or remove the habitats of animals in, on, or under the bed of a lake or river.

(3) This section does not apply to any use of land in the coastal marine area.

(4) Nothing in this section limits section 9.

Section 13 heading: amended, on 7 July 1993, by section 11 of the Resource Management Amendment Act 1993 (1993 No 65).

Section 13(1): replaced, on 7 July 1993, by section 11 of the Resource Management Amendment Act 1993 (1993 No 65).

Section 13(1): amended, on 1 October 2009, by section 13(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 13(2): replaced, on 1 October 2009, by section 13(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 13(2A): inserted, on 1 October 2009, by section 13(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 14 Restrictions relating to water

(1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity—

(a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):

(a) water other than open coastal water; or

(b) heat or energy from water other than open coastal water; or

(c) heat or energy from the material surrounding geothermal water.

(3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—

(a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or

(b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—

(i) an individual's reasonable domestic needs; or

(ii) the reasonable needs of an individual's animals for drinking water,—

and the taking or use does not, or is not likely to, have an adverse effect on the environment; or

(c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for firefighting purposes.

Section 14(1): replaced, on 1 October 2009, by section 14(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 14(2): replaced, on 1 October 2009, by section 14(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 14(3): amended, on 1 October 2009, by section 14(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 14(3)(a): amended, on 1 October 2009, by section 14(3) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 15 Discharge of contaminants into environment

(1) No person may discharge any—

(a) contaminant or water into water; or

(b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

(c) contaminant from any industrial or trade premises into air; or

(d) contaminant from any industrial or trade premises onto or into land—

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge—

(a) is expressly allowed by other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge—

(a) is expressly allowed by a national environmental standard or other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(3) This section shall not apply to anything to which section 15A or section 15B applies.

Section 15(1): amended, on 1 October 2009, by section 15(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 15(2): replaced, on 1 October 2009, by section 15(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 15(2A): inserted, on 1 October 2009, by section 15(2) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 15(3): inserted, on 20 August 1998, by section 5 of the Resource Management Amendment Act 1994 (1994 No 105).