



Waste and contaminated land: Who does what and why it matters

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| Specific advice should always be obtained before relying on any aspect of the content of this presentation or associated materials.



Charging Document

s 14 Criminal Procedure Act 2011

CRN:

on:

Filed in the District Court at

The Issue

Real Life Case:

- Client was contractor engaged to construct a facility
- Site was HAIL
- Got contamination expert to do DSI and consent obtained from DC
- Everything from below 500mm to landfill
- Rest could be re-used on site, as met recreational and residential guidelines
- Took everything from below 500mm to approved landfill
- Found out top 500mm unsuitable for on site use
- Found consented cleanfill, showed material to owner, he approved and they took it there
- RC found out and investigated – turns out didn't meet Class B landfill guidelines:
 - prosecuted client, site owner, principal and engineer for illegal contaminant discharge
 - Indicated that on conviction RC would seek EO to remove all fill and send to landfill
 - Total cost would be several hundreds of thousands for removal alone

Can this be right?

Yes:

- Land use consent triggered by NES because:
 - Site is HAIL;
 - Disturbance beyond PA involved;
 - district/city council administers;
 - Issues land use consent with conditions;
- “Deposition” breaches s15 because:
 - Material meets “contaminant” definition s2 RMA;
 - Site is industrial or trade premises, or contaminant could enter water;
 - No permitted activity rule;
 - Regional Council consent authority for s15 must enforce.



How does it Work?

- Sections 9, 11 and 12-15 say that no person shall...
- Unless expressly allowed
- Section 314 provides for Enforcement Orders requiring:
 - Ceasing or not doing something that will contravene Act/rule/NES/consent;
 - Requiring action necessary to comply with Act/rule/NES/consent **or** to avoid, remedy or mitigate adverse effect
- Section 322 provides for notices to be served requiring:
 - Ceasing or not doing something that will contravene Act/rule/NES/consent;
 - Requiring action necessary to comply with Act/rule/NES/consent **and** to avoid, remedy or mitigate adverse effect;
- Section 338(1)(a) makes it offence to contravene/permit contravention of ss9, 11 or 12-15;



Penalty

- Section 340 vicarious liability:
 - Employee
 - Agent (includes contractor)
- Section 341 strict liability:
 - No intent necessary
 - No negligence necessary
- To avoid, have to be able to establish:
 - Remedied or mitigated harm
 - All reasonable steps to avoid offence
- Maximum penalty under s339:
 - 600K company
 - 300K and/or 2 years natural person
 - Any of the orders available under s314



Thou shalt not do what – Land use?

- Section 9 – No person shall use land in a manner that contravenes:
 - (1) National Environmental Standard – NES will specify whether Regional or district/city council;
 - (2) Regional Plan – Administered by Regional Council;
 - (3) District Plan – Administered by City Council;
- Section 13 (administered by Regional Council) – No person shall, in the bed of a lake or river:
 - (1) Disturb, excavate, deposit, construct structure, use structure, introduce vegetation;
 - (2)/(2A) Remove vegetation, pass along
- “Use land” very wide, s2:
 - (a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—
 - (i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:
 - (ii) drill, excavate, or tunnel land or disturb land in a similar way:
 - (iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:
 - (iv) **deposit a substance in, on, or under land:**
 - (v) any other use of land; and
 - (b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river]

Thou shalt not do what? - Discharge

Section 15 (administered by Regional Council) No person shall discharge contaminant:

- (1):
 - (a) To water;
 - (b) To land in circumstances where may enter water;
 - (c) To air from industrial or trade premises;
 - (d) To land from industrial or trade premises
- (2): To land/air in a manner that contravenes regional rule.

Discharge is wide:

- Section 2: includes emit, **deposit**, and allow to escape

Industrial or Trade Premises:

- Section 2:
 - (a) Any premises used for any industrial or trade purposes; or
 - (b) Any premises used for the **storage, transfer, treatment, or disposal of waste** materials or for **other waste-management purposes**, or used for composting organic materials; or
 - (c) Any other premises from which a contaminant is discharged in connection with any industrial or trade process—
 - ... but does not include any production land:

Consequences

- More than one:
 - Plan can apply
 - Council needs to be involved
 - Type of consent may be required.
- Each Council will have its own focus:
 - Section 30 functions for regional councils
 - Section 31 functions for district/city councils
- Each type of consent will have its own focus:
 - NES contaminated land district/city council – human health
 - District/city council land use – wide, amenity, stability, etc.
 - Regional Council land use – contaminant, soil conservation
 - Regional Council discharge – much wider than human health
 - Even with unitary authority focus will differ depending on consent type

Pitfalls for Young Players

- Section 91 not used as often as one might hope
- Land use contaminant levels (District Council NESCL) different from landfill standards (Regional Council discharge permit);
- District/Regional rules differ from region to region and district to district;
- Activity may trigger regional land use as well as discharge permit as well as district land use;
- District may have own land use rule that triggers land use in addition to NESCL
- Sections 9, 12-15 all include “unless expressly allowed by...”, so must have:
 - Consent/pa
 - From right consent authority
 - Issued under right section
 - Can be in one document, but MUST meet above.

What went wrong in Case Example?

- Didn't tell the contamination expert that they wanted to take it elsewhere
- Expert's report was scoped exclusively for using on site
- Didn't understand that meeting residential/recreational guidelines doesn't make it "clean fill" for RC
- Didn't appreciate that sampling was for different purpose
- Didn't appreciate that there isn't "one consent to rule them all"
- No formal written contract with contractor

Result:

- Year long litigation for my client
- RC withdrew EO application against my client
- Company discharged and director convicted & fined
- Other parties still to have trial
- Civil EO application now on the go

Key Points

- Understand which parts of ss9 and 11-14 you could contravene
- Which council or councils involved
- Get the right expert advice:
 - Right expertise for right work
- Make sure that brief:
 - Is clear
 - matches work
- If work changes, update report
- Don't skimp on compliance costs
- Make sure paper trail is complete:
 - Contracts
 - Reporting lines
 - Actual reports



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