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## Farm Dairy Effluent Discharges can be Costly

There's no denying that most farmers in New Zealand work hard to manage their farms efficiently and responsibly. However even the most careful farmer can find themselves in the proverbial muck if farm dairy effluent is discharged contrary to a resource consent, a regional plan or a national environmental standard.

Under the Resource Management Act 1991 ("RMA"), Regional Councils are able to prosecute for a range of offences against the RMA.

In our experience, the most common prosecutions in Taranaki relate to the discharge of dairy effluent onto land and/or into waterways. Recent examples of this include *Taranaki Regional Council v Bolton* (13 June 2011) where dairy effluent was discharged from a sand trap into a waterway and from a wash tank and race onto land. In *Taranaki Regional Council v Jane* (23 August 2011) Mr Jane was convicted for four offences, the most serious of which involved a discharge from a pipe leading to a spray irrigator which resulting in ponding of effluent on land over a period of 18 days.

It is important for farm owners to be aware that owners, farm managers and/or sharemilkers can be found jointly and severally liable for offences against the RMA. This means that the owner of a farm can be prosecuted and found equally liable for an offence caused by their farm manager or their sharemilker. Further, whether a discharge was intentional or not is irrelevant, as offences against the RMA are strict liability offences.

Once charged with contravention of the RMA, there are limited grounds upon which the charge can be defended. These include:

1. If the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health or preventing serious damage to property or avoiding actual or likely adverse effect on the environment; AND the conduct of the defendant was reasonable in the circumstances; AND the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.
2. If the action or event to which the prosecution relates was due to an event beyond the control of the defendant including natural disaster, mechanical failure or sabotage; AND in each case, the action or event could not reasonably have been foreseen or been provided against by the defendant; AND the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

If a valid defence does not exist, it is generally advisable that a guilty plea be entered as early as possible. This is because when sentencing, the Judge will take an early guilty into account with a number of other factors, including matters such as:

- The nature of the environment affected and the extent of the damage.
- The deliberateness of the offence and the attitude of the accused.

- The age and financial position of the accused.
- The extent of attempts to comply.
- Whether or not the accused has shown remorse.
- Profits realised by the offence.
- Previous convictions.
- The need for deterrence (both individual and general).

The sentences that are imposed for farm dairy effluent discharges are significant and it is therefore critical that all mitigating circumstances are put before the sentencing Judge. If an early guilty plea has been entered, this will typically result in a 25% – 33% reduction in the fine ultimately imposed.

The maximum penalty for an individual under the RMA is \$300,000.00. An individual can also be liable on conviction to a maximum term of imprisonment of two years, although sentences involving imprisonment under the RMA are rare. The maximum penalty for companies and other entities is \$600,000.00. In addition to this, if an offence is an on-going one, it is referred to as a continuing offence and a fine of up to \$10,000.00 a day can be imposed. Accordingly, if a sump overflowed onto land for seven days in a row, an additional fine of up to \$70,000.00 could be imposed.

In reality, the fines that are imposed are considerably less than the maximum fines. In the *Taranaki Regional Council v Bolton* case, Mr Bolton was fined \$23,000 for two separate incidents. The Judge acknowledged that the discharges arose from an electrical failure and problems with an effluent pump but nonetheless held that the foreseeability of the problem reflected a high degree of carelessness and noted that the discharges were directly into a sensitive water body. In *Taranaki Regional Council v Jane* a total fine of \$60,000.00 was imposed. The Judge in this case found that as one of the discharges had occurred for a period of 18 days, this demonstrated extreme carelessness.

In other cases, farm owners have been found to have greater culpability than that of their farm managers or sharemilkers (see for example *Taranaki Regional Council v Lilley*, 16 November 2010) if they have failed to put in place properly functioning systems and adequately supervise management of the effluent disposal system. In *Northland Regional Council v Pinny & Bolton* (18 March 2011), Judge Whiting said this:

*“Owners of dairy farm properties cannot lightly escape their responsibilities by a contract of employment or agency. They are responsible for the infrastructure which includes any effluent disposal systems. They hold any resource consents which are required to operate a system. As the owner and holder of any resource consent they should be aware of the consequences of an effluent system that is inadequate or which is not operated appropriately. As the owner they have the authority to intervene. They have the responsibility to intervene.”*

In short, careful management and good systems are required to avoid illegal farm dairy effluent discharges. If however a discharge does occur and a prosecution follows, our resource management specialists are experienced in advising on the best course of action for farmers whether that be in relation to defending the charge or ensuring all mitigating factors are put before the Court to minimise any fine imposed.



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