
Initial report on Nutrient Trading under the Resource Management Act (1991)

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14 August 2008

Introduction

- 1 Motu Economic and Public Policy Research (*Motu*) is developing a nutrient trading programme to improve water quality in Lake Rotorua. This report provides a brief overview of the issues arising from a nutrient trading programme within the context of the Resource Management Act 1991 (*RMA*).
- 2 In our view, a nutrient trading programme can, in theory, be developed and operated within the context of the RMA in its current form. The approach would likely involve a regime requiring resource consents (administered by Environment Bay of Plenty under its Proposed Regional Water and Land Plan) for a range of activities which have the potential for nutrient leaching. The key element of the regime would be conditions on resource consents requiring specified numbers of "nutrient emissions units" to be held and surrendered according to a process specified in plan rules.
- 3 It is important to note that while theoretically feasible under the RMA in its current form, the introduction and implementation of a nutrient trading programme would be novel, and is essentially untested legally to date.¹ It can be expected that the programme will come under careful scrutiny by a range of parties that may be affected.
- 4 We have considered two potential jurisdictional bases for a nutrient programme under the RMA in its present form:
 - 4.1 Section 15(1)(b); and
 - 4.2 Section 30(c)(ii).

Section 15(1)(b) of the RMA

- 5 It is considered that relying on Section 15(1)(b) of the RMA as the jurisdictional basis for the nutrient trading programme may engender opposition because of the potential "precedent effect." An activity that is considered a "discharge" under Section 15(1)(b) is presumed to be unlawful unless expressly authorised in a plan or resource consent. For example, if the activity of stock grazing were considered to result in a discharge within the meaning of Section 15(1)(b) in the Bay of Plenty region, that activity may be considered to be unlawful in other jurisdictions (eg Taranaki) unless

¹ A programme involving transferable "offsets" for nutrient discharges in the Lake Taupo catchment – Variation 5 to the Proposed Waikato Regional Plan – is currently on appeal to the Environment Court. Although Variation 5 shares some similar conceptual elements to Motu's proposed nutrient trading scheme for Lake Rotorua, there are a number of important differences between that scheme and the framework proposed for Lake Rotorua which means that we do not regard it as a legal "precedent" as such.

“the discharge is expressly allowed by a rule in a regional plan ... [or] a resource consent” in that region.² As a result, stakeholders – in particular, the agricultural sector – may strongly oppose a nutrient trading programme based upon Section 15(1)(b).³

- 6 In addition, relying on Section 15(1)(b) as the jurisdictional basis may require a showing that each of the activities to be included in the nutrient trading programme results in a discharge of a contaminant by a person. It may be difficult to show that some nutrient leaching activities (eg forestry) are discharges by a person.

Section 30(c)(ii) of the RMA

- 7 It is considered that Section 30(c)(ii) of the RMA may provide an appropriate jurisdictional basis for a nutrient trading programme. Importantly, Section 30(c)(ii) does not present the same presumption of unlawfulness for activities within the trading programme that would result if Section 15(1)(b) were to serve as the jurisdictional basis. Moreover, a programme based on Section 30(c)(ii) also may not be bound by the same evidentiary constraints (ie proving that each activity is a discharge by a person) that arise under Section 15(1)(b).

- 8 As the use of Section 30(c)(ii) in this way appears to be novel, we would welcome the views of the lawyers for the Ministry for the Environment (MfE) and Environmental Bay of Plenty on the proposed jurisdictional bases.

Design of nutrient trading programme

- 9 The programme will need to be designed carefully to ensure its efficient functioning while protecting the environment and providing an appropriate degree of public participation. The subsequent design phase therefore will be critical to ensuring that the trading programme meets the requirements of the RMA.
- 10 It appears that the nutrient trading programme will need to be introduced through a variation to the Environment Bay of Plenty Proposed Regional Water and Land Plan pursuant to the Schedule 1 of the RMA. If the variation approach is taken, the plan change documents will need to cover all the core aspects of the trading programme, and will specifically need to address the nutrient cap, allocation of nutrient discharge units, the process by which the units will be traded, and the process by which the discharge

² RMA, s15.

³ Variation 5, which appears to be based (at least in part) on Section 15(1)(b), has encountered significant opposition from the agricultural sector. As you are aware, Chapman Tripp represents Fonterra in the Variation 5 proceedings.

units will be calculated. The scope of the variation will become clearer once the trading programme becomes more defined. We note that consideration would need to be given to consistency with higher level regional planning documents such as the Bay of Plenty Regional Policy Statement.

- 11 Given the complex legal issues arising from the trading programme, we note two other options that may be available, with appropriate central Government support:

- 11.1 An amendment to the RMA to provide specifically for a nutrient trading programme in the Lake Rotorua catchment. Such an amendment would need to be developed in conjunction with MfE, and would need to be passed by Parliament. The Resource Management (Waitaki Catchment) Amendment Act 2004 provides an example of this type of legislative enactment.

- 11.2 Alternatively, a National Environmental Standard (*NES*) under Section 43 of the RMA could be developed for the proposed nutrient trading programme. Like the proposed amendment to the RMA, the *NES* would need to be developed in conjunction with MfE.

- 12 We are happy to discuss any of the issues addressed in this initial report.