

REPORT

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Subject: Implications of the Hazardous Substances and New Organisms Act for Regional Councils

1. Précis

This report analyses the implications for regional councils of the Hazardous Substances and New Organisms Act. There are no significant implications for the council in terms of policy or plan changes.

2. Background

The Hazardous Substances and New Organisms (HSNO) Act was enacted in 1996. The Act came into force for new organisms in 1998 and for hazardous substances in 2001.

The historical laws repealed by the HSNO Act are:

- Explosives Act
- Dangerous Goods Act 1975
- Toxic Substances Act 1975
- Pesticides Act 1979 (with minor exceptions)
- Parts of the Animal Remedies Act 1967
- Parts of the Animal Act 1967 and Plants Act 1970 not already superseded by the Biosecurity Act 1993

2.1 Purpose of HSNO Act

The purpose of the Act is to protect the environment, and health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

2.2 Principles

The principles of the Act are similar to the Resource Management Act (RMA) (e.g. safeguarding the life supporting capacity of air, water and soil ecosystems). The difference is the HSNO Act does not have the option of avoiding, remedying or mitigating adverse effects.

2.3 Matters considered

Matters relevant to the Act are also mostly similar to the RMA, apart from HSNO Act considering economic benefits derived from a hazardous substance or new organism and New Zealand's international obligations.

Another difference is that, unlike the RMA, s7 of HSNO Act promotes a precautionary approach to managing adverse effects where there is scientific and technical uncertainty about those effects. Whilst this is not prescribed in the RMA, those who exercise powers, functions

and duties under the RMA have been, in general, adopting a precautionary approach under the circumstances.

2.4 Types of substances/organisms covered

HSNO Act covers all hazardous substances (defined as substances with explosive, flammable, oxidising, corrosive, toxic and ecotoxic properties) except radioactive substances (Radiation Protection Act 1967 covers this) and ozone depleting substances (covered by Ozone Layer Protection Act 1956) and infectious substances. The inclusion of ecotoxic properties of a substance is new (i.e. poorly considered in the past) and HSNO Act requires all substances managed throughout their lifecycle (i.e. from importation or manufacture to end use, disposal or export, using a range of appropriate controls).

2.5 Process

Unlike previous legislation, HSNO Act requires a thorough analysis of risks and benefits. This includes consideration of public perceptions of risk which may not be related to risks identified scientifically. Where environmental risks are high when introducing a hazardous substance or new organism, the process will involve public participation (similar to notified consents).

The Minister for the Environment has the powers to appoint a national Crown agency, called the Environmental Risk Management Authority (ERMA, referred to as “the Authority” in HSNO Act). It is assisted by a support agency called ERMA New Zealand. The authority's key tasks are:

- manage control of hazardous substances and new organisms including public process;
- investigate or require an investigation into incidents and accidents;
- approve test certifiers and codes of practice;
- monitor and report on the effectiveness of HSNO Act;
- promote awareness of safe management of hazardous substances and new organisms.

According to s68 of the HSNO Act, the Minister for the Environment has the powers to call in and decide on an application of national or international significance. The MfE provides advice to the Minister on HSNO Act matters.

2.6 Enforcement

ERMA is responsible for supervising enforcement of the Act through appointed enforcement agencies. The following agencies are listed in s97 of the Act as enforcement agencies:

- Ministry of Health (to protect public health);
- OSH, Department of Labour (work place related);
- Maritime Safety Authority (ship/wharf);
- Police and LTSA (roads, rail and vehicles);
- Civil Aviation Authority (airport, aircraft);
- Ministry of Consumer Affairs (gas related according to Gas Act 1992);
- City and district councils (premises not covered by other agencies, enforcing RMA, functions transferred or contracted by other agencies, dangerous goods during transitional period of the Act).

Regional councils are not statutorily enlisted as enforcement agencies.

