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**by email and post**

**NUTRIENT TRADING PROGRAMME - INCORPORATION INTO ENVIRONMENT BAY OF PLENTY REGIONAL PLAN**

**Introduction**

1 You have asked us to prepare a paper on what would need to be included in a plan change to implement a nutrient trading programme. The following advice therefore provides an outline of the matters which we consider will need to be addressed by way of a Plan Change to the Regional Plan in order to incorporate the nutrient trading programme into the plan provisions.

**Background**

2 This advice supplements our earlier advice, provided on 1 May 2008 and 6 June 2008 (*the previous advice*), regarding the viability of developing and operating a nutrient trading programme (*the nutrient trading programme*) within the context of the Resource Management Act 1991 (*RMA* or *the Act*).

3 As noted in the previous advice, we consider that a nutrient trading programme could potentially be developed and operated within the context of the RMA, and that the most appropriate jurisdictional basis for such a programme would be under Section 30(1) of the RMA, which provides for regional plans to control land uses to ensure the maintenance and enhancement of water quality. Therefore, the nutrient trading programme will need to be incorporated into the regional plan by way of a Plan Change (*the Plan Change*) to the Environment Bay of Plenty Regional Land and Water Plan (*the Regional Plan*).

4 As previously advised however, there are a number of features of the nutrient trading scheme approach which are novel (in the context of the RMA in its present form). To our knowledge the development and implementation of such a scheme under the RMA has not been previously attempted or tested. For this reason, although we consider that a scheme along these lines could theoretically be developed, there may be considerable benefit in considering whether legislative amendments, to more explicitly provide for such a scheme, might be considered and adopted (in conjunction with the wider reform of water law under the Act presently being advanced by the Ministry for the Environment with input from the Land and Water Forum). At the very least there would need to be careful consideration of the proposed water reforms when they are released for consultation to ensure that no legislative proposals create additional hurdles for a scheme of this nature.

**Summary**

5 By way of summary, we consider that the Plan Change will need to:

5.1 Provide an explanation of the reasons for and effect of the Plan Change;

5.2 Outline the relevant issues, objectives and policies which the Plan Change aims to address/implement;

5.3 Identify those land use activities, which cause nutrient discharges, and which will be covered by the Plan Change (*the discharge activities*) and specify the activity status and controls to be imposed upon those activities:

5.4 Address discharge activities which are below the threshold for consent or which remain outside the nutrient trading programme;

5.5 Outline the core provisions of the nutrient trading programme including the overall "cap" on nutrient discharges, the mechanism for allocating discharge units, the process by which the discharge units will be calculated (including how to address new technology or practices), and the obligation to surrender nutrient discharge units annually;

5.6 Specify how compliance with the Plan Change will be monitored and outline penalties for non-compliance; and

5.7 Set up a Governance Body to facilitate technical changes to the nutrient trading programme and specify those elements which the Body is able to change without a further change to the Regional Plan.

6 The Plan Change should also impose limited controls on the trading of discharge unit transfers (for example to avoid disputes as to whether such transfers have occurred, or to limit participation in the nutrient trading programme), but otherwise should avoid regulating the trading process.

7 We anticipate that the Plan Change will need to be incorporated into the Regional Plan as a standalone section explaining the nutrient trading programme, allocation mechanism, cap etc... Exactly where this would fit into that Plan is a matter for the Regional Council to determine. We have not considered whether consequential amendments to other provisions of the Regional Plan will be necessary but this is possible, particularly with regard to maps or existing land use and discharge provisions.

**Plan Change Process**

8 Before we proceed to consider the above Plan Change matters in detail, we note that the proponent of the Plan Change, presumably Environment Bay of Plenty (*EBOP*) will have to address the reasonably onerous requirements of section 32 of the RMA.

9 That section requires that the Plan Change proponent conduct an evaluation of the Plan Change prior to notification. That evaluation must consider "the extent to which each objective is the most appropriate way to achieve the purpose of [the

RMA]; and whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives."

10 In the case of the nutrient trading programme, because it is an innovative approach to dealing with water quality issues, we anticipate there will be an expectation from the Commissioners/Environment Court for a comprehensive and rigorous section 32 evaluation which examines and evaluates the various alternative means of regulating land use and discharges, and records the reasons why a nutrient trading programme is considered the most appropriate mechanism for achieving the objectives of the Plan Change and the RMA. The alternatives analysis will be a particularly important element of the pre-plan change process and will need to carefully assess the advantages and disadvantages of a nutrient trading scheme over other options, including the status quo, and more restrictive rules on land use and discharges involving "conventional" RMA techniques.

11 This analysis will need to be driven by EBOP, and would likely involve a range of relevant experts, including legal, planning, water quality scientists and economists.

**Plan Change Explanation**

12 The first component of the Plan Change should be an explanation, drafted in 'lay' terms, of the purpose of the Plan Change and what it in practice does. We suggest this include:

12.1 A description of the decline in water quality in Lake Rotorua (the Lake) arising from nutrient discharges and the ecological, social, cultural and economic effects of this decline;

12.2 An explanation of how the nutrient discharges result from land use activities, specifying the main causes;

12.3 An identification of local iwi or hapu, their relationship with the Lake and the effect of the decline in water quality on the iwi or hapu and their relationship with the lake;

12.4 A description of the discharge activities, noting the need to continue such activities to the extent consistent with sustainable management of the Lake; and

12.5 A brief explanation that this Plan Change enables a nutrient discharge trading programme within the limits set by a cap on annual emissions from the discharge activities.

13 At the outset also, the Plan Change should define the area which it will cover. We consider that this could be achieved by reference to a map attached as an Annexure to the Plan Change showing the general catchment boundary. Some form of overlay or cross reference on the existing maps may also be necessary..

**Issues, Objectives and Policies**

14 In accordance with the relevant statutory requirements, plans developed under the RMA typically follow a format of identifying an issue, setting an objective in relation

to that issue, setting broad policies to achieve the objective and then specifying methods to implement the objectives and policies.[1] The rules which will form the basis of the nutrient trading programme and the oversight by the proposed Governance Body are two forms of methods; but the issues, objectives and policies supporting the Plan Change still need to be carefully outlined.

15 This is because the issues, objectives and policies provide the scope and legal framework for the land use controls and rules imposed on the discharge activities under the Plan Change. Moreover, if there are any disputes as to interpretation of the rules or the role of the Governance Body, the issues, objectives and policies form the basis on which to resolve such disputes.

16 The Council/community will need to define the issue(s), but we anticipate that it will be the decline of water quality and the effects that this has on environmental, cultural, social, and economic values. We recommend that the issue(s) also expressly recognise the simultaneous need to weigh the economic value to be obtained from land use activities – which is after all why a trading scheme is proposed rather than other regulatory action.

17 The objectives could include:

17.1 Controlling or reducing the inflow of nutrients into the Lake;

17.2 Maintaining or improving the current water quality in the Lake; and

17.3 The minimisation of social and economic effects resulting from the management of the discharge activities.

18 We anticipate the policies could include:

18.1 Capping the annual average amount of nutrients discharged in the catchment[2];

18.2 Reducing nutrient discharges from the discharge activities by requiring that such activities operate within the cap;

18.3 Enabling landowners to determine the most efficient way to reduce nutrient discharges; and

18.4 Recognising the role of tangata whenua as kaitiaki of the Lake.

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[1] Section 67(1) of the RMA requires a regional plan to state the objectives for the region, the policies to implement the objectives and the rules to implement the policies. Section 67(2) allows a plan to state a number of other optional factors, including issues that the plan seeks to address, methods for implementing the policies and the principal reasons for adopting the policies and methods.

[2] See paragraphs 45 to 50 below for an outline of our understanding of how a "cap" might operate, utilising a "vintage" system, which recognises that land in different areas will have different time frames for the transportation of nutrients to the relevant water bodies.

**Regulation of discharge activities by land use controls**

19 Section 30 of the RMA provides that a regional council may include rules in its regional plan regulating land uses to protect water quality. Therefore, in order to create a nutrient trading programme grounded in Section 30 of the RMA, the Plan Change will need to introduce rules into the Regional Plan regulating those land uses that are discharge activities.

20 As we have previously advised, we consider that the simplest approach would be for the Plan Change rules to require that existing and new nutrient discharge activities obtain consent as controlled activities.[3]

21 We note that the Plan Change will need to carefully define the discharge activities so that all land-uses which result in nutrient discharges are captured. Likewise the Plan Change should be careful to exclude point source discharges if these are not to be included.

***Scope***

22 The Plan Change will also need to define its scope in terms of any threshold limits, under which the discharge activities will not be captured. On the basis of earlier discussions with you, we understand that the Plan Change could cover properties with 10 hectares or more of area, regardless of land use.

23 However, consideration will need to be given to this scope and in particular how to address nutrient emissions from properties which fall under the above thresholds, and other properties such as urban areas (we understand that responsibility for both is intended to fall on the Regional and District Councils). We discuss this further below.

***Land use rules***

*Captured Discharge Activities – Controlled Activities*

24 We recommend the Plan Change state that the discharge activities are controlled activities subject to conditions. The matters to be covered by the conditions (such as the obligation to surrender nutrient discharge units) should also be set out in the Plan Change, and are discussed further below.

25 The land use rules will also need to include provision setting out some of the basic structure of the nutrient trading programme, including the discharge cap, the allocation mechanism and the role of the Governing Body. Again this is discussed in greater detail below.

[3] In passing, we note that the introduction of controlled activity status for land uses within the geographical area covered by the plan change (and the prohibition on carrying out a relevant land use without holding the correct number of emissions units) would require all of the relevant landowners/occupiers to apply for resource consents to continue with their present activities, as well as to undertake any new activities. We anticipate that this would mean a relatively large number of applications being made within a few months of the plan change becoming operative, and the need for careful thought concerning Council resourcing to process the applications. Amongst other things, there would need to be clear guidance, such as development of brochures for landowners, to assist them through the application process.

*Below Threshold Discharge Activities – Unregulated or Permitted Activities*

26 Consideration will need to be given to whether land use activities which result in a low level of discharge (below the thresholds noted above) should remain unregulated or be included in the Plan Change as permitted activities subject to compliance with certain standards.

27 If the activities are to remain unregulated, then the Council will need to be satisfied that activities beneath the threshold levels will not cause problematic levels of discharge no matter how the property is managed. If, however, the scope outlined above assumes certain stocking rates or other standard practices, it may be necessary to provide that such activities are permitted subject to specified standards. In that case consideration will need to be given to exactly what those relevant standards might be, and what should happen if they are breached.

*Discharge Activities outside the Nutrient Trading Programme*

28 The Plan Change should also clarify the status of discharge activities where the landowner does not seek controlled activity consent, that is where the landowner refuses to operate within the nutrient trading programme, but wants to continue the existing land use activities[4].

*Prohibited Activity*

29 For the nutrient trading programme to work, there needs to be a measure of compulsion about participation in the scheme. If one landowner is able to ignore the cap and continue current discharge activities without an obligation to surrender discharge units, the nutrient trading programme will be undermined. This suggests that the carrying out of a land use which constitutes a discharge activity without holding the correct number of emissions units should be a prohibited activity.

30 Classifying the carrying out of a land use which constitutes a discharge as a prohibited activity would mean that no-one may carry out a discharge activity unless controlled activity consent is held (i.e. the landowner is operating within the programme) and no-one may make an application to carry out a discharge activity other than for the controlled activity, to which the relevant cap and conditions will apply.

31 The RMA empowers local authorities to make rules imposing a prohibited activity status on certain land use and activities.[5] However, the Environment Court has noted that the prohibited activity status is a distinct exception to the permissive, effects based philosophy of the RMA as a whole, and that therefore; prohibiting an activity is a planning tool which should be used sparingly and in a precisely targeted way.[6]

32 The Environment Court has confirmed that the use of prohibited activity status should be restricted to activities for which, having undertaken the processes

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[4] This is a different issue from the compliance issue which arises where landowners obtain consent but then exceed their allocation or do not surrender sufficient discharge units.

[5] Section 77B RMA.

[6] New Zealand Mineral Industry Association v The Thames Coromandel District Council (EnvC, W50/04, 27 May 2004).

required by the RMA, a Council could rationally conclude that a prohibited activity status is the most appropriate.[7] Examples of situations in which the Court has accepted the use of prohibited activity status as being the most appropriate include situations where the Council wishes to restrict the allocation of resources, and situations where the Council wishes to establish priorities otherwise than on a "first in first served" basis.[8] The incorporation of a nutrient trading programme into the Proposed Regional Plan in order to reduce nutrient discharges into the catchment as a whole would appear to fall into these accepted categories, which suggests that prohibited activity status, for discharge activities outside the nutrient trading programme, is appropriate.

33 We note this approach does not compel trading (the consent holder could simply limit their activities to meet their consent allocation) or a reduction of activity (the consent holder could acquire more nutrient discharge units) but it does compel acceptance of the nutrient discharge cap and of the requirements to obtain consent and surrender nutrient discharge units, if the landowner wishes to continue their land use activities.

***Transitional provisions***

34 It would be prudent to include provision in the Plan Change for transitional arrangements. This is because the reality of transitioning from an essentially unregulated system, to one which operates under a nutrient trading programme with a requirement for consent, will raise a number of practical issues, as will the transition from the 'cap' imposed by Rule 11, to the cap imposed under the nutrient trading programme.

35 At the outset we recommend that the Plan Change specify it is to have no interim effect prior to becoming operative. An RMA plan normally has a level of effect from the time it is notified, however it would be inappropriate and difficult (if not administratively impossible) to require compliance with the Plan Change prior to the details of allocation and the nutrient training programme being in place.

36 Consideration will then need to be given to how once the Plan Change is operative, the transition should work in a practical sense. We assume that it would be most effective to require consent holders to surrender their discharge units annually on the same specified date. Obviously, however, not all landowners will apply for or obtain their consent on the same date.

37 Therefore, it may be worth considering including provisions to the effect that landowners have a certain amount of time (for example, six months or a year) to apply for consent but that such consents will not commence until a specified date (say for example a further month after the expiry of the initial six month or one year period). The "surrender date" could then be annually thereafter on the date of commencement of consent.

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[7] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562; (2007) 13 ELRNZ 279; [2008] NZRMA 77 (CA).

[8] *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562; (2007) 13 ELRNZ 279; [2008] NZRMA 77 (CA).

38 The transitional provisions will also need to be robust enough to cope with potential delays from Section 20A RMA. That section will allow landowners, who are lawfully carrying out discharge activities at the time the Plan Change comes into effect, to continue their activities without obtaining consent, for 6 months after the Plan Change comes into effect (hence our recommendation of a minimum 6 month transition). It will also allow any such landowners to continue their activities without consent, while they appeal any conditions of their consent.[9]

39 We note that the timeframe in which consent must be applied for will also need to be long enough to give the Regional Council and affected landowners a reasonable timeframe in which to collate any information necessary to determine landowner's nutrient discharge unit allocation (discussed in greater detail below) and to formally set up the Governing Body.

**Core provisions of the nutrient trading programme**

40 As noted above, we consider that the core provisions of the nutrient trading programme should be included in the Regional Plan. While it may be appropriate for the proposed Governing Body to be able to amend some detailed matters over time, it is important that the core provisions of the nutrient trading programme be clearly defined in the Regional Plan, so that landowners have sufficient investment certainty. Therefore, the Plan Change should include provisions addressing:

40.1 The overall cap on nutrient discharges;

40.2 The allocation mechanism;

40.3 The division of the catchment into vintages;

40.4 The surrender obligation;

40.5 Any restrictions on the sale and purchase of discharge units; and

40.6 The process by which the nutrient discharge units will be calculated.

41 We address each of these components in greater detail below.

***Cap on nutrient discharges***

42 We understand that it is intended to establish a "cap" on the nutrient discharges to Lake Rotorua which will set the maximum amount of nutrients that may be discharged into specific areas[10] of the catchment (on the basis of how many nutrient units are anticipated to reach the lake during any one year).

43 The total amount of nutrient discharge units (the cap amount) will then be shared amongst landowners (and unregulated/permitted activities) in accordance with the

[9] Opportunities to challenge conditions of consent can be limited by reflecting the key conditions (e.g. the surrender obligation or reporting requirements) in the Plan Change itself. We discuss this further below.

[10] We refer here to the proposal to separate the catchment into "vintages".

number of discharge units allocated to them through the chosen allocation mechanism (discussed in greater detail below).

44 We understand that you consider the Governing Body may need to change the cap over time, in response to new information or revised assessments. We consider, however, that the total amount of discharge units available as set by the cap will be a critical issue for the programme, with direct effects on individuals. The cap should therefore be, to the extent possible, developed through a public planning process and incorporated into the Regional Plan.

45 Preferably this means the cap should be set in the Regional Plan, but if you consider this will lead to a need for semi-regular amendment, you could instead consider setting out the process and criteria for determining the cap in the Regional Plan, rather than the actual cap itself. Exactly what that process and criteria might include needs to be fleshed out in discussion with Motu's science advisors but the process for revising the cap should have a set goal (say a reduction of nutrients to x level by x year), and should be based solely on what the latest scientific analysis suggests is the necessary cap to get to that point. If the cap is to be revised on anything other than a purely technical basis (for example if broader political or economic decisions are able to be factored in) then a plan change (focused solely on the cap) will be required.

46 The Plan Change will need to provide for the Governing Body to make this assessment and for any peer review process considered necessary. A dispute resolution process may also need to be considered. The Plan Change will also need to address how often such reviews of the cap should occur and when a revised cap will come into effect (as both these matters have implications for investment certainty).

47 I note that we have assumed that the changes to the cap will be in response to revised information. If in fact you intend that the cap should follow a steady path of reduction (regardless of new information) then this gradually declining cap should be set into the Plan Change.

***The allocation mechanism***

48 We understand that once the nutrient discharge cap has been established, it will then be distributed as follows:

48.1 A proportion of the cap will be allocated to unregulated/permitted activities such as urban areas or rural activities beneath the programme threshold (these activities will not receive nutrient discharge units as such but will need to be accounted for in the allocation of the cap); and

48.2 Most of the cap will be allocated to landowners carrying out discharge activities, who will receive an allocation of nutrient discharge units to be calculated via an allocation mechanism.

49 This broader distribution should be noted in the variation, along with the basis for calculating how many units will be assigned to below threshold activities. The key allocation issue however will be how to allocate the nutrient discharge units between landowners.

50 There are many different allocation regimes which could be used to allocate the units, for example, participants could be allocated individual nutrient discharge units based on their land-holding, their historic use of the land or they could be allowed to purchase individual units by auction. The Council/community will need to consider which allocation mechanism (or combination) will be most fair, effective and appropriate.

51 Regardless of which regime is ultimately decided upon, we consider that the allocation mechanism needs to be clearly spelled out in the Plan Change. This is because the allocation (unlike the total cap) affects the relative benefits received by individual landowners.

52 We do not mean to suggest that the Plan Change identify that Mr Paterson gets 200 units and his neighbour 175; rather it should identify a clear process for calculating how many units will apply for any given property. So a landowner can enter in the area of their site, or whatever other factors are relevant and use that to calculate how many units they will receive. While the allocation mechanism may require the inputting of information and some calculation, it should not involve discretion.

53 However allocated, the number of units allocated to each property should then be recorded with the resource consent granted for the discharge activity, but the allocation will not limit the scale of the activity authorised by the consent as such.

54 So, if a landowner has been allocated 200 discharge units, the resource consent would state that controlled activity consent has been granted to undertake the relevant discharge activity on that landowner's property. Separately, the covering letter for the consent would advise that the property has been allocated an annual allocation of 200 discharge units. However, the consent would not specify the scale of the activity (e.g. stock numbers). Instead, as we discuss shortly, the consent would be subject to a requirement to surrender annually a sufficient number of nutrient discharge units to cover the scale of the discharge activity that actually occurred on the property in that preceding year.

55 We have recommended that the allocation not form part of the consent terms because then that allocation is fixed for the lifetime of the consent (up to 35 years) regardless of subsequent amendments to the cap. Accordingly we have suggested a separate allocation process that only applies to people who have consents but which avoids having the allocation as part of the consent itself. Under this allocation approach, if the cap is altered, with consequential amendments to the level of allocation for individual properties, the Council can simply advise landowners of the amended allocation and when that will apply from.

56 Alternatively if it was considered preferable that each consent include the specific allocation granted as one of its terms, then the consent could also include a review clause which specifically recognised that the Council (or Governing Body) could

make amendments to the cap, and would require that each consent be 'reviewed' (i.e. amended) accordingly as and when required.

***Division of the catchment into vintages***

57 We understand that you propose the Lake catchment should be divided into various areas based on the amount of time that it takes nutrients to make their way from the land to the Lake. We understand that this division is necessary as there are significant differences in the time it takes for nutrients to reach the Lake depending on where they are 'discharged'.

58 This leads to a requirement for nutrient discharge units to be divided into various 'vintages'. That is, because nutrients from discharge activities at location A will reach the lake in 1 year from now but those from location B will arrive 50 years from now, landowners in location A will need 1 year vintages and landowners in location B will need 50 year discharges.

59 The vintage system will need to be clearly explained in the explanation provisions and policies. Vintages would then need to be provided for within the allocation mechanism. The Plan Change will need to detail any necessary restrictions on the surrender of different vintages and should include a map detailing the relevant vintage areas.

60 We note that the vintages system could lead to a series of practical restrictions within the market. While we understand the importance of dividing the catchment into vintages we would recommend dividing the catchment into as few vintages as possible so as not to unnecessarily limit the market or complicate the programme.

***The surrender obligation***

61 As noted above, we suggest that the nutrient trading programme include a requirement that each consent holder must annually surrender nutrient discharge units corresponding to the actual scale of nutrient discharge from their land use activities over the previous year.

62 It is important to highlight that the surrender obligation must relate to the actual activities not the original allocation. For example, if a landowner has been allocated 100 units for the year, and during that year they have discharged the equivalent of 150 units of nutrients, then at the end of the year they must account to Council for 150 units back to the Council, meaning they would need to have acquired an additional 50 units on the market.

63 Also the Plan (and consent conditions) should clarify that the nutrient discharge units' surrender must accord with the vintage of the relevant property.

64 This process of accounting for actual nutrients discharged is referred to as the "surrender obligation". We recommend that this obligation is noted in both the Regional Plan provisions and as a condition of consent.

*Calculation of actual discharge*

65 The surrender obligation will require the provision of detailed information to the Council regarding the ongoing operations on each property and the level of nutrients

discharged, to prove that the actual discharges correspond to the number of nutrient discharge units[11] being surrendered to the Council.

66 The requirement to submit this information, when fulfilling the surrender obligation, should also be expressly noted in the Plan Change, and again specifically required as a condition of resource consent.

67 The Plan Change will need to clarify who is responsible for reviewing the surrendered units and assessing the land use activity information provided to determine whether sufficient nutrient discharge units have been surrendered. We recommend that this role be left with Council for administrative efficiency and because the Council will need to enforce any non-compliance[12].

68 While we consider the Council should be responsible for assessing annual land use information and calculating the required number of nutrient discharge units for surrender, we consider the Governance Body will have a role in determining how to assess the effects of new technology or new practices that reduce emissions. That is, if a landowner (or any other person) introduces new technology or new practices to reduce emissions then the Governance Body will need to assess the extent by which that technology or practice reduces the actual nutrient discharges of the land use activities[13].

69 We understand that revised calculations based on any new methodology will only apply in the following year. We anticipate that the Governance Body's decisions on new technology and new practices will set a precedent and that the next landowner to use the technology or practice can then simply be assessed by Council. In practice the ability for Council to carry out this assessment will be subject to whether the amount of nutrient reduction from the new technology or practice is dependent on any site specific factors but over time a clear picture of the effect of the technology or practice should emerge.

***The trading process***

70 It is intended that consent holders should be able to sell and purchase nutrient discharge units. The cap means that overall there must be no net increase in discharges within the catchment, therefore increases in discharges on one property (above the allocated amount) can only occur where there are corresponding discharge decreases elsewhere in the catchment. This trading ability is the key element of the nutrient trading programme as it allows the market to determine the most cost-efficient way to reduce discharges and allows higher value activities to continue subject to addressing their external environmental costs.

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11 Exactly what level of nutrient discharge corresponds to one unit is a matter which will also need to be addressed in the Plan Change.

12 As discussed with you previously, advice on how to set up a compliance system to enforce the nutrient trading programme will form a third stage of work. We note that this will also need to consider how landowners who wish to challenge the calculation of units may do so, other than by refusing to surrender the required units.

13 While the employment of new technology and practices should lead to cost savings, the assessment process will still need to be as robust and cost efficient as possible, as it otherwise may risk deterring innovation. We note the costs of proving new technology will tend to fall on those taking the innovation.

71 As noted in our previous advice, we consider that the sale and purchase of discharge units can and should operate independently of the Council and should not involve any consenting requirements. This will reduce transaction costs, delay and administration. Moreover, with the overall cap in place there is no environmental need to control the trading of nutrient discharge units between landowners. It follows that the trading process should not be regulated by the Plan Change[14].

72 Having said that, we consider there are three areas where some degree of regulation of the market may be required. These are:

72.1 To determine who should be able to purchase nutrient discharge units;

72.2 To confirm that purported trades of nutrient discharge units have indeed occurred; and

72.3 To address the risk that properties are sold without the allocation rights included.

*Who can participate?*

73 On the first point, the community needs to consider whether the nutrient discharge unit should be a completely open market, where anyone could buy nutrient discharge units regardless of whether they were a landowner; or whether the market should be restricted to landowners. If the market is to be anything other than completely open, the extent of restrictions will need to be noted in the Variation.

*Keeping track of trades*

74 On the second matter, Council needs to have some way of ascertaining that if Landowner A is surrendering 150 units, 50 of which they claim to have purchased from Landowner B, that Landowner B has indeed sold Landowner A the 50 units. Otherwise Landowner A could simply make up additional units or could 'steal' units from another landowner, which would either leave the nutrient trading programme in disrepute (as it would be seen as allowing the double counting of units) or at least leave the Council with a difficult dispute to resolve.

75 Accordingly while the trading process should remain essentially unregulated, we consider that the Plan Change should require that any person purporting to have purchased units should be required to provide copies of some form of receipt.[15] Council should then be required to advise the vendor that it has received notice of the sale, and will amend its records to reduce the vendor's allocation accordingly.

76 It follows from this that we consider Council must also maintain a register or some other form of record of the consent holders and their respective allocations at any given time. This register could be public and could remove the need for owners of units to have any physical receipt.

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[14] Although it may be useful to have an explanatory note in the Plan Change to clarify this, in case there is any doubt.

[15] The receipt needs to identify the vendor and amount of units but need not identify price.

*Sale of Properties separately from Discharge Unit Allocations*

77 A final point to consider is how to address the sale of nutrient discharge units during the sale of a property. Unless otherwise regulated we consider nutrient discharge units will be treated like water permits and the units (including the ongoing consent allocation for the lifetime of the consent) could be sold separately to the land. This could leave some properties without any allocated units.

78 In theory properties being stripped of any discharge allocation is simply an effect of the operation of a free market (and indeed it could also occur where a property owner sells all their allocation prior to disposal of the property). However this situation could prove problematic in practice as new landowners unexpectedly find themselves with a farm they can't graze stock on without purchasing new nutrient discharge units.

79 Of course this would not be a problem if the price they paid for the farm reflected the absence of a discharge allocation, or they purchased in full knowledge of the lack of any such allocation, but this will not always be the case. The Plan Change could either take a buyer beware approach or could require as a condition of consent that the Landowner advise any subsequent owners of the level of units being transferred with the property and what level of activity that enables. Alternatively (or in addition) the Council could record the need for emissions units and record of units held on the Land Information Memorandum (LIM) for the relevant properties.

**Enforcement and Compliance**

80 Once implemented, the nutrient discharge programme will need to be regularly monitored to ensure compliance. As discussed previously the compliance strategy for this programme is a separate, and not insignificant, piece of work. Consideration will be needed as to how best to ensure compliance and as to what penalties for non-compliance will be appropriate. At this point we simply note that the Plan Change will need to outline how compliance with the relevant land use rules will be monitored and measured, and the penalties for non-compliance. We also recommend that agreement to on-site monitoring and the supply of information be a condition of consent to avoid any challenge from landowners to Council's monitoring role or requests for information.

81 We anticipate that this will require ongoing monitoring based on either information based or random checks to assess the scale of land use activities over the course of a year. As previously discussed however, a breach of the discharge activity consent does not occur with the change in activity levels, but with the failure at the end of the year to surrender sufficient nutrient discharge units. At that point a range of enforcement, commercial and prosecutions options will need to be considered, as noted in out earlier presentation to you. This matter will need to be discussed further with the Nutrient Trading Group in the next phase of work.

**Governance Body**

82 We understand that as part of the programme, it is intended to set up a Governance Body to assist with facilitating changes to the nutrient trading programme once established via the Plan Change.

83 We consider that the Plan Change should identify the Governance Body, prescribe its function, articulate its guiding principles and specify what kinds of representatives or expertise will make up its composition. It may be appropriate to have a representative from each of the key stakeholder groups make up the Body, but that is a matter which the community will have to determine through the Plan Change.

84 Functions should include:

84.1 Review of novel technology or practices to determine the extent to which they reduce the levels of nutrient discharge (and therefore nutrient discharge units saved);

84.2 Any amendments to the nutrient discharge cap within the process and criteria set out in the Plan Change;

84.3 Review of the methodology – on say a 5 year basis, or as new information becomes available – leading to a recommendation to amend the Regional Plan, if necessary.

**Conclusion**

85 We trust that this letter assists in outlining the matters which will need to be addressed in order to incorporate the nutrient trading programme into the Regional Plan. We are happy to meet with you to clarify any of the matters raised. Please feel free to contact us to discuss.

Yours faithfully

Cameron Law
SENIOR SOLICITOR

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