Spilling the beans on environmental compliance: emergency plans in the New Zealand legislative framework

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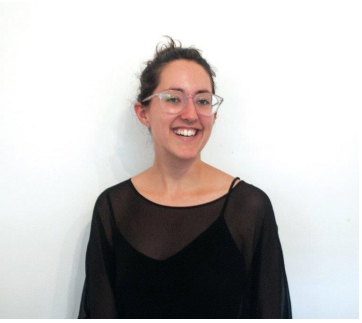

Emergency management for hazardous substances is, from a legislative perspective, oriented towards protecting the environment and the public from spills and other untoward events. This is reflected, for example, in s 4 of the Hazardous Substances and New Organisms Act 1996 (HSNO), with the purpose of the Act being to "protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances".

Although there is very little literature or analyses available on emergency plans, they are an essential mechanism in protecting our environment and the public via emergency management. Additionally, they are required under various district and regional plans, hazardous substances regulations and, potentially, local trade waste bylaws. In the last year, the Auckland Unitary Plan and health and safety at work regulations have also instigated changes in this area.

Environmental compliance in regards to safety management is likely to become increasingly important in the future, in light of Marie A Brown's *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, 2017). This article will outline the various legal mechanisms requiring emergency plans and consider the consequences of businesses failing to fulfil their obligations, as well as the benefits of compliance.

THE LAW

Hazardous substances regulations

Where a business has environmentally hazardous substances on-site that are over certain threshold quantities, it will require an Emergency Response Plan (ERP) under the Hazardous Substances (Emergency Management) Regulations 2001. These regulations are enforceable under the HSNO, which enables territorial authorities to inspect premises (ss 97–103) and issue compliance orders (ss 104–108) and infringement notices for fines for non-compliance (s 112). Additionally, the HSNO makes it an offence to fail to comply with any controls specified in any regulations (s 109(1)(e)(ii)), and to fail to comply with any controls imposed by any approval granted under the Act (s 109(1)(e)(i)), for which there is a maximum penalty of a term of imprisonment not exceeding three months or a fine not

exceeding $500,000 and, if the offence is a continuing one, to a further fine not exceeding $50,000 per day (s 114(1)).

District and regional plans

The Resource Management Act 1991 (RMA) makes it an offence to use land in a manner that contravenes a district rule or regional rule (s 9). Section 15 addresses unlawful discharges of contaminants into the environment, which is a strict liability offence under s 338(1)(a). The maximum penalty for an offence under either of these provisions is $300,000 in the case of a natural person, or a term of imprisonment of two years, and $600,000 in the case of any other person (s 339(1)).

Additionally, enforcement orders and abatement notices can be issued for an offence, as well as an infringement fee of $300 for an offence under s 9 and a fee of $300–$1,000 for an offence under s 15 (under the Resource Management (Infringement Offences) Regulations 1999).

Under the Auckland Unitary Plan (AUP), "industrial or trade activities" are required by the permitted activity standards to have an Emergency Spill Response Plan (ESRP) and potentially also an Environmental Management Plan (EMP) where hazardous substances are stored on-site in quantities "greater than used for domestic purposes" (ie five litres). There are many businesses that this impacts on, as "industrial or trade activities" span a wide variety of industries, from agricultural support and animal feedstuffs to wood and paper product storage and manufacturing. If a business already has an ERP as a result of its complying with the Hazardous Substances (Emergency Management) Regulations 2001, only *some* of the requirements of an ESRP under the AUP will need to be included. Additionally, where a business was established prior to a plan being notified and remains the same or similar in terms of its character, intensity and scale, it may constitute an existing use and be lawful under the RMA (under ss 10(1)(a), 10A, 10B or 20A). As such, the AUP requirements will tend to apply only to *new* businesses, or to older businesses whose emergency plans and systems were not originally compliant with the regional plan that preceded the AUP.

The district and regional plans for Dunedin, Wellington and Christchurch all approach the matter of emergency plans in regards to hazardous substances relatively similarly. While some of these plans do not touch upon emergency plans at all, on the whole they all appear to allow for some form of emergency plan or management plan to be required as a condition of granting a resource consent. Additionally, the Regional Plan for Discharges to Land for the Wellington Region (updated July 2014) requires a discharge management plan (which includes emergency response procedures) in regards to reticulated sewerage systems (at [4.2.14]). However, outside of these examples there is nothing in these plans specifically requiring businesses to institute such plans. Rather, the onus is on the council to encourage the adoption of such plans, or to require them within the context of granting a consent – in contrast with the AUP where it is a permitted activity standard that industrial and trade activities must have such plans in place. The AUP may signal the way of the future in terms of protecting the environment, given that what it requires is so much more stringent as compared to the other district and regional plans reviewed here.

Health and safety at work regulations

The Health and Safety at Work (Major Hazard Facilities) Regulations 2016 apply to relatively more hazardous substances, such as those that are acutely toxic. Additionally, the threshold quantities required for the regulations to apply are relatively high, ranging from five to 50,000 tonnes. The regulations require the operator of a major hazard facility to prepare an emergency plan, somewhat different again from an ESRP, EMP and ERP.

2016 also saw the implementation of the Health and Safety at Work (General Work and Workplace Management) Regulations 2016. Regulation 14 requires a person conducting a business or undertaking (PCBU) to prepare a general emergency plan, covering effective responses, evacuation procedures and testing of the plan. Hazardous substances would likely need to be addressed by such a plan.

Contravention of either of these provisions may lead to a fine not exceeding $10,000 for an individual and $50,000 for any business or undertaking.

Trade waste bylaws

Additionally, the relevant council's trade waste bylaw may be relevant. For example, under the Auckland Council's Trade Waste Bylaw 2013 the Council may consider whether a business has a trade waste management plan and/or emergency response procedures in deciding whether to

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grant a conditional trade waste consent, or it may require a business to institute such procedures. A breach of this bylaw can lead to a maximum penalty of $200,000 per offence (cl 24(1)).

ENFORCEMENT

Spills

The case law makes it clear that, where a spill of environmentally hazardous substances takes place, a business that is prosecuted is likely to experience significant penalties.

The latest example of this is *Waikato Regional Council v Chemwash Hamilton Ltd* [2017] NZDC 3284, where a Hamilton cleaning company was convicted under the RMA for a toxic discharge of chemicals in Paeroa that killed a significant number of fish (at least 53 eels and 28 banded kōkopu). Judge Kirkpatrick stated that the company's activities were "at least reckless", and that the steps it had taken to protect against a discharge were "completely inadequate" (at [13]). The company instigated a review and implemented changes to its systems as a result of the incident. It was fined $39,000. Similarly, on 8 March 2017 the Waikato Council fined a farmer $65,750 for discharging dairy effluent into the Piako River and the Waihou River.

The case law indicates that fines for a spill will range from around $25,000 (as in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC)) to the highest fine in New Zealand of $300,000 for the Rena oil spill in *Maritime New Zealand v Daina Shipping Co* DC Tauranga CRI-2012-070-1872, 26 October 2012.

Emergency plans

There is little case law as regards the enforcement of emergency plans themselves. The only case which appears to have a prosecution of a party in regards to such a situation is that of *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68 (DC), which involved a spill of diesel. The defendant was fined $15,000 under the Hazardous Substances (Emergency Management) Regulations 2001 for failing to ensure that an ERP was tested every 12 months (this was reduced in the High Court to $8,500 to recognise the defendant's co-operation with WorkSafe New Zealand's investigation and its assistance in clean-up efforts). Judge Dwyer in the District Court stated:

> *"[54] … It is reasonable to ask the question, if a tested emergency response plan had been available and executed when this discharge occurred, would the consequences of the offending have been what they were?"*

In relation to the spill itself, the charge for failing to maintain a stationary container system so that it contained a hazardous substance without leakage resulted in a fine of $51,500 (under the HSNO) and the charge under s 15 of the RMA amounted to $240,000, indicating the significance for the Court of such incidents.

There is very little data available to indicate the extent to which councils, the primary enforcers of the RMA and HSNO regulations, enforce the requirement to have these plans. Although the *Last Line of Defence* report, for example, notes how many infringement notices, abatement notices, enforcement orders and prosecutions have been undertaken by councils over the last few years, the data does not specify what breaches have taken place. However, this report identifies a lack of monitoring and enforcement by councils in general – signalling that enforcement of the requirements to have such plans may not, in itself, be extensive.

An example of this can be seen in the monitoring of dairy farms in the Waikato region. Of the 773 farms monitored thus far between 30 June 2016 – 30 June 2017, 16.5 per cent or 127 of them were found to have high-risk effluent

systems that could contaminate the environment. However, while there are 4,500 farms in this area, only 1,200 will be investigated in this time: Alexa Cook "More than 100 Waikato dairy farms found to be 'high risk' for effluent spills" (9 March 2017) Radio New Zealand <www.radionz.co.nz>.

However, at least within the context of the RMA, it appears that having appropriate systems in place (such as an emergency plan) will act as a mitigating factor in sentencing where a spill does occur. For example, in *Te Kinga Farms Ltd v West Coast Regional Council* [2015] NZHC 293 the High Court considered that the implementation of an EMP costing $300,000 after the discharge justified relatively small fines of $17,100, $25,650 and $17,100 for three separate instances of farm effluent entering water. Similarly, in *Mainstream Forwarders Ltd v Canterbury Regional Council* HC Christchurch CRI-2009-409-105, 1 October 2009 (on appeal from *Canterbury Regional Council v Mainstream Forwarders Ltd* DC Christchurch CRI-2009-009-1431, 28 May 2009), where blue ink liquid concentrate had entered water, the High Court quoted the District Court, which considered that the defendant had put reasonable steps in place to manage a spill and this was a mitigating factor:

> *"While the steps taken by the defendant proved to be inadequate, nevertheless steps were taken – it did have on hand a containment spill kit and also a spill response plan, which it implemented." (District Court judgment at [31]; High Court judgment at [13])*

Conversely, in *Auckland Council v Jenners Worldwide Freight Ltd* DC Auckland CRI-2014-092-257, 4 February 2015, which involved an unlawful discharge of 1,000 litres of methyl violet onto land in circumstances where it entered water, the defendant "accepted that it was negligent in not providing procedures concerning the storage of hazardous goods and training to its staff, and that it failed to comply with the provisions of the Regional Plan" (at [37]). The starting point for the fine was thus $180,000, with an ultimate fine of $103,561.88.

THE BENEFITS OF COMPLIANCE

Emergency plans are legally required in New Zealand. Additionally, they are an effective mechanism for ensuring that a spill or other adverse event does not occur in the first place, as they provide businesses with the opportunity to methodically assess: the environmentally hazardous substances they have on-site and how to avoid discharges of environmentally hazardous substances; how discharges will be managed in the event of a spill or other emergency; how substances will be disposed of; who will need to be contacted; their responsibilities in terms of drainage; how spills will be mitigated or avoided; how the plan will be tested; where spill kits, fire extinguishers and other such materials will be located; how staff will be trained to deal with an emergency; how the permitted activity controls in a district or regional plan will be complied with; and much more.

These are all aspects of environmental compliance that businesses should take responsibility for, both in order to fulfil their legal obligations and to manage their risk into the future – not only to avoid potentially significant penalties in the event of a spill, but to protect from reputational damage. This is particularly so in a legal environment where monitoring and enforcement are likely to become more important in the future.