Catchment Management for Protecting Water Quality: Why the reticence to regulate diffuse source pollution?

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Overview

1. What is the problem?
   - Defining “diffuse water pollution” and its regulation in the constitutional setting

2. Regulatory challenges and approaches

3. Case study: SW Western Australia
   - Concluding remarks: why the reticence to regulate?
     - The Vision
     - Comparative comments from Great Barrier Reef
     - New potential for common law riparian right to water quality
1. What is “diffuse water pollution”?
‘Diffuse water pollution’...

• Difficulties with measurement and attribution

• Cumulative impacts – generally only significant on a landscape scale over time

• Episodic variability – high rainfall and high pollution load lead to high impact episodes

➢ Agriculture (incl. pastoral) major contributor
  – Pollutant emissions influenced by a number of variable factors
  – Economic & social fragilities

>> political sensitivity of regulation
...and its ‘regulation’ in the constitutional setting

- ‘regulation’ – we adopt traditional meaning
  - Australian Gov’t’s Best Practice Regulation Handbook
  - Contemporary definitions include non-state / non-legal means of achieving societal outcomes

- Why should we regulate diffuse water pollution?
  - Limitations of common law rights to water quality

- Constitutional setting
  - States have primary authority to regulate
  - But Commonwealth authority could sustain legislation to limit State management; for example
    - ‘Water trigger’ & Water Act 2007 ‘sustainable diversion limits’
2. Regulatory Challenges & Approaches

- Trans-jurisdictional context: shared responsibilities across governments, agencies and sectors
  - Challenge of protecting waters from land use emissions

- Key regulatory challenges:
  - agreeing water quality objectives and targets
  - translating them into effective policy & regulatory tools
  - Voluntary measures alone ‘manifestly unsuccessful’
    - a range of regulatory measures are available; eg regulating inputs & best management prac’s

- Targets: Total maximum pollutant loads (TMPL) from NWQMS = flow $\times$ concentration / period of time
  - Eg of US TDMLs – cover both point & non-point
3. Sth-West Western Australia

- 2 basic propositions from NWQMS doc’s;
  - States develop Water Quality Improvement Plans
  - Identify objectives and TMPLs
    - Allocate responsibilities for current pollutant loads, and
    - Set targets for TMPL reductions

**NB** How to allocate burden of reductions to particular entities?

- Historical practice: non-regulatory & timid regulation
  - 1990s: *Env Protection Act* *Env Protection Policies*
  - 2006-2012: non-statutory WQIPs implementing NWQMS process – but not allocating pollutant load responsibility to particular entities or land users
  - Reliant on Cwlth funding to make & implement
Sth-West Western Australia (2)

- Means to implement WQIPs re particular entities:
  - *Environmental Protection Act* Part V licences relating to intensive animal raising
  - Environment Protection (Unauthorised Discharge) Regulations 2004
  - Fertiliser Action Plan 2007-08 & 2012-16 & farmer attitudes
  - *Soil & Land Conservation Act* - ‘land degradation’
- Notices to landholders to refrain / adopt land use prac’s
- Breach of notice is offence; but small penalties
- Commissioner’s office redolent with reticence: poor investigation process & mistaken standard of proof
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Geographe Bay Catchment

• Review by Prof Barry Hart, 03 / 2014: Key findings
  – Water Quality Improvement Plan 2009
  – Implementation heavily reliant on *ad hoc* NRM funds
  – Lack of regulation and enforcement; no Ramsar plan

• Key recommendations for future management

• State Government responses – minimal adoption
  – single Management Authority v Lead Agency
  – adequate powers and reporting responsibilities
  – Better catchment planning, including of drainage network and redirecting flushing flows
  – Dairy regulations to ensure BMPs adopted
  – Better funding, including by 4 new levies
So, why the reticence to regulate?

- Diffuse water pollution is complex; solutions are complex but increasingly available

- **Vision:** regulatory reform backed by Cth legislation
  - Mandate Cth accredited State plans to adopt TMPLs & allocate legal responsibility for individual loads
    - Science for this is improving & probably adequate
  - Need for a range of implementing measures: regulation supported by a range of voluntary / self reg’n measures
  - Need long term funding commitments, including for implementation, monitoring, reporting and enforcement
    - Apply polluter pays principle to at least a share of costs

- Political will?? 2015 Cth – Qld *Reef 2050 Long Term Sustainability Plan* – proposes water quality regulation
• New potential for common law riparian right to water quality
- “the main sources of nutrients have been clearly identified (agricultural and urban) ... the management actions have also been identified”: Prof Barry Hart