3. Implications for Regional Councils

Section 142 of the HSNO Act is the only section of the Act that has some significance for regional councils:

142. Relationship to other Acts

- (1) *Nothing in this Act shall affect the requirements of the Biosecurity Act 1993 in relation to any organism.*
- (2) *Every person exercising a power or function under the Resource Management Act 1991 relating to the storage, use, disposal or transportation of any hazardous substance shall comply with the provisions of this Act and any regulations made under this Act.*
- (3) *Nothing in subsection (2) of this section shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal or transportation of any hazardous substance than may be required by this Act or regulations made under this Act where such requirements are considered necessary by that person for the purposes of the Resource Management Act 1991.*
- (4) *Nothing in this Act shall apply to any resource consent, being -(a) a land use consent relating to the storage, use, disposal, or transportation of any hazardous substance; or(b) a coastal permit to do something that would otherwise contravene section 15 of the Resource Management Act; or (c) a discharge permit, -where that resource consent was granted before the coming into force of any regulations made under this Act (other than regulations made under Parts XI to XVI of this Act) until such time as the conditions on the resource consent are reviewed in accordance with section 128 of the Resource Management Act 1991.*
- (5) *For the purposes of this section, "resource consent" has the same meaning as in the Resource Management Act 1991.*
- (6) *Any controls prescribed under any other Act for any hazardous substance shall not contravene the provisions of regulations made under sections 75 and 76 of this Act unless- (a) there is a provision in that other Act that expressly provides that controls made under that other Act for specified purposes may contravene the provisions of regulations made under this Act; and (b) The controls are made for the purposes provided for in that Act.*

As for s142(2) of HSNO Act, the fourth schedule of the HSNO Act intends to amend the RMA:

<p>1991, No. 69 – the Resource Management Act 1991 (RS Vol 32 p132)</p>	<ul style="list-style-type: none">• By repealing section 1(8)• By inserting, after the definition of the term “Government road” in section 2(1), the following definition: “Hazardous substance’ includes, but is not limited to, any substance defined in section 2 of the Hazardous Substances and New Organisms Act 1996 as a hazardous substance”.• By omitting from section 62(1)(ha) (as inserted by section 34(1) of the Resource Management Act 1993) the words “the regional council shall retain primary responsibility for the hazard or hazardous substances; and”, and substituting the following subparagraphs: “(iii) The regional council shall retain primary responsibility for the natural hazard; and (iv) the relevant territorial authority shall retain primary responsibility for the hazardous substance.”• By repealing Part XIII (sections 344 to 351).• By repealing the Fifth Schedule.• By repealing so much of Part I of the Eight Schedule as relates to the Ombudsmen Act 1975, the Official Information Act 1982, and the definition of the term "hazardous substance" in section 2 of the Environment Act 1986.
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Please note that the RMA Amendment Bill 1999 is yet to be approved by the Cabinet.

Despite the amendment of the RMA and providing greater responsibilities for hazardous substances to the TLAs, there will be a considerable amount of confusion with regard to policy, planning and enforcement of hazardous substances.

3.1 Hazardous wastes

It is also understood that despite the provision in s140D(1)(p) of the HSNO Act (i.e. "*... the Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes: (p) prescribing controls for by-products with hazardous properties which result from the manufacture of any substance* the policy, planning, and enforcement of hazardous wastes will not be managed by ERMA. It appears that MfE may be placing controls over hazardous wastes.

It must be noted that the definition for hazardous substances could also apply to hazardous wastes. The draft New Zealand definition for hazardous wastes relies heavily on HSNO Act for minimum thresholds for hazardous characteristics. MfE has developed a Waste Categories (w-code) list with 15 waste categories. According to the hazardous waste definition, if a waste fits into the waste category and is hazardous according to the HSNO Act threshold, it is considered as "hazardous waste".

For example, according to the Waste Category products whose date for appropriate use has expired (Category 3) and substances that no longer perform satisfactorily (Category 7) that have characteristics threshold above HSNO Act levels will be considered as hazardous wastes not hazardous substances. In the event of the above materials' use or misuse, enforcement action may not be taken by ERMA or its enforcement agencies.

3.2 Environmental limits

As for s142(3), if regional councils set limits on use, storage, transport and disposal of the hazardous substances, such limits or requirements could be stricter.

A similar principle applies to ERMA's Environmental Exposure Limits (EEL) and Tolerable Exposure Limits (TEL). EELs will be derived from ecotoxicological data and will be related to disposal/discharge limits. Regional councils shall use these limits as bottom lines in their policies and consent processes. TEL is the level below which a substance in an environment is unlikely to cause an adverse effect on humans. These limits will have implications for water quality guidelines etc.

