

Dairy effluent prosecutions

In this article Nikki Edwards, a solicitor with Harkness Henry, outlines the consequences for farmers who pollute.

No farmer has the right to pollute

'No farmer has the right to pollute.' That was the message delivered by the Minister of Agriculture on 30 July 2009 at the Farmers' Mutual Group Annual General Meeting. It is a message that is being reinforced by Fonterra which announced earlier this year its plans to introduce a milk payout deduction system for those who pollute.

Our experience with clients in the Waikato region is that Environment Waikato is vigilant in its detection and enforcement of effluent offences. This is supported by the statistics, which show that prosecutions in the agricultural sector are increasing significantly.

The message to farmers is clear – you should ensure that you are complying with the Resource Management Act 1991 ('RMA') because failure to comply has significant consequences.

Prosecution statistics

Recent statistics released by the Ministry for the Environment (MfE) show that regional councils are taking a firm approach towards non-compliance by the agriculture sector. The MfE surveyed RMA prosecutions for the period 1 May 2005 to 30 June 2008. The table below compares this survey period against the previous two survey periods.

RMA prosecutions

Statistic	1991-2001	2001-2005	2005-2008
Total prosecutions	375	171	260
Agriculture sector prosecutions	18	64	110
(% of total prosecutions)	(5%)	(37%)	(42%)
Highest fine	\$50,000	\$55,000	\$86,500
Average fine	\$6,500	\$8,167	\$12,463
Average of 30 highest fines	\$20,367	\$20,307	\$37,142

Source: Ministry for the Environment: 'Study into the use of Prosecutions under the RMA 2005/2008'

The key messages from the statistics are:

1. Prosecutions in the agriculture sector are rapidly increasing. For the most recent period they represent 42% of all RMA prosecutions. Within that sector unlawful discharges to water, or to land

that may enter water, were the activities that were most frequently prosecuted.

2. If prosecuted, there is a strong likelihood of conviction – 93% of the 260 prosecutions in 2005-2008 resulted in convictions.
3. During the 2005-2008 survey period, the Waikato Regional Council was the most active local authority, bringing 17.4% of all prosecutions (followed by the Canterbury Regional Council and the Otago Regional Council).
4. The average fines imposed for RMA prosecutions have increased significantly.
5. While a fine is the key punishment for non-compliance with the RMA, the courts have shown a willingness to impose other forms of punishment with 38 enforcement orders, two prison terms (six and eight months), and 12 community work sentences imposed in the 2005-2008 period.

Penalties for effluent offences

The current maximum penalty under the RMA is \$200,000. Recent cases have determined the appropriate fine for effluent discharges by categorising the offence into one of the following categories:

Categorisation of effluent offences

Seriousness of offence and description	Range
Level 1 – less serious	
Unintentional one-off incidents, system failure	\$0 to \$15,000
Level 2 – moderately serious	
Unintentional but careless discharge, recurring over period of time	\$15,000 to \$30,000
Level 3 – serious	
Deliberate or extremely careless, multiple discharges or one large event	\$30,000 and above

Source: *Waikato Regional Council v Chick Limited* (27/09/07, Judge Whiting, DC Thames CRN0707950094)

Judge Thompson has recently criticised the level of fines imposed to date for not having 'enough sting ... to be really felt on the offenders financial bottom line' (*Hawke's Bay Regional Council v Stockade Pastoral Farms Limited* (20/03/09, DC Napier, CRI-2008-081-000096, paragraph 16)).

The maximum penalty has recently increased under the Resource Management (Simplifying and Streamlining) Amendment



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Act 2009 ('Act') to \$300,000 for individuals and \$600,000 for companies. The courts will also have the power under the Act to review consent conditions in this punitive context.

While the largest fine imposed to date under the RMA is \$86,500, the recent increase in the maximum penalty is likely to signal to sentencing judges a need to increase the fines imposed. If the increase in maximum penalties is reflected in fine levels proportionally, considerably increased fines can be expected.

Conclusions

In no circumstances does a farmer have the right to pollute. The RMA is a strict liability statute, so even unintentional discharges may attract prosecution unless the limited defences available apply.

From our experience, the circumstances that have commonly led to unauthorised discharges have included:

- an increase in herd size without a corresponding system upgrade;
- operating at the margins (no tolerance for unusual weather events);
- inadequate systems maintenance;
- delegation without appropriate supervision; and
- unfamiliarity with relevant rules (eg Waikato Regional Plan Rules).

Our advice to farmers is to ensure familiarity with the relevant regional council rules, educate staff and ensure systems are properly operated and maintained. Failure to do so significantly increases the risk of being prosecuted and the fines that are likely to follow are significant.

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