

SUBMISSION

NSW Environment Protection
Authority

Review of Hunter River Salinity
Trading Scheme – Amendment
Regulation 2016

NSW MINERALS COUNCIL

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Executive Summary

The NSW Minerals Council (NSWMC) welcomes the review of the *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002* (the Scheme), which has proven to be an effective means of meeting salinity and environmental objectives in the Hunter River whilst still allowing industries to discharge excess saline water under high-dilution scenarios.

The 10-year statutory review, and subsequent preparation of the draft *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Amendment Regulation 2016* (draft Regulation) presents an opportunity to enhance the operation of the Scheme.

The Environment Protection Authority (EPA) has proposed a number of sensible amendments to the draft Regulation. NSWMC supports the majority of the proposed amendments to the draft Regulation.

In relation to the most significant change proposed – the substantial increase to flood flow thresholds – the industry has reviewed the additional analysis prepared by the EPA on the impact of the proposal. The industry generally agrees with the EPA's conclusion that the impact on discharge opportunities is likely to be low and we therefore do not oppose the proposal. However, the industry believes that the EPA should focus on improving the efficiency of temporary trading mechanisms so that participants can take full advantage of unused credits during discharge events, which often have a very short lead-in time.

The industry will cease the operation of the industry-coordinated flood flow sharing scheme (i.e. the MERF scheme) should the proposed changes to flood flow thresholds go ahead.

There are some aspects of the draft Regulation or the Scheme generally that would benefit from amendment or improvement.

In relation to the draft Regulation:

- The drafting of the clause relating to credit transfers from restricted to non-restricted sectors is unclear. The EPA should reconsider the drafting of the proposed provisions relating to clause 49C(3)(c) and (4) to ensure that its effect is as intended.
- There is currently no defence to offences relating to contravening trading rules, even where a Scheme participant uses the appropriate process in good faith and their mistake is reasonable. In certain circumstances, there should be a defence to a penalty for relying on an irregular trade.
- A definition of eligible person should be included and the purchase and trading of credits should be limited to those who meet the eligible person criteria.

In relation to other operational improvements or investigations relating to the Scheme:

- The procedural aspects and operational systems of the Scheme should be made more robust and sophisticated, particularly in relation to managing temporary trades.
- In collaboration with the Upper Hunter Mining Dialogue, the EPA should investigate and characterise the chemistry of discharge water and the effect of its interaction on the Hunter River catchment.

1. Introduction

1.1. About the NSW Minerals Council

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry. Our membership includes approximately 80 members, ranging from junior exploration companies to international mining companies, as well as associated service providers. NSWMC represents all coal mining operations that participate in the Hunter River Salinity Trading Scheme.

1.2. Background

The *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002* (the Scheme) has proven to be an effective means of meeting salinity and environmental objectives in the Hunter River whilst still allowing industries to discharge excess saline water under high-dilution scenarios.

The 10-year statutory review, and subsequent preparation of the draft *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Amendment Regulation 2016* (draft Regulation) presents an opportunity to enhance the operation of the Scheme.

The Environment Protection Authority (EPA) has proposed a number of sensible amendments to the draft Regulation. NSWMC supports the majority of the proposed amendments to the draft Regulation, including the most substantial amendments discussed in Section 2 of this submission. Nevertheless there are some aspects of the draft Regulation or the Scheme generally that would benefit from amendment or improvement – these are outlined in Sections 3 and 4.

2. Support for proposed amendments

2.1. The increases to flood flow thresholds are appropriate

The EPA has thoroughly investigated the implications of increasing the flood flow thresholds and removing the Managed Envelope of Residual Flows (MERF) flood-sharing process. The EPA has shown that its proposal to increase the flood flow thresholds may in occasional circumstances result in reduced opportunities or increased costs to discharge saline water (as compared to the current flood flow thresholds). Industry agrees that the potential impacts are likely to be infrequent and that improvements to temporary credit trading mechanisms would mitigate most of the impacts.

The industry will cease the operation of the MERF flood-sharing process should the proposals to increase the flood flow thresholds go ahead.

Recommendation

- Improve the efficiency of temporary trading mechanisms.

2.2. Linking credit locations to discharge points is appropriate

The EPA has demonstrated in its *Report and Recommendations*¹ the advantages of avoiding complications relating to scheduling and organisation of discharges when the point of discharge may be unknown. Therefore, the industry supports the assignment of credits to an authorised discharge point.

3. Regulatory amendments requiring further consideration

3.1. The drafting of the clause relating to credit transfers from restricted to non-restricted sectors is unclear

The proposed clauses 49C(3) and (4) will replace the existing clause 60 and state:

(3) A credit cannot be assigned to an authorised discharge point (the proposed authorised discharge point) as it relates to a particular block if:

...

(c) a sector credit discount factor of less than one has effect in relation to the block when it is in the sector that the proposed authorised discharge point is in.

(4) Subclause (3) (c) does not prevent an assignment of a credit if, immediately before the sector credit discount factor took effect, the credit was assigned to another authorised discharge point that is in the same sector as the proposed authorised discharge point.

It is understood that the intent of clause 49C(3)(c) is to permit credit transfers from a restricted sector to a non-restricted sector. NSWMC supports this intent. However, the drafting of clause 49C(3)(c) does not clearly convey this intent.

The proposed provisions seem to operate the same way as the current clause 60 (proposed for deletion) but worded differently. Current clause 60 enables credit transfers *within the same sector* whilst a sector discount factor is less than 1, but not from outside the sector. The new proposed subclause 49C(4) makes the same provision, however, only allows assignment if it took place *“immediately before the sector credit discount factor took effect”*.

The effect of these provisions is unclear.

The EPA should also note that, within the Explanatory Tables, it makes reference to a “new” sub-clause 49C(6), however this sub-clause does not appear in draft Regulation. This missing sub-clause might have clarified the intent of 49C(3)(c).

The EPA should revisit the drafting of this sub-clause to ensure that its effect is clear.

Recommendation

- Reconsider the drafting of the proposed provisions relating to clause 49C(3)(c) and (4) to ensure that its effect is to permit credit transfers from a restricted sector to a non-restricted sector.

¹ EPA 2016, *Review of the Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002: Report and Recommendations*, p.30, NSW Government.

3.2. In certain circumstances, there should be a defence to a penalty for relying on an irregular trade

Clause 62 of the existing Regulation relates to the effect of contravening trading rules. However, there is no defence to this offence even where a Scheme participant uses the appropriate process in good faith but despite that the trade of a credit (which the participant has relied upon) proves to be irregular. Some potential examples of innocent transferees may include:

- EPA approve transfers (see clause 64(1) – credit transfers do not take effect until recorded in the Register) – the EPA’s requirements for approval of a transfer of credits may include things of which the transferee cannot have knowledge.
- Transferor may not be properly registered as a credit trader (see clause 54(b)).
- “Corrections” of Register under clause 65.
- Electronic failure or administrative failure by EPA (see clause 64(1) – credit transfers do not take effect until recorded in the Register and clause 63A(1) – assignment of a credit does not take effect until it is entered in the Credit Register)

So, even where the EPA system allows the trade of a credit, but it subsequently turns out to be in breach of the EPA’s process, there is no relief.

Given the significant increases in the thresholds for flood flows in all sectors (and thus a diminished scope for discharges outside of credits), it is anticipated that there may be more reliance on temporary trades to enable necessary discharges in the enlarged high flow window.

Therefore, there should be a defence to penalty for relying on an irregular trade where the scheme participant has acted in good faith and made an honest and reasonable mistake.

Recommendation

- Provide a defence for an irregular trade where the scheme participant has acted in good faith and made an honest and reasonable mistake.

3.3. The definition of eligible person should be retained

NSWMC retains the view that participation in the Scheme should be limited to those who have a genuine current or future need to discharge saline water. Allowing the Scheme to potentially be manipulated by external parties could have significant ramifications for major employment and energy generating industries in the region.

NSWMC believes that a definition of an eligible person (such as, in the existing clause 44(2)) should be included in the regulation and that participation in the Scheme should be restricted to those who meet the criteria.

Under the current proposal to remove the definition of eligible person under clause 44(2), the concept of “eligible person” in proposed clauses 52(1) and (2) is undefined and serves no purpose.

Recommendation

- A definition of eligible person (such as in the existing clause 44(2)) should be included in the regulation and participation in the Scheme should be restricted to those who meet the criteria.

4. Operational improvements and investigations requiring further consideration

4.1. The procedural aspects and operational systems of the Scheme should be made more robust and sophisticated

The procedural aspects and operational systems that assist with the management of the Scheme need to be more robust and sophisticated. This includes:

- The credit register process.
- Processes for registration of assignments.
- Processes for registration of transfers of credits.
- Operational aspects relevant to upcoming discharge opportunities.
- The temporary trading mechanisms, generally.

These systems should be able to be utilised at all times (24 hours, 7 days a week). The processes and systems proposed should be explained and made transparent.

The operational efficacy of these elements of the Scheme will be paramount if the central amendments of increases in flood flow thresholds and requirements to assign all credits to an authorised discharge point are formalised. It is therefore appropriate to consider the practicalities and likely efficiency of those systems simultaneously with the considerations relating to regulatory changes.

One specific issue that should be resolved relates to the current inability of the Scheme to account for daylight savings hours changes in the timing of the discharge blocks, since this can cause unintended regulatory breaches.

Other opportunities to improve the operational systems of the Scheme include:

- Providing more lead-in time pre discharge events through some form of wet weather forecasting early warning system and flow modelling.
- Providing an SMS alert for forthcoming River Registers.
- Improve facilitation of temporary trades for specific discharge events, such as via a notification to all licencees when credits become available.
- Installing functionality that prevents trades that are inconsistent with the Scheme rules.

Recommendations

- Aim to maximise the robustness and sophistication of procedural aspects and operational systems of the Scheme, particularly in relation to temporary trading mechanisms.
- Disclose the details of proposed improvements to Register management, including: recording and administration of assignments, and transfers of credits.
- Enable the timing of discharge blocks to reflect changes in daylight savings hours.

4.2. In collaboration with the UHMD, the EPA should investigate and characterise the chemistry of discharge water and the effect of its interaction with the Hunter River catchment

The Hunter Catchment Salinity Assessment recommended that the effects of different components of saline water discharge (i.e. ionic composition, metals/metalloid contamination etc.) be understood, and that experimental studies be undertaken. The EPA has reiterated this by stating that it “*will consider the most appropriate mechanism for further investigating the issue of other contaminants that may be present in participant discharge waters and their impacts on the Hunter River catchment*”.

The Upper Hunter coal mining industry and its Upper Hunter Mining Dialogue (UHMD) stakeholders have been very interested in ensuring that the Hunter Catchment is in good health. The UHMD’s *Joint Working Group – Water*² has been particularly interested in understanding whether any potential metallic content in discharge water is sufficiently diluted or is impacting upon the water quality of the river. This working group has in fact committed to investigating some aspect of the health of the Hunter River, and seeks to do so in collaboration with the EPA.

Recommendations

- Commit to funding investigations of the chemistry of discharge water and any effect of its interaction on the Hunter River catchment.
- Liaise with the *UHMD Joint Working Group – Water* with regard to undertaking investigations of different components of saline discharge water.

² A working group consisting of industry, government, community and landholder group representatives that are looking at ways to reduce any impacts from mining on water resources in the Upper Hunter region.