To date the exposure limits have not been set by ERMA. This process may take several years to complete and even if such limits are available, they are subject to scientific criticism and controversy. It appears that ERMA may undertake an extensive public consultation and communication before the development of exposure limits.

3.3 Resource consents

As for implications for Council's resource consent process, apart from adhering to TEL and EEL limits set by ERMA on new consents, according to s142(4) of HSNO Act there are no implications on the following consents that were granted before the Act:

- a. land use consent to store, dispose, use or transport hazardous substances;
- b. coastal discharge permits;

- c. all other discharge permits.

The Council may review the above consents according to s128 of the RMA.

3.4 Compliance

As described before, the territorial authorities will be one of the key enforcement agencies in ensuring compliance with the HSNO Act. In any incidents where a hazardous substance is mismanaged or spilled, HSNO Act requires the territorial authorities to keep incident records and take necessary legal actions should these be required.

Currently the Council responds to all known or reported pollution incidents. In incidents involving chemical release into the environment, the Council maintains a record and could take legal action against the offender using the RMA provisions.

Under the above circumstance a territorial authority and a regional council could duplicate actions, which may cause confusion (e.g. the offender is prosecuted by two authorities at once). In future any incident involving hazardous substances should be reported to the respective territorial authority and should be considered carefully with the respective territorial authority before taking any legal action.

3.5 Policy

As for the proposed RMA Amendment Bill (1999), s62(a)(ha) of the RMA will be amended to:

- iii. *The regional council shall retain primary responsibility for natural hazards and*
- iv. *The relevant territorial authority shall retain primary responsibility for the hazardous substances.*

Chapter 13 of the Regional Policy Statement deals with waste and hazardous substances. A majority of the methods set out in this chapter are voluntary and creating awareness, hence the RPS does not require a review in light of the HSNO Act enactment.

Section 30(c) of the RMA states the following as one of several functions, powers and duties of regional councils:

*“The control of the use of land for the purpose of -
(v) The prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances ...”*

Compare the above with one of the functions and powers set out in s31(b) of the RMA for territorial authorities:

“The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances ...”

These overlapping functions have caused some confusion in the past and will continue to do so in the future. As stated above, the Otago Regional Council has a provision in the Regional Policy Statement on hazardous substances.

There are no specific exposure limits prescribed in the Water Plan in the context of hazardous substances use, storage, transportation or disposal. Therefore Water Plan does not require any reviews.

The Air Plan has listed materials that are prohibited from burning and provides for the management of hazardous chemical discharges to air, hence does not require a review.

The Coastal Plan is currently being reviewed and this process will consider any implications of HSNO Act.

If any plan change/variation is required, it will be on word changes to permitted activities in Water and Air Plans to accommodate ERMA's test certification to spraying/applying chemicals for pest control.

3.6 Resource Science

ERMA relies on MfE to collect information related to the environmental effects arising from the use, storage, transportation and disposal of hazardous substances. MfE will be using the Environmental Performance Indicator (EPI) programme to gather such information from the regional councils and territorial authorities. Territorial authorities are expected to maintain and provide records of incidents and compliance related to hazardous substances. When indicators are developed there may be some implications for the Council's Resource Science section to accommodate any monitoring on the effects of hazardous substances in the environment.

4. Conclusions

There are no major and immediate implications for the Council as a result of the full implementation of the HSNO Act. Territorial authorities will be impacted significantly in terms of enforcement of the HSNO Act.

Once ERMA has set exposure limits, the Council may use these as values to authorise consented activities.

Council plans may require minor variation or changes to permitted activities to accommodate any new agricultural or pesticide certifications imposed by ERMA.

5. Recommendations

That the Committee notes:

1. That the full implementation of the Hazardous Substances and New Organisms Act does not create a need to review the Regional Policy Statement, Proposal Regional Plan: Water, or Proposed Air Plan.
2. That when ERMA determines schedules of Environmental Exposure Limits and Tolerable Exposure Limits, Council will need to consider the impact of those on subsequent RMA consenting and any discordant figures in its RMA plans.